Case No. S086234
Appeal from the Judgment of the Superior Court
of the State of California, San Bernardino County
San Bernardino Case No. FSB09438

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent,

—v.—

JOHNNY DUANE MILES,

Appellant.

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLANT

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INTERESTS OF THE AMICUS CURIAE

Amicus curiae the NAACP Legal Defense & Educational Fund, Inc. ("LDF") respectfully submits this brief in support of appellant Johnny Duane Miles. Founded in 1940 under the leadership of Thurgood Marshall, LDF is a non-profit law organization that focuses on advancing civil rights in education, economic justice, political participation, and criminal justice. LDF has longstanding interests in ensuring that any death sentence meets constitutional requirements and that criminal defendants are tried before a jury selected free from racial discrimination.

LDF has litigated or filed amicus briefs in numerous cases advancing and protecting these rights, including *Furman v. Georgia*, 408 U.S. 238 (1972); *Coker v. Georgia*, 433 U.S. 584 (1977); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Banks v. Dretke*, 540 U.S. 668 (2004); *Roper v. Simmons*, 543 U.S. 551 (2005); *Buck v. Davis*, 580 U.S. __, 137 S. Ct. 759 (2017). LDF has also served as counsel of record in cases challenging racial bias in the jury system, including *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972), and *Ham v. South Carolina*, 409 U.S. 524 (1973), as well as amicus in *Peña-Rodriguez v. Colorado*, 580 U.S. __, 137 S. Ct. 860 (2016). Finally, LDF pioneered the affirmative use of civil actions to end jury discrimination in *Carter v. Jury Commission*, 396 U.S. 320 (1970) and *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as amicus curiae in cases involving the use of race in peremptory challenges in *Johnson v.*

California, 543 U.S. 499 (2005), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Georgia v. McCollum*, 505 U.S. 42 (1992), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), and *Batson v. Kentucky*, 476 U.S. 79 (1986) (overruling *Swain*).

The circumstances of Johnny Duane Miles's capital trial directly implicate racial discrimination in jury selection and sentencing. LDF is committed to eradicating such discrimination from our criminal justice system.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

"More than a century ago, the [Supreme] Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." *Batson v. Kentucky*, 476 U.S. 79, 85 (1986) (citing *Swain v. Alabama*, 380 U.S. 202, 203-04 (1880)). Ever since, the Supreme Court has made "unceasing efforts to eradicate racial discrimination" from jury selection. *Id.*; *see also Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 871 (2017) (explaining that our Nation needs "to continue to make strides to overcome race-based discrimination"). Courts must diligently ferret out

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[1] Pursuant to California Rule of Court 8.200(c)(3), amicus LDF states that no party's counsel authored this brief either in whole or in part, and further, that no party or party's counsel, or person or entity other than amicus, amicus's members, and their counsel, contributed money intended to fund preparing or submitting this brief.

discrimination from the jury selection process because such discrimination "casts doubt on the integrity of the judicial process, and places the fairness of a criminal proceeding in doubt." *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (quotation marks omitted); *see also Batson*, 476 U.S. at 88 ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."). Excluding jurors because of their race "not only violates our Constitution . . . but is at war with our basic concepts of a democratic society and a representative government." *Smith v. Texas*, 311 U.S. 128, 130 (1940).

This Court has made equally clear that discrimination in jury selection is not tolerated by the California Constitution. *See, e.g.*, *People v. Harris*, 57 Cal. 4th 804, 833 (2013); *People v. Wheeler*, 22 Cal. 3d 258, 276-77 (1978).

Nevertheless, for as long as the Supreme Court and this Court have denounced racial discrimination in jury selection, some prosecutors have found new ways to discriminate.[2] *See Miller-El v. Dretke* (*Miller-El II)*, 545 U.S. 231, 268-69 (2005) (Breyer, J., concurring) (citing eight studies and anecdotal reports detailing widespread race discrimination in jury selection). Here, the prosecution used a transparently discriminatory tactic that surfaced more than 20 years ago across this State: asking potential jurors whether they

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[2] The discriminatory use of preemptory strikes has led at least two Supreme Court Justices to call for their abolition. *See Batson*, 476 U.S. at 102-03 (Marshall, J., concurring); *Miller-El II*, 545 U.S. at 266-67 (Breyer, J., concurring).

were upset by the verdict in the O.J. Simpson trial (the "O.J. Simpson Question"), and then using a "no" answer as an alleged "race-neutral" justification for striking Black jurors.[3]

Orenthal James ("O.J.") Simpson was a megastar college and professional athlete, who successfully transitioned into a wildly popular and wealthy public figure through film and television appearances, endorsements, and sports broadcasting.[4] And he did it all as a Black man from humble beginnings. During the height of his professional football career in 1973, *People Magazine* described O.J. Simpson as "wealthy, gorgeous, slavishly admired and indecently gifted[;] . . . it is impossible not to like him."[5] Universally revered, Black people put him on an even higher pedestal. In 1985, after retiring from professional football, O.J. Simpson married his second wife, Nicole Brown, a white woman fourteen years his junior.[6] They had two children before divorcing in 1992.[7] Two years later, Ms. Simpson and a friend, also white, were discovered murdered, in front of her

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[3] In another capital case arising from San Bernardino County currently pending before this Court, *People v. Floyd Daniel Smith*, No. S065233 (argued Mar. 7, 2018), the prosecution also struck all the Black jurors, and used a "yes" answer to the O.J. Simpson Question to justify some of its strikes. *See also infra* section II.B.
[4] Mark Goodman, *Buffalo Turns on the Juice, and O.J. Simpson Tramples the Pro Football Record Books*, PEOPLE MAGAZINE, Oct. 13, 1975; *see also* Mark Goodman, *A Class Act from the Start, O.J. Simpson Retires in Style*, TIMES HERALD, Jan. 13, 1980, at 8.
[5] Goodman, *Buffalo Turns on the Juice, supra* note 4.
[6] Josh Meyer & Eric Malnic, *O.J. Simpson's Ex-Wife, Man Found Slain*, L.A. TIMES, Jun. 14, 1994, at A27.
[7] *Id.*

Brentwood condominium.[8] In 1995, the Los Angeles County District Attorney's Office tried O.J. Simpson for their murders, for which he was acquitted.[9]

Objective evidence demonstrates that the O.J. Simpson Question and answer are inextricably tied to race. In fact, they are a proxy for race. Studies have shown that for many Black people, the trial of O.J. Simpson was about the "centrality of police brutality to black Americans' very sense of self," and was a symbol of "endemic racism in the justice system."[10] Whereas, many whites believed O.J. Simpson was culpable in light of the mountain of evidence against him, including his alleged history of domestic violence.[11] Unsurprisingly, therefore, the answer to whether the verdict in the O.J. Simpson case was fair largely broke along racial lines, with Black people answering "yes" and white people "no." Thus, using a "yes" answer to the O.J. Simpson Question as justification for striking jurors disparately applies to Black venirepersons. And, here, there can be no doubt that the O.J. Simpson Question was a tool for racial discrimination, because the prosecution used a "yes" answer to the O.J. Simpson Question to justify

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[8] *Id.* at A1.
[9] *People v. Simpson*, No. BA097211 (Oct. 3, 1995).
[10] John McWhorter, *What O.J. Simpson Taught Me About Being Black*, N.Y. TIMES, Feb. 4, 2016, at A23.
[11] *See* Sheryl Stolberg, *The Simpson Legacy: Just Under the Skin*, L.A. TIMES, Oct. 10, 1995, at S3.

striking prospective Black jurors *only*, while not striking non-Black venirepersons who answered “yes” to the same question.

Simply, the prosecution in this case used the O.J. Simpson Question and answer as a proxy for race; a way to discriminatorily remove Black people from Mr. Miles’s jury. But the federal and California Constitutions do not allow the prosecution to do covertly what it cannot do overtly; the government cannot use racial proxies to justify the exclusion of qualified Black venirepersons. *See, e.g.*, *Hernandez v. New York*, 500 U.S. 352, 371 (1991) (voir dire criterion closely associated with “certain ethnic groups” “should be treated as a surrogate for race under an equal protection analysis”); *People v. Alvarez*, 14 Cal. 4th 155, 197 (1996) (courts are “required to assess whether the prosecutor stated adequate neutral reasons for the preemptory challenges” to ensure the reasons “were not mere surrogates or proxies from group membership.” (Quotation marks, brackets, and citation omitted)); *see also United States v. Bishop*, 959 F.2d 820, 826 (9th Cir. 1992) (the Constitution does not permit voir dire criterion that acts “as a discriminatory racial proxy”); *Splunge v. Clark*, 960 F.2d 705, 709 (7th Cir. 1992) (“Where the prosecutor’s neutral explanation is an obvious mask for a race-based challenge, the prosecutor has not met his burden under *Batson*.”). Accordingly, this Court should grant Mr. Miles a new trial. *See Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (“The Constitution forbids striking even a single prospective juror for a discriminatory purpose.”)

(internal quotation marks and brackets omitted); *People v. Silva*, 25 Cal. 4th 347, 386 (2001) ("[T]he exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal.").

STATEMENT OF CASE AND FACTS

In 1999, a San Bernardino jury convicted and sentenced Johnny Duane Miles, an African-American man, to death for the 1992 rape and murder of a white woman, in addition to other serious crimes.[12] During the time between Mr. Miles's arrest and trial, another African-American man was charged and tried for the murder of two white victims in nearby Los Angeles County—O.J. Simpson.[13] There was no escaping O.J. Simpson's high-profile murder trial. At the time, it was dubbed the "trial of the century."[14] Television and print media captured every moment of the proceedings, starting with the discovery of the victims' bodies on June 12, 1994, through the jury's announcement of the not-guilty verdict on October

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[12] *People v. Miles*, No. FSB09438 (Sept. 27, 1999).

[13] *People v. Simpson*, No. BA097211 (Oct. 3, 1995).

[14] *See* Peter Lewis, *Discussion of the O.J. Simpson Murder Trial is On-Line as Well as on the Air*, N.Y. TIMES, Feb. 14, 1995, at A15 ("Commentators in the news media have already dubbed the Simpson case 'The Trial of the Century.'"); Susan Caba, *Trial watchers form 4 truths about system from O.J. case*, CINCINNATI ENQUIRER, Oct. 8, 1995, at A4 ("So what have people learned, thanks of the trail of the century, about the criminal justice system?"); Mike Duffy, *Not Guilty: Coverage was riveting television*, DETROIT FREE PRESS, Oct. 4, 1995, at 8A ("regardless of one's feelings on guilt or innocence, the trial of the century came to an almost preposterously riveting, televised climax."); Editorial Opinion, *The Simpson Verdict*, N.Y. TIMES, Oct. 4, 1995, at A20 ("…this 'trial of the century' has left a stigma on criminal justice that could take years to repair.").

3, 1995.[15] Much of the coverage "politicized the O.J. Simpson case and furthered the rift in race relations[;] stoking race in an extraordinarily divisive manner."[16] The reaction to the not guilty verdict was drawn largely on racial lines; most white people disapproved of the verdict, whereas most Blacks were either ambivalent or favored Simpson's acquittal.[17] The racially polarizing Simpson case was still prominent in the nation's consciousness during jury selection in Mr. Miles's trial four years later.[18]

Each prospective juror in Mr. Miles's trial was confronted with Question 68 on the juror questionnaire: "W[]ere you upset with the jury's verdict in the O.J. Simpson case?"[19] Prospective jurors could mark "yes" or "no," and could provide a narrative explanation as to "why or why not."[20]

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[15] *See* Tim Walker, *OJ Simpson trial laid bare America's race problems – and invented Reality TV*, INDEPENDENT (Mar. 4, 2016), ("The 1995 OJ Simpson murder trial was one of the most sensational moments in recent US history. The world watched as the fault-lines of American race relations were laid bare . . . and the blanket media coverage brought to life a phenomenon later known as reality TV"), https://www.independent.co.uk/news/world/americas/oj-simpson-knife-la-dna-testing-trial-laid-bare-americas-race-problems-and-invented-reality-tv-a6912786.html.

[16] Christo Lassiter, *The O.J. Simpson Verdict: A Lesson in Black and White*, 1 MICH. J. RACE & L. 69, 70-71 (1996).

[17] *See* Todd D. Paterson, *Studying the Impact of Race and Ethnicity in the Federal Courts*, 64 GEO. WASH. L. REV. 173, 173 (1996) ("the striking contrast between African American joy and white anger over the Simpson verdict…show[ed the] dramatic differences in how Americans of differing races and ethnicities perceive the justice system."); Joe Urschel, *A Nation More Divided*, USA TODAY, Oct. 9, 1996, at 5A ("[T]here quarters of white Americans believe Simpson was guilty. Only one-quarter of blacks do.").

[18] *See* David Daley & Dana Tofig, *Five Years Later, Murder Trial Still Reverberates: O.J.'s Legacy*, HARTFORD COURANT, Jun. 10, 1999, at A1; Linda Deutsch, *O.J. backlash curbs court access*, MORNING CALL, Jun. 23, 1999, at A13.

[19] Juror Questionnaire, pg. 19.

[20] *Id.*

Prospective Jurors KC and SG, both of whom were Black,[21] marked "no," in response to Question 68, indicating that they were not upset with the jury's verdict in the O.J. Simpson case.[22]

After the State struck Jurors KC and SG, as well as one other Black prospective juror, defense counsel raised a *Batson*/*Wheeler* challenge, requesting the court to inquire into the prosecution's "reasons for excusing" Jurors KC and SG because "[e]ach of these is an African American . . . And I believe that . . . indicates a pattern."[23] The trial court stated that defense counsel had made the necessary prima facie showing of a *Batson/Wheeler* violation and asked the prosecution to provide reasons for the strikes.[24]

In support of striking Juror KC, the prosecution asserted that Juror KC compared DNA to a polygraph on his questionnaire suggesting such evidence "wasn't a for sure thing," that "his answers . . . regarding the death penalty were much more tentative," and that he was "very skeptical of the O.J. Simpson case" because of the "circumstantial evidence."[25] The State voiced concern that Mr. Miles's case was "a DNA case" much like O.J. Simpson's case. The prosecutor described each of these reasons as his "main

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[21] KC Juror Questionnaire at 1 (self-identifying as "Africa[n] American"); and SG Juror Questionnaire at 1 (self-identifying as "African American").
[22] KC Juror Questionnaire at 19 and SG Juror Questionnaire at 19.
[23] Transcript at 1719, Ln. 16-27.
[24] Transcript at 1720, Ln. 6-9.
[25] *Id.* at Ln. 10-19.

concerns."[26] The prosecutor did not acknowledge the many ways in which Juror KC's experiences and views favored the prosecution: he had been in the military performing law enforcement duties;[27] his spouse worked in corrections;[28] he had previously served on a criminal jury and had a positive experience;[29] he had applied to work in law enforcement;[30] and despite the prosecutor's characterization to the contrary, Juror KC favored the death penalty.[31]

The State also asserted several reasons for striking Juror SG. "[H]e likes his opinions over others,"[32] he believed that "if [he has] a feeling he didn't do it, he's not guilty," and the trial court had to "personally track[] [him] down this morning."[33] When the trial court asked for clarification about whether Juror SG's feelings about reasonable doubt bothered the State,[34] the prosecution said "yes," and then stated "[a]lso, he was not upset by the O.J. Simpson verdict."[35] Yet like Juror KC, Juror SG's responses in the questionnaire indicated that his views favored the prosecution: his father

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[26] Transcript at 1720, Ln. 18-19.
[27] Juror KC Questionnaire, at 4 and 7.
[28] *Id.* at 5.
[29] *Id.* at 10.
[30] *Id.* at 20.
[31] *Id.* at 28.
[32] Transcript at 1720, Ln. 25-26.
[33] Transcript at 1721, Ln. 1-5; *but see* Transcript 1722, Ln. 1-4 (defense counsel explained that Juror SG misunderstood when to report for jury service, but upon clarification, he appeared on his own volition).
[34] Transcript at 1721, Ln. 13-15.
[35] *Id.* at 21.

worked in law enforcement;[36] he considered working as a police officer;[37] and he understood the seriousness and finality of the death penalty and supported it.[38] Once again, the prosecutor did not acknowledge any of the ways in which Juror SG appeared to be a favorable prosecution juror.

The prosecutor then volunteered the following summary of his strikes:

> If you'll notice across the board, I've excused jurors I believe of Hispanic origin and Caucasian origin, and the common denominator essentially, is that they were not, were not upset by the O.J. Simpson verdict, which was a DNA, circumstantial case. And I think those, those raise significant concerns in my mind as a guilt phase juror and the type of case that I'm dealing with.[39]

However, the record reveals that the prosecutor's strikes regarding juror responses to the O.J. Simpson Question were not uniform "across the board." Rather, the State failed to exercise strikes against non-Black prospective jurors who also responded that they were not upset by the O.J. Simpson verdict, despite the State's insistence that a juror's failure to be upset at the verdict was a "significant concern[]." Specifically, Seated Juror 6, who self-identified as "Hispanic (Mexican)," checked "no," that she was not upset by the verdict,[40] as did Alternative Juror 5, who self-identified as "white" and

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[36] Juror SG Questionnaire, at 9, 20-21 (his father served as a "special agent" in the Drug Enforcement Administration (DEA)).
[37] *Id.* at 21.
[38] *See id.* at 25-28.
[39] Transcript at 1721, Ln. 22-28.
[40] *See* Juror 6 Questionnaire, pg. 1 and 19.

checked "no" that he was not upset by the verdict.[41] The State passed on both these jurors, one of whom served while the other was designated as an alternate.

The State's inconsistent rationale for striking jurors revealed that the "common denominator" was race, not a "no" response to the O.J. Simpson Question. Said another way, that Jurors SG and KC were Black, substantially motivated the prosecution's exercise of peremptory strikes against them. When Question 68 on the questionnaire, the O.J. Simpson Question, produced the likely result that certain Black prospective jurors were not upset by the verdict, the State used their responses to strike them. In the hands of the State, the "racially neutral" justification—the answer to the O.J. Simpson Question—served instead as a proxy for race, enabling the prosecutor to unlawfully remove Black jurors based on their view of the verdict.

It is against this backdrop that the Court should consider Johnny Duane Miles's claim that the State violated Mr. Miles's constitutional right to a jury selected free from racial discrimination, as well as Juror KC and SG's constitutional rights to serve on a jury free from racial discrimination. *See Batson*, 476 U.S. 79; *Wheeler*, 22 Cal. 3d 258.

[41] Alternate Juror 5 Questionnaire, pg. 1 and 19.

ARGUMENT

I. The O.J. Simpson Trial Placed Issues of Race and Justice Squarely Before the American Public.

The media coverage of the O.J. Simpson trial placed issues of race and criminal justice squarely before the American public. O.J. Simpson was a Black man, but it was his athletic prowess as a Heisman trophy winner at U.S.C.,[42] his record setting dominance in the N.F.L.,[43] his massive crossover appeal,[44] his wealth, his charm and good looks, and his celebrity status that made his experience within the criminal justice system unique from most Black men facing criminal charges. "It took an atypical case, one in which minority race and lower socioeconomic class did not coincide, in which the defense outperformed the prosecution and in which the jury was predominately black. . . to [bring to] the foreground issues that lurk beneath the entire system of criminal justice."[45] O.J. Simpson's well-funded defense

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[42] After leading a national championship team in 1967, Mr. Simpson was awarded the Walter Camp, the Maxwell, and unanimously voted all-American in 1967 and 1968. In 1983, he was inducted into the College Football Hall of Fame. *See* COLLEGE FOOTBALL HALL OF FAME (last visited May 9, 2018), https://www.cfbhall.com/about/inductees/.

[43] In 1969, Mr. Simpson was the number one pick in the N.F.L. draft, playing with the Buffalo Bills. In 1973, he won the N.F.L.'s Offensive Player of the Year and Most Valuable Player. Simpson was selected five times to the Pro Bowl and First-team All-Pro from 1972-1976. In 1985, he was inducted into the Pro Football Hall of Fame, his first year of eligibility. *See* PRO FOOTBALL HALL OF FAME (last visited May 9, 2018), http://www.profootballhof.com/players/oj-simpson/.

[44] Toward the end of his football career, Mr. Simpson began new careers in acting (commercials, television, and film) and football broadcasting. *See* Meyer & Malnic, *supra* note 6 at A27.

[45] David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System*, NEW PRESS, at 3 (1999); *see also* Stolberg, *supra* note 11 at S3 ("[R]ace

team seemed especially adept at shedding light on longstanding racism that plagued law enforcement investigations,[46] a strategy that arguably proved effective in creating reasonable doubt and securing an acquittal.[47]

Race touched every aspect of the case: The Simpson marriage,[48] law enforcement's handling of the investigation,[49] the makeup of the defense team and prosecution,[50] the theory of the defense,[51] and especially the assessment of whether justice resulted.[52] Due to O.J. Simpson's celebrity,

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was the trickle that turned into a flood, eventually drowning the trial—and the nation along with it.").

[46] *See* Walker, *supra* note 15 ("…many African-Americans believed [O.J.] had been framed for the killings by a racist police force."); *see also* Robin Barnes, *Blue by Day and White by (K)night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 IOWA L. REV. 1079, n.9 (1996).

[47] *See* Deborah Prothrow-Stith, *Time to address the 'Fuhrman factor'*, CHI. TRIB., Oct. 4, 1995, at 19.

[48] *See* Earl Ofari Hutchinson, *Perspective on the Simpson Case: Race and Sex – the Last Taboo Lives*, L.A. TIMES, Jun. 30, 1994, at B7; Janet Gilmore, *The Simpson Trial: Jurors probed on racism, celebrities*, SOUTHLAND, Sept. 30, 1994, at A7.

[49] Kenneth Noble, *Simpson Judge Permits Evidence on Racial Bias of Detective*, N.Y. TIMES, Jan. 21, 1995, at 10; Clarence Page, *The Forensic Uses of Race*, BALT. SUN, Mar. 3, 1995, at 17A.

[50] Gayle Pollard Terry, *O.J.'s Black Prosecutor: Proud, Complex*, ST. LOUIS POST-DISPATCH, Jun. 6, 1995, at 11B; Henry Weinstein, *Delicate Case Ends on Up Note for Darden*, L.A. TIMES, Sept. 28, 1995, at 1 ("For Christopher A. Darden, the past two days have been a personal triumph after a year of wrenching adversity as the only African-American on the team prosecuting O.J. Simpson.").

[51] Kenneth Noble, *Race grows as issue in case*, DETROIT NEWS, Jan. 14, 1995, at 1; Linda Deutsch, *Race issue raised in O.J. case*, IND. GAZETTE, Jan. 14, 1995, at 4; Lassiter, *supra* note 16 at 70 (1996) ("The defense countered that the [LAPD] personnel assigned to this case were driven by a volatile mix of racial hatred, greed, and fear . . .").

[52] *See* Leonard Green, *Racism is Still the Hot Coal the Nation Refuses to Touch*, BOS. HERALD, Oct. 2, 1995, at 4 (describing the O.J. Simpson case as "one of the most racially divisive trials of our history."); Deirde Wiggins, *Will blacks and whites ever just get along?*, ASHEVILLE CITIZEN-TIMES, Feb. 14, 1997, at A11 ("It soon became shockingly apparent to me very shortly after this trial ensued how much of a racial divide this case had taken on. No matter how disinterested I

print and televised media covered every moment of the proceedings, forcing American households nationwide to grapple with how race impacted the criminal justice system.[53] America proved a captive audience; more than 100 million viewers tuned in to watch the verdict.[54]

A. Reactions to the verdict were drawn along racial lines.

The jury's not guilty verdict in Mr. Simpson's case elicited strong reactions, largely along racial lines. Although the response to the verdict was not universal among Blacks and whites, the correlation with race was undeniable and grounded in the predominant Black American experience within the criminal justice system. In the words of journalist Sheryl Stolberg:

> [T]he celebration over Simpson's acquittal was not really a celebration over letting the Juice loose…Rather, it was a moment of sweet triumph for all the anonymous black men in America who didn't have money to buy a dream team of attorneys to fight a system that produces a racist cop like Mark Fuhrman—and does nothing to weed him out.[55]

Touching on a similar sentiment, Mike Wilbon writing for the *Washington Post* the day after the verdict, noted:

> It was as if acquitting O.J. Simpson made up for Rodney King and Emmitt Till. For all the black fathers and uncles and grandfathers who'd been jailed unjustly, for every brother who

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became, it was very hard for me to notice the obvious miscarriage of justice shouldered in this case.").

[53] David Shaw, *The Simpson Legacy; Obsession: Did the Media Overfeed a Starving Public?*, L.A. TIMES, Oct. 9, 1995, at S2 ("[T]he news media—the newspaper and television reporters, the magazine writers and the book authors—were often as central to the case as were the attorneys and investigators on both sides.").

[54] *See Id.*

[55] Stolberg, *supra* note 11 at S3.

> has been framed or railroaded, beaten into a confession or placed at the scene of a crime when he was a million miles away.[56]

Black people approving of, or failing to be upset by, the O.J. Simpson verdict was a predictable occurrence. A 1995 CBS poll found that 79% of whites believed Mr. Simpson was guilty of murder, relative to only 22% of Blacks; conversely, 16% of whites believed Mr. Simpson was not guilty compared to 69% of Blacks.[57] The racial coding of the verdict was exacerbated when days later in a televised Barbara Walters's interview, a white lawyer on Mr. Simpson's defense team, Robert Shapiro, accused the lead trial attorney, African-American attorney Johnny Cochran, of 'playing the race card' at trial.[58] As Justice Price of the Texas Court of Appeals observed in a dissenting opinion: "It is common knowledge the Simpson trial had a polarizing effect on the American public. It is difficult to find an African American who publicly will admit disagreement with Simpson's acquittal. Likewise, the majority of whites believe he is guilty." *Shelling v. State*, 52 S.W.3d 213, 229 (Tex. App. 2001) (Price, J., dissenting).

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[56] Michael Wilbon, "*A Celebrity Goes Free*," WASH. POST, Oct. 4, 1995, at F1.

[57] Jennifer De Pinto, *et al.*, *Poll: Only 27 Percent of Americans Think O.J. Simpson Will Regain Celebrity Status*, CBSNEWS (Sept. 29, 2017), https://www.cbsnews.com/news/o-j-simpson-poll-celebrity-status.

[58] Joel Achenbach, *Lawyers' Sniping Destroys Illusion of Defense Team Unity*, WASH. POST (Oct. 5, 1995), https://wapo.st/2FZ4tw2.

B. Other prosecutors in California have referenced O.J. Simpson to racially discriminate in jury selection.

Capitalizing on the widespread coverage of the Simpson trial and the racially polarized reactions to the verdict, numerous prosecutors in this State have asked questions about the O.J. Simpson case as a pretext to strike Blacks from juries. In another San Bernardino County capital trial, *People v. Floyd Daniel Smith*, the prosecutor struck multiple Black prospective jurors for their failure to be upset with the verdict from Mr. Simpson's trial, claiming that the view was "extremely negative" and "anti-prosecution," yet kept white jurors who expressed the same view. *People v. Smith*, No. S065233 (Oct. 16, 1997).[59] A Riverside County prosecutor offered inconsistent reasons for why he struck two Black jurors during a capital trial: one believed O.J. Simpson was "properly" acquitted and the other "had no feelings about, or did not care about" the O.J. Simpson case. *People v. Montes*, 58 Cal. 4th 809, 851 & 856 (2014), *as modified on denial of reh'g* (May 21, 2014). In a Sacramento County case, the prosecution struck one Black juror who wrote "that the O.J. Simpson trial 'restore[d]' his 'faith' in the justice system." *People v. Vines*, 51 Cal. 4th 830, 849 (2011), *as modified* (Aug. 10, 2011).

[59] The prosecution removed four Black prospective jurors who were not upset by the O.J. Simpson verdict, but seated three white jurors who stated they were also not upset.

II. The Prosecution Violated Johnny Duane Miles's Constitutional Rights When It Used the O.J. Simpson Question as a Proxy for Striking Black Jurors.

The trial court recognized that Johnny Duane Miles's defense counsel made a prima facie showing of unlawful racial discrimination after the State struck prospective Jurors KC and SG, both of whom are Black.[60] In response, the State proffered multiple purportedly race neutral reasons for the strikes – including that both jurors were not upset by the O.J. Simpson verdict.[61] The trial court warily accepted the State's reasons, apparently in part because of a concern with restarting voir dire. The court stated: "we're treading on thin ice in this area, and the consequences of falling through means we start all over again."[62] This Court is tasked with scrutinizing those reasons.

Federal and state law instructs reviewing courts to consider "all of the circumstances that bear upon the issue of racial animosity." *Snyder*, 552 U.S. at 478; *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016); *see also Crittendon v. Ayers*, 624 F.3d 943, 958 (9th Cir. 2010); *People v. Gutierrez*, 2 Cal. 5th 1150, 1159 (2017). Included in this consideration is a determination of whether the prosecution's race-neutral reasons were in fact a proxy for racial discrimination. *See, e.g.*, *Turnbull v. Florida,* 959 So. 2d 275, 276 (Fla. Dist. Ct. App. 2006) (finding *Batson* violation where State used questions about

[60] Transcript at 1720, Ln. 2-4.
[61] Transcript at 1720, Ln. 10-19 and 1721, Ln. 21.
[62] Transcript at 1722, Ln. 26-28.

racial profiling as a proxy for race in striking Black prospective jurors); *Love v. Yates*, 586 F. Supp. 2d 1155, 1179-80 (N.D. Cal. 2008) (holding that State's inquiry about juror's experience with racism was proxy for race). In the face of multiple reasons proffered by the State, it is enough for the challenging party to demonstrate that the State's peremptory strike was motivated in "*substantial part* by discriminatory intent." *Snyder*, 552 U.S. at 485 (emphasis added). Further, in this case, a "comparative juror analysis" is essential to assessing the veracity of the State's proffered "race-neutral reasons"—such an analysis involves a "side-by-side comparison" of the relevant Black jurors who the State struck with non-Black jurors who the State allowed to serve. *Miller-El II*, 545 U.S. at 241; *see also Snyder*, 552 U.S. at 474-75 (comparative juror analysis was "particularly striking" where white seated juror voiced even more demanding family hardships than struck Black juror and State declined to strike him).

A. The prosecution's reasons for striking the Black jurors in Mr. Miles's case were substantially motivated by race in violation of the federal and California Constitutions.

The State provided multiple race-neutral reasons for striking prospective Jurors KC and SG, but the "common denominator[s]" were that they were both Black and answered no to the O.J. Simpson Question. That a prosecutor proffers multiple reasons for striking a juror can, itself, indicate discriminatory intent. *See Foster*, 136 S. Ct. at 1755 (prosecutor's multiple

proffered race neutral explanations for striking Black venire cast doubt on the sincerity of each explanation).

1. The prosecution made no effort to inquire further into the jurors' views of the O.J. Simpson case.

The prosecutor here stated that he was concerned with Jurors SG and KC's view of the O.J. Simpson verdict. However, during voir dire, the prosecutor failed to ask them follow-up or clarifying questions about why they were not upset by the verdict or whether their view of the verdict would impact their view of Mr. Miles's case. A State's "failure to engage in any meaningful voir dire examination on a subject a party asserts it is concerned about is evidence suggesting that the stated concern is pretextual." *People v. Huggins*, 38 Cal. 4th 175, 235 (2006); *Gutierrez*, 2 Cal. 5th at 1169-70 (finding *Batson* violation, in part, because prosecutor failed to ask follow-up questions regarding alleged reason for strike); *see also Shelling v. State*, 52 S.W.3d 213, 231 (Tex. App. 2001) (Mirabal, J., dissenting) ("It is significant that, during voir dire, the prosecutor made no effort to learn the basis for any prospective juror's opinion about the O.J. Simpson verdict. Rather, simply, if a prospective juror agreed that the O.J. Simpson 'not guilty' verdict was 'fair,' the prosecutor struck that prospective juror.").

The State also claimed to be concerned about Jurors KC and SG's views on the verdict in O.J. Simpson's case because Mr. Miles's case, like Mr. Simpson's, involved circumstantial evidence and DNA testing. But the

prosecutor failed to question Jurors KC and SG about their views of circumstantial evidence, DNA testing, or O.J. Simpson beyond what they indicated on their juror questionnaires. Even the trial judge emphasized that he did not understand—based on Jurors KC and SG's oral responses in voir dire and their pro-prosecution views on their questionnaires—why the State chose to remove them: "I understand [the removal of] Miss Brazier from answers, discussions, and conversations during the *Hovey*, I don't understand as to [Juror KC] and as to [SG]. You'll have to explain those."[63] That the State remained silent on DNA, circumstantial evidence, and the verdict in Mr. Simpson's case, when confronted with the opportunity to orally question Jurors KC and SG, indicates that those were not actual areas of concern for the State. Rather, the State's conduct during voir dire shows it was most concerned with removing Black jurors and with using the O.J. Simpson Question as a proxy to do so. *See Bishop*, 959 F.2d at 826 (finding *Batson* violation where State struck Black juror based on residence in Compton without inquiring whether juror's residence would impact the ability to be impartial).

Inquiring about jurors' views of the O.J. Simpson verdict on a written questionnaire, ignoring the issue during voir dire, striking Black jurors based on their view while keeping non-Black jurors with the same view, and then

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[63] Transcript at 1720, Ln. 6-9.

asserting that responses to the O.J. Simpson Question were significant, smacks of insincerity. This insincerity, combined with comparative juror analysis, reveals a more serious harm—that the State used the O.J. Simpson Question as a proxy for race, and violated Mr. Miles's and the jurors' constitutional rights when he struck Jurors KC and SG from the venire. *Shelling*, 52 S.W.3d at 231 (Mirabal, J., dissenting) ("We should not sanction skirting around *Batson* by condoning the peremptory strike of a member of a particular minority based solely on one answer to one question about which a vast majority of that minority have been demonstrated to agree.").

2. This Court should apply a comparative juror analysis, which reveals that race substantially motivated the prosecutor's strikes.

That the State used the O.J. Simpson Question as a proxy for race is especially apparent because the prosecutor only struck Black jurors who were not upset by the verdict but allowed non-Black jurors who answered similarly to remain. This Court should apply a comparative juror analysis in this case because it "provides the strongest evidence of discrimination . . . when the record indicates that an excluded black prospective juror was the same as a seated juror in all respects except race." *McGee v. Kirkland*, 506 F. App'x. 588, 590 n.1 (9th Cir. 2013). Indeed, "where the prosecutor has offered a justification for striking a particular juror that applies equally to jurors he has not excluded . . . this comparison [] supports the logical conclusion that the proffered justification was disingenuous." *Id.* A

comparative juror analysis between Jurors KC and SG, and the non-Black jurors who were permitted to serve, reveals the State's purposeful discrimination. *See Miller-El II*, 545 U.S. 240-41; *Currie v. McDowell*, 825 F.3d 603, 612 (9th Cir. 2016) ("comparative analysis strongly suggests [the prosecutor's] concern was pretextual."); *see also Lewis v. Lewis*, 321 F.3d 824, 830 (9th Cir. 2003) ("[I]f a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination.").

In a recent Ninth Circuit case originating from Contra Costa County, the court held that the prosecutor engaged in unlawful racial discrimination when he struck a Black juror. *Currie*, 825 F.3d at 604. In doing so, the court compared the one Black woman who the State struck with "[f]ive . . . non-black panelists who ended up being sworn jurors [and] displayed the same pattern in answering" questions. *Currie*, 825 F.3d at 612. As was the case here, the prosecutor in *Currie* offered multiple purported race neutral reasons for striking the Black prospective juror, and like here, he indicated that he was most concerned with juror responses to one question (in that case, whether jurors had relatives who used drugs because the case against Currie involved drugs). However, the court's side-by-side analysis of the Black juror's response to the drug question with the five non-Black jurors who provided the same answer, revealed that the prosecutor's proffered reason was pretext for discrimination. Regarding the prosecutor's other proffered

reasons, the Ninth Circuit explained: "[a] court does not need to find all of a prosecutor's race-neutral reasons pretextual to find impermissible racial discrimination[;]" rather, "[t]he relevant inquiry for *Batson* purposes is whether 'race was a substantial motivating factor.'" *Currie*, 825 F.3d at 613 (quoting *Cook v. Lamarque*, 593 F.3d 810, 815 (9th Cir. 2010)); *see also Snyder*, 552 U.S. at 485.[64]

In Mr. Miles's case, the prosecutor asserted that jurors' responses to the O.J. Simpson Question were a "significant concern[]" because like the case against Mr. Simpson, the proof against Mr. Miles was "a DNA, circumstantial case."[65] That purported rationale does not hold up, however, in a side-by-side comparison between Jurors SG and KC and non-Black jurors who the prosecutor allowed to remain. Seated Juror 6, who was "Hispanic (Mexican)," checked "no," expressing that she was not upset by the Simpson verdict.[66] Similarly, Alternative Juror 5, who was "white," also marked "no" that he was not upset by the verdict.[67] Thus, the prosecutor's

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[64] Notably, the prosecutor in *Snyder* publicly and repeatedly compared the defendant Allen Snyder to O.J. Simpson, and unlawfully used peremptory strikes to achieve an all-white venire in a Louisiana parish that was approximately 20% Black. *See* Camille A. Nelson, *Procedural Justice: Perspectives on Summary Judgment, Peremptory Challenges, and the Exclusionary Rule:* Batson*, O.J.,* Snyder*: Lessons from an Interesting Trilogy*, 93 IOWA L. REV. 1687, 1705 n.119 (2008).

[65] Transcript at 1721, Ln. 26-28.

[66] See Juror 6 Questionnaire, at 1, 19.

[67] Alternate Juror 5 Questionnaire, at 1, 19.

rationale for striking Jurors KC and SG is implausible in light of Seated Juror 6 and Alternate Juror 5's identical views regarding the O.J. Simpson verdict.

It does not matter that the prosecutor also offered other reasons for striking Jurors KC and SG. By the prosecutor's own account, the State was motivated by its supposed concern about these jurors' responses to the O.J. Simpson Question. As noted, the prosecutor summarized his justifications for striking KC and SG by focusing solely on the O.J. Simpson Question. In his summary, the prosecutor stated: "If you'll notice across the board, I've excused jurors I believe of Hispanic origin and Caucasian origin, and the common denominator essentially, is that they were not, were not upset by the O.J. Simpson verdict, which was a DNA, circumstantial case," because those answers supposedly raised "significant concerns" given "the type of case that I'm dealing with."[68] In fact, the prosecutor did not strike such jurors "across the board" because they were not upset by the O.J. Simpson verdict. He struck two prospective Black jurors for providing that answer while allowing two non-Black prospective jurors to serve.

The law does not turn a blind eye to such obvious pretext simply because the prosecutor has also raised other purported reasons for a strike. "If a prosecutor supplies enough reasons for a strike, it may well be likely that one of those reasons is plausible. But it remains the case that implausible

[68] Transcript at 1721, Ln. 22-28.

justifications 'may (and probably will) be found to be pretexts for purposeful discrimination.'" *Currie*, 825 F.3d at 613-14 (citing *Miller-El*, 537 U.S. at 339 and *Purkett v. Elem*, 514 U.S. 765, 768 (1995)) (internal quotations omitted).

III. Courts Have Repeatedly Found *Batson* Violations Where Prosecutors Used Similar Racial Proxies During Voir Dire.

Courts across the country have found constitutional violations where, as here, prosecutors have used racial proxies as purported "race-neutral" justifications for striking minority venirepersons. For example, courts have held that prosecutors justifying striking Black venirepersons because they have previously experienced discrimination is an unconstitutional racial proxy. *See, e.g.*, *Turnbull*, 959 So. 2d 275; *Love*, 586 F. Supp. 2d 1155.

In *Turnbull*, the prosecution asked during voir dire: "Do you think that the police racially profile people," and five venirepersons—all Black—answered "yes." 59 So. 2d at 276. The State used peremptory strikes against four of the Black venirepersons and justified striking one of them because "he had experiences with racial profiling." *Id.* In finding a *Batson* violation, the court noted that "the question of racial profiling did not bear any relevance to the case." *Id.* at 276 "Instead, the State designed tangential questions on racial profiling to elicit responses from potential black jurors, which the State later held against them when selecting the final jury panel." *Id.* The court recognized that "the State's questioning on racial profiling and

use of the elicited responses to strike black jurors constituted a subterfuge." *Id.* at 277.

In *Love*, the prosecutor justified striking one Black juror because she thought "the greatest cause of crime in the community is racial prejudice," gave "money to the Black Adoption Fund," and felt "she was a victim of racism in the public schools growing up." 586 F. Supp. 2d at 1179. The court held that the State's rationales were "a proxy for race." *Id.* at 1179-80. The court recognized that "it would require willful intellectual blindness for [it] to conclude that a juror's combined experience of racism, concern about racism, and support of an African-American charity do not correlate to race." *Id.* at 1180.

Courts have also found that striking venirepersons based on where they live can also be an unconstitutional racial proxy *See, e.g.*, *Bishop*, 959 F.2d at 822; *People v. Turner*, 90 Cal. App. 4th 413 (2001).[69]

[69] As Justice Marshall explained:

> Mere place of residence, or any other factor closely related to race, should not be regarded as a legitimate basis for exercising peremptory challenges without some corroboration on voir dire that the challenged venirepersons actually entertain the bias underlying the use of that factor. This is true particularly when, as in this case, the prosecutor can easily ascertain the existence of the alleged bias without use of the overly broad proxy for bias. To hold otherwise would render *Batson*'s protections against race discrimination in jury selection illusory.

Lynn v. Alabama, 493 U.S. 945, 947-48 (1989) (Marshall, J., dissenting from denial of certiorari).

In *Bishop*, the prosecutor justified striking a Black juror based on the fact that she lived in Compton, where, according to the prosecutor, people "are having a tough time, aren't upper middle class, and probably believe[ ] that police in Compton in South Central L.A. pick on black people." 959 F.2d at 822. The Ninth Circuit held this explanation was not race-neutral because "it amounted to little more than the assumption that one who lives in an area heavily populated by poor black people could not fairly try a black defendant." *Id.* at 825. This justification could have just as easily been "ascribed to vast portions of the African-American community," and "the invocation of residence both reflected and conveyed deeply ingrained and pernicious stereotypes. *Id.* The court held that the prosecutor unconstitutionally used the juror's residence as a proxy for "prejudice." *Id.* at 825-26.

In *Turner*, where Mr. Turner was charged with cocaine possession, the defense challenged the prosecution's use of peremptory strikes to exclude Black venirepersons. 90 Cal. App. 4th at 418. The prosecution explained that it excused one Black person because "she is from Inglewood. And my particular experience with Inglewood jurors has not been good." *Id.* The prosecution assured the court that "it's not a race issue. It's more of an issue of logistics, where they live. It seems to me that people in that location . . . may or may not consider drugs the problem that people in other locations do." *Id.* In finding a constitutional violation, the court of appeal took stock

of the fact that the "population of Inglewood is . . . substantially African-American[;]" to therefore state "'Inglewood jurors' have a different attitude toward the drug culture is just as stereotypical as the reason given in *Bishop*." *Id.* at 420. The court held that striking a juror because she was from Inglewood was a "mere surrogate or proxy for group membership." *Id.* (quotation marks and brackets omitted).[70]

Finally, a court recently held that justifying striking a juror based on his gold teeth was a proxy for race-based discrimination. *See Clayton v. Georgia*, 797 S.E.2d 639 (Ga. App. 2017). There, the prosecution exercised six of its preemptory strikes against African-Americans. *Id.* at 641. The prosecutor justified striking one of the Black people because of his gold teeth, which he did not "like." *Id.* The defense "explained that the State's gold-teeth rationale was a race-based stereotype of African-American culture," and

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[70] *See also Pennsylvania v. Horne*, 635 A.2d 1033 (Mem), 1035 (Pa. 1994) (Nix, C.J., in support of affirmance) (affirming a lower court's finding of a *Batson* violation where the prosecution justified striking a Black juror because she lived in a "high crime area," reasoning that "[r]esidence is too closely tied to race," that this widely applicable justification "will undoubtedly have a disparate racial effect" and was therefore "not race neutral"); *Louisiana v. Harris*, 820 So. 2d 471, 476 (La. 2002) (finding a *Batson* violation where the prosecution justified striking a Black juror both because he was a single Black man and because of where he lived, finding the prosecution's strike "based on his residency unpersuasive and . . . a pretext to its true reason, that the state excused [the juror] because of his race"); *United States v. Wynn*, 20 F. Supp. 2d 7, 14-5 (D.D.C. 1997) (finding a reverse *Batson* violation where the defense struck white jurors and justified the strikes because they lived "in the upper Northwest area of Washington, D.C.," because such criterion "had a disparate impact of white members of the venire," finding that this race-neutral reason was "in fact, a proxy for race").

reliance on that "was merely a pretext for the State's explicitly race-based strike[;]" an assertion the prosecution vehemently protested. *Id.* at 642. The appellate court agreed, reiterating that "an explanation is not racially neutral if it is based upon either a characteristic that is specific to a racial group or a stereotypical belief that is imputed to a particular race." *Id.* at 643 (internal quotation marks omitted). The court could not "ignore the fact that having a full mouth of gold teeth is a cultural proxy associated with African-Americans," even though "nothing about having gold teeth describes skin tone in a literal sense." *Id.* at 644. Thus, "striking the African-American juror because he had a full set of gold teeth cannot be race-neutral." *Id.*

Courts both in and outside of California have vigilantly guarded against prosecutors using on-their-face race-neutral surrogates as a ruse for targeting and then striking Black venirepersons and have repeatedly found such "discrimination by proxy" unconstitutional. This Court must be vigilant here, too, because the federal and state Constitutions compel it to scrutinize "elusive, intangible, and easily contrived explanations with a healthy skepticism. Otherwise, [such explanations] will inevitably serve as a convenient talisman transforming *Batson*'s [and *Wheeler*'s] protection[s] against racial discrimination in jury selection into an illusion and the *Batson[/Wheeler*] hearing into an empty ceremony." *Daniels v. Texas*, 768 S.W.2d 314, 318 (Tex. App. 1988).

IV. This Court Should Decide This Issue Even If It Determines That Relief is Warranted on Other Grounds, as It Implicates an Important and Recurring Constitutional Issue.

As Mr. Miles explains in his briefs, the prosecution's use of its peremptory strikes was based on race even ignoring the fact that the prosecutor's reliance on the question about the O.J. Simpson verdict was an impermissible racial proxy. *See* Appellant's Br. at 45-76; Reply Br. at 6-54. Still, this Court should decide whether the O.J. Simpson justification was a proxy for race discrimination for three reasons:

First, for this Court to adequately engage in a comparative juror analysis, it must scrutinize the justifications given by the prosecution for its various preemptory strikes. And to scrutinize the O.J. Simpson justification, this Court must grapple with the racialized history of Mr. Simpson's trial. This includes the fact that Mr. Simpson's trial was symbolic of racial tensions in the criminal justice system, the question of whether venirepersons thought the O.J. Simpson verdict was fair would break along racial lines, and the fact that the prosecution used Black venirepersons' predictable responses to justify striking them. As the Supreme Court said, "*all* of the circumstances bearing upon the issue of racial animosity must be consulted." *Snyder*, 552 U.S. at 478 (emphasis added).

Second, this Court should decide this issue because it involves an earlier step in the *Batson/Wheeler* process. If this Court finds that the O.J. Simpson justification for striking Jurors KC and SG was not in fact race-

neutral, then the prosecution falters at step two of the *Batson/Wheeler* analysis. At that point, there would be no need to engage in the comparative juror analysis because the prosecution would have failed to adequately rebut the prima facie *Batson/Wheeler* violation that Mr. Miles indisputably proved when he showed that the prosecution used three of its first six preemptory strikes to remove every Black person from the jury.[71] Appellant's Br. at 47-48. Because "[t]he prosecutor did not meet his burden of articulating a racially neutral explanation for striking Jurors [KC and SG] [p]ursuant to *Batson* [and *Wheeler*], [this Court] must reverse." *Bishop*, 959 F.2d at 827.

Finally, this Court should decide this issue because it's recurring. California prosecutors have repeatedly used this tactic to remove Black venirepersons from the juries of Black defendants facing death.[72] The right to a fairly selected jury comprised of a cross-section of the community is at its zenith where the state is seeking to execute a defendant, *cf. Ring v. Arizona*, 536 U.S. 584, 606 (2002) ("[d]eath is different"), and this Court

[71] Notably, the prosecution permitted one African American to serve as an alternate juror. However, this was after the defense raised a *Batson* challenge, after the court found a prima facie case of racial discrimination, and after the court required the prosecution to justify his discharge of Black jurors.

[72] *See, e.g.*, *People v. Smith*, S065233 (argued Mar. 7, 2018) (where, in a capital case, the prosecution struck every Black venireperson and used the answer to the O.J. Simpson Question as a "race-neutral" justification for striking some Black jurors); *People v. Montes*, 58 Cal. 4th 809, 851 (2014) (where, in a capital case, after the defense proved a prima facie *Batson/Wheeler* violation, the prosecutor used a Black juror's answer to a variant of the O.J. Simpson Question as justification for preemptory strike); *People v. Vines*, 51 Cal. 4th 830, 851 (2011) (same); *People v. Mills*, 48 Cal. 4th 158, 184 (2010) (same). This Court did not decide the issue presented in this brief in any of these cases.

should take particular care to ensure that California prosecutors comply with the federal and state Constitutions when endeavoring to execute people.

The issue of whether reliance on questions about the O.J. Simpson verdict to strike Black venirepersons is a proxy for discrimination involves an important question of federal and state constitutional rights, which amicus respectfully submits this Court must address.

> [T]his court bears the ultimate judicial responsibility for resolving questions of state law, including the proper interpretation of provisions of the state Constitution. In fulfilling this difficult and grave responsibility, we cannot properly relegate our task to the judicial guardians of the federal Constitution, but instead must recognize our personal obligation to exercise independent legal judgment in ascertaining the meaning and application of state constitutional provisions.

Comm. To Defend Reprod. Rights v. Myers, 29 Cal. 3d 252, 261-62 (1981) (quotation marks and citations omitted).

This Court should provide guidance on this issue not only for Mr. Miles and other similarly situated defendants, but for all Californians who still face the potential of being unlawfully stricken from juries based on proxies for discrimination. A decision on this issue will hopefully forestall prosecutors from using this invidious proxy by discrimination tactic again in the future, helping to ensure that people are not rejected from juries because of their race or any other protected status.

CONCLUSION

For these reasons, amicus curiae LDF respectfully urges this Court to grant Mr. Miles a new trial.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.520(c)(1), I certify that the foregoing BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLANT contains 8,779 words, not including the Table of Contents, Table of Authorities, this Certificate, the caption page, or signature block.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLANT will be delivered via certified delivery on the following parties on this 9th day of May, 2018:

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