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Supreme Court of Texas.
Donald Davis
v.
Fisk Electric Company, Fisk Technologies and Fisk Management, Inc.
No. 06-0162.

April 10, 2007

Appearances:
Renuka V. Jain, Renuka V. Jain & Associates, P.C., Sugar Land, Texas, for petitioner.
J. Cary Gray, Looper Reed & McGraw, P.C., Houston, Texas, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice H arriet O'Neill, Justice Dale Wainwright, Justice Scott A. Brister, Justice D avid Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett, Supreme Court Justices.

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CHIEF JUSTICE JEFFERSON: The Court is now ready to hear argument in 06- 0162 Donald Davis versus Fix-- Fisk Electric Company.
THE COURT MARSHAL: May it please the Court. Ms. Jain will present argument for the petitioner. The petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF RENUKA V. JAIN ON BEHALF OF THE PETITIONER

MS. JAIN: May it please the Court. Fisk ever saw a single member of the venire panel, before he asked a single question to any member of the venire panel, he held a firm conviction that African-Americans should not serve on this case because it involved issues of race discrimination. And he stated in briefing to this Court admitting that fact. In his briefing to this Court, particularly in his response to the Petition for Review, Fisk Electric stated that it held the belief that African-Americans would respond with hostility towards it and would be peremptorily challenged. This is the essence of what Batson law is enacted to forbid. Batson forbids a party from challenging potential jurors solely on account of their race or on the assumption that Black jurors as a group will be unable impartially to consider the State's case against a Black defendant.

JUSTICE MEDINA: I want, I want to go back to the Trial Court proceeding and the way Judge Walberg conducted this. From my reading of the record, it appears, it appears to me that he conducted everything by the book in this hearing so that whatever challenges were made, they were done properly or procedurally.

MS. JAIN: I disagree, Justice Medina.

JUSTICE MEDINA: How so?

MS. JAIN: When the trial court considered the reasons that were advanced for the strikes, he was relying off on Purkett versus Elem. And as the Court now knows, Miller-El versus Dretke has overruled Purkett's, silly and superstitious standard for a Batson strike. Miller-El specifically requires a commonsense best fit sort of approach to the reasons that I advanced for the strike. And it rejects the silly and superstitious standard. In fact, Miller-El, unlike Purkett and Hernandez versus New York, is not a plurality opinion. It is a majority open-end authored by six Justices of the Supreme Court. And it specifically requires that when a Batson strike is made and the reason are offered for the strike, the reasons that are offered have to be plausible. And it also -

JUSTICE HECHT: Do you think it had to be verbal?

MS. JAIN: They have to be verbal?

JUSTICE HECHT: Do you think they do? Or can they be body language and demeanor?

MS. JAIN: They can be demeanor-related questions, but -

JUSTICE HECHT: If the lawyer says that's what it was, how can we judge when-- when we'd all-- we're just looking at a cold record.

MS. JAIN: Justice Hecht, I agree with you that in Yarborough versus State, the Texas Court of Criminal Appeals did resolve the conflict between the Courts of Appeals in whole, that when you have-- the explanation that is given refers to a demeanor-related question, and the person who's on the other side refuses to challenge ,ergo, is completely silent, then, an assumption can be made that, in fact, the demeanor-related question did occur in the record because an Appellate Court has nothing else to review by -

JUSTICE HECHT: So we, we can take the lawyer's word for it, do you think?

MS. JAIN: Except, your Honor, in this specific case there was an objection. On two specific occasions, I said, "The nonverbal conduct is not supported by the record." Now, the Court of Appeals said that when I used the word record, I was referring to a non-existent transcript. The Batson hearing, unlike a State criminal procedure, occurred contemporaneous with, as soon as the voir dire was concluded, we had the Batson jury. There was no record. And I specifically referred to the nonverbal occurrences and said all the statements that had been made, because I didn't just have this lawyer providing nonverbal reasons. I had the trial judge adding his reasons. And none of those are supported by the record, and they were all fueled by the stereotypical belief that African-Americans should not decide race discrimination cases. And that is very clear when you look at the two-- the two issues on which the Court of Appeals said, well these are significant reasons. And that's -

JUSTICE HECHT: If, if the lawyer says, "Well, the potential juror was frowning at me the whole time." Then, we can take his word for it unless there's an objection. Is that, is that your view of how we look at this procedure?

MS. JAIN: In terms of not this case, but in a general issue of law, if a lawyer offers as a reason that the juror frowned, that is a

reason that is provided. That does not mean that the trial judge abdicates his responsibility to see if that reason is pretextual, whether in fact that reason did occur -

JUSTICE HECHT: Right. But the trial judge says, Black-- he, he doesn't say anything or he says, "I agree." Then we're-- then where are we?

MS. JAIN: In this case particularly, the trial judge did not conduct any kind of weighing of the evidence. He did not even attempt to determine whether the explanation that was being offered was, in fact, the best fit for this. So concerns as that were presented. And I'll give you a perfect example. If you look at the strike against Patrick Daigle, this is the employee who worked for Continental Airlines. The reference that-- the reason that was given was Mr. Daigle was most clear when he said that-- or when he reacted that punitive damages should be awarded against defendants. When you look at this sentence in its entirety, no reasonable person can come to the conclusion that that was a reference to any sort of nonverbal gesture, nonverbal occurrence, which is what Yarborough was designed to address. Now, unless this Counsel is clairvoyant, how did he know why or how Mr. Daigle felt about punitive damages if he didn't speak a word? Now -

JUSTICE MEDINA: Why isn't this ultimately left to the trial judge who's there to control the court, has a lot of discretion on how these proceedings go forward as long it follows certain parameters such as, such as Cortez. Ultimately, the trial judge has to make a decision based on what he or she views, either body language or verbal commitment or non-commitment, chance for rehabilitation. Why can't the trial judge ultimately make that decision?

MS. JAIN: He can, but in this case, he's still, and in all cases, he's still required isn't he, to follow the law? He's still required -

JUSTICE MEDINA: But it seems like he did to me. And I, and I don't understand, or he didn't. Or your assertion is that there's a nonverbal response that the trial judge missed.

MS. JAIN: No. My assertion is not, Justice Medina, that there's a nonverbal response that he missed. But for example, let's assume in this Courtroom people laugh, and there is a reference to the fact that there is laughter. And anybody before this Court then come to the conclusion that the laughter is motivated by disbelief, by dislike. How can you attribute motivations to laughter? Laughter is a nonverbal occurrence, and Counsel did say there was laughter. And the issue of laughter illustrates the limitations of the Yarborough Rule. That is a -

CHIEF JUSTICE JEFFERSON: Non-- so nonverbal is not sufficient to show a neutral reason for the exercise of a peremptory strike -

MS. JAIN: No. Not in, in and of itself, Chief Justice. I believe that you need to look at the record in its entirely. And clearly, if you look at Miller-El, that is exactly what the Supreme Court majority sees. It -

JUSTICE HECHT: What you mean, if the-- that our person is just sitting there frowning and shaking his head all during the examination, but he doesn't say a word, that's not enough? I'm sure [inaudible] that.

MS. JAIN: No. Justice Hecht, it is not enough. Because for example, I am from India. We move our hands while talking, okay? African-Americans may have certain cultural differences. They, for example, somebody might-- when, when you're asking me a question, I frown because I'm thinking. If you interpret my frown as disrespect, solemness, [sic], then, you're making a judgment or a -

JUSTICE HECHT: Yes. But that's what-- that's, that's what peremptory challenges are about. You -

MS. JAIN: But -

JUSTICE HECHT: It's not-- you're not trying to prove. You're just trying to get a feel, sort of -

MS. JAIN: But you still have to look at the question in its totality. You have to still consider the voir dire record, in its totality. And what happened in this case is, if, for example, you are going to strike African-Americans because they have a reaction to the word "nigger." But you're not going to strike the Hispanic juror who was equally offended, the two Caucasians jurors who were equally offended. That is disparate treatment as a matter of law, and it's a violation of Title 7 under which this case was brought. When 42 U.S.C, 1981(a) was passed-- if you remember, it specifically added 2000e(m), a subsection to the statute that says, that when you have a good reason, or a-- and a bad reason together in the same case, you still win. The plaintiff still wins because of that bad reason even if he may not recover damages. And the courts have said that when you think about the word "nigger", there is no other word in the English language that so segregates African-Americans from everybody else. And yet this trial judge said, "That could be a condition for excluding people from the jury." That surely cannot be the law of this land. In essence, what Frisk has been arguing throughout this case is, yes, that is the Fourteenth Amendment. Yes, that is the Equal Protection Clause. But race discrimination cases are an exception to the Fourteenth Amendment clause. And -

JUSTICE MEDINA: And I, I can appreciate the concern of this whole scenario 'cause it certainly didn't appear right. But the record to me didn't indicate that anything was done wrong. And certainly, the use of a particular word can be offensive for one group in a certain setting but not in another setting. Because the word you just used is a word that's constantly used in this rap music and it's not offensive there. So I guess, it depends on what the setting is to make the word offensive. Whether it's that word or some other words, correct?

MS. JAIN: Justice Medina, did you say that it is used in rap music?

JUSTICE MEDINA: It's used in other type of -

MS. JAIN: But -

JUSTICE MEDINA: - environments.

MS. JAIN: I -

JUSTICE MEDINA: But having said that, is it-- is it the word or just something else in the proceeding that is offensive?

MS. JAIN: Well, I don't believe what basketball players say on a basketball court or what Kanye West may say, who is a rapper, and his music sets our legal standards. Our legal standards still require that we apply the Equal Protection Clause to protect African-Americans [inaudible] people, women or men, gender-based strikes, national or region strikes. We protect these people from being struck because of their race.

JUSTICE MEDINA: Oh, but so it's not the word then. It's something else, right?

MS. JAIN: Well, it's the, it's the fact that, that word, the reaction of that word is utilized as a basis to strike African-Americans, it's the race-based strike as a matter of law. How can we say, how can we say that you're as a Hispanic juror who find that word equally offensive. But we are going to retain that person on the jury. Here is a Caucasian juror who finds the word offensive. We are going to

retain that person on the jury. But we're only going to strike African-Americans from the jury. And here you have a defendant, a respondent who is unequivocally telling you, "This is just common sense. It's just common sense to expect African-Americans to lack that objectivity that we agree and recognize in every other race." But in this case, they completely lack the objectivity because when, when presented with an issue of race discrimination, they're going to be so overwhelmed with bias and prejudice that they're simply not going to be able to make a decision.

JUSTICE WILLETT: How-- well-- we struggle with distinguishing explanations that are perhaps unlikely versus those that are really laughably untrue or, on their face implausible? Can you help us kind of draw the distinction between-- or is it that we just think are more likely than not, fictional or just unlikely versus those that are truly too incredible to merit belief?

MS. JAIN: I will illustrate that with an example from this case. Your-- you have a situation with respect to Juror No. 18 who was struck, who was Leon Randle. He was a janitor for Freeman Distributors. When both parties in this case and the judge asked the panel, "Had-- does anybody know these lawyers? Does anybody know the parties?" And if you recollect from the voir dire, nobody raised their hand. The reason that's offered to strike Mr. Randle by Fisk's counsel is, "I got a judgment against Freeman Distributors and I'm sure-- I'm very concerned about him being in this case." Why would a janitor even know about the existence of a judgment? And particularly when that reason that is offered, which is so laughable, the reason that's offered is, "Oh! He must be knowing about this judgment that I got." Well, if you look at the record in its totality, clearly nobody raised their hand to acknowledge that anybody knew any of the lawyers of the parties. But that is the reason that is offered. And the Court buys that reason. Even though -

JUSTICE MEDINA: And so, and so at that point, you said the Court bought that reason. Is that the point where the judge says, "Well, I don't believe you. Therefore, you're going to have to use a strike?" I mean the judge has to have some discretion on what he or she believes, correct?

MS. JAIN: Yes. The judge has to have discretion. But here, I believe -

JUSTICE MEDINA: And how we review that?

MS. JAIN: Well, Justice Medina, you, you review it by applying the law. And Miller-El versus Dretke gives you a road map. It says you do side by side juror comparisons.

JUSTICE MEDINA: The judge says that's not good enough. There's no way a janitor would have known that. Therefore, he leaves on that cause.

MS. JAIN: No, Justice Medina. What the judge says is, "There is nothing in this record that indicates that Mr. Randle knew of either Fisk or its Counsel." And therefore, the reason that you have addressed is a false reason. It's a pretextual reason. Eighty-four point -

JUSTICE MEDINA: That require more questioning by the judge or, or is it, does it-- in there?

MS. JAIN: But the Batson hearing was conducted after the voir dire was over. And certainly, Counsel had the opportunity. I knew that he could, in fact, go in and separately question Mr. Randle. So if he truly believed, and I'll give him the benefit of doubt on this. Well, then say, okay, let's assume that he believed that, in fact, he knew; the, the, the janitor, in fact, knew about the judgment. Why didn't he

question him? He certainly was familiar with that process. He exercised that process to question Mary Harts, who was a physical therapist, on an absolutely silly reason. "Oh, she doesn't like lifting people and I want to know if she likes her job." He then calls her in, and you know that's another example, Justice [inaudible] for silly and superstitious reasons. He says, "I've got to strike Ms. Harts." You know, I've been to law school. And when I did my law school voir dire, I was told whenever you question a person separately, you've got to strike them because they might think that, you know, that I'm challenging them for cause. And going back to Justice Hecht's question about nonverbal occurrences, is my time up?

CHIEF JUSTICE JEFFERSON: Yes. Your time is up.

MS. JAIN: I am so sorry.

CHIEF JUSTICE JEFFERSON: Are there -

MS. JAIN: I didn't feel it.

CHIEF JUSTICE JEFFERSON: -Are there further questions? Thank you.

JUSTICE MEDINA: You, you hold -

JUSTICE MEDINA: That thought on -

MS. JAIN: I will. Thank you.

JUSTICE MEDINA: Get on the rebuttal .

CHIEF JUSTICE JEFFERSON: The Court is ready to hear argument from the respondents.

COURT MARSHALL: May it please the Court. Mr. Gray will present argument for the respondents.

ORAL ARGUMENT OF J. CARY GRAY ON BEHALF OF THE RESPONDENT

MR. GRAY: May it please the Court. I have absolutely no idea why the conclusion that's presented to this Court, that we believed African-Americans should be struck before this case ever started is the conclusion that the petitioner brings to you. It'ss just not the case. But -

JUSTICE MEDINA: But it's easy to come to that conclusion. If you look at the, the, the record and you, and you understand what the underlying case is about, and you come to the realization that all African-Americans were struck, that's a pretty reasonable conclusion.

MR. GRAY: Well, it is true that five African-Americans ended up being struck, but there was no one reason not to answer to any one question, not the answer-- not any one verbal or nonverbal reaction why any of those prospective jurors were struck. In fact, they were struck in response to direct question-- I mean, and Randle would be a great place to start as an example for that. And I can talk as much as anybody would like about any of the particular jurors, and I know maybe the Court has bigger policy questions in mind. But on Randle, what I said ...

JUSTICE: Well, before you, before you go into that, let me ask you this: Does the fact that you asked for a jury shuffle at the beginning, does that affect the, the consideration of all of this?

MR. GRAY: I think of a fair thing to say to you is everything affects the consideration of all of this. Yes, we asked for a jury shuffle. Now you should say, "Why do you ask for a jury shuffle?" Answer: Because if you looked at the makeup of the jurors, in fact the Court of Appeals observed that it-- the, the, the, the African-American prospective jurors were fairly equally dispersed throughout the entire

panel. But what you look at-- what you see if you look carefully at the jury cards is, that what we ended up being concerned about on the shuffle, and I have some specific, some specific-- there were two attorneys in the back half, there was an engineer who was in the back half, there was a supervisor, there was a CPA, and there was an SBA loan officer who's a counselor to small businesses that ended up being-- that were in the back half that ended up being the very people that the petitioner used its peremptory challenges on. So it was the socio-economic status particularly we, we had in mind before this case that the people who would be most likely to understand our client's position, were employers. People who had supervisory -

JUSTICE: Are all of those, all of those folks white?

MR. GRAY: Were the ones in the back? Yes. The petitioner did strike all six of the people that the petitioner struck were Anglos.

JUSTICE: So that the shuffle wasn't to move the Afro-Americans back but to move the whites up.

MR. GRAY: No. In fact, the, the racial make up of the entire panel was equally dispersed. The shuffle was because of the occupations, primarily, of the people that were in the back half. And that is one of the questions that the Court was looking at. And it's one of the things the Court has to look at. But if you look at the-- all the jurisprudence on Batson, and the Hernandez case is a great example of that, where they say the decision on the Batson challenges is akin to a fact finding by the trial judge who is uniquely, particularly within his purview, to see that-- sit there and watch the reactions of the prospective jurors, see exactly what we're talking about vis-a-vis the dispersment [sic] of the prospective jurors in the courtroom, and that, that decision by the trial judge is akin to a fact finding that's entitled to great deference. And that's just, that's the way it almost has to be in order for there to be any practical, any practical way for the courts to review the issue -

CHIEF JUSTICE JEFFERSON: Well, certainly -

MR. GRAY: - [inaudible] -

CHIEF JUSTICE JEFFERSON: - he's entitled to great deference, but then you have a case like Miller-El, where that trial court would be entitled to great deference, and the Supreme Court and the majority opinion said that the peremptory challenges were not neutrally exercised. So what standard should we use to determine whether the trial court's discretion has been-- was abused?

MR. GRAY: Well, on the Federal Court side and what it says in Hernandez is it's clearly erroneous stand. And so of course, here it's an abuse of discretion or that's the way we would articulate it. But that's how significant the fact-finding is. Miller-El, as I recall the case, was tried before Batson. And it was the case where the Dallas County District Attorney's office had like a play book that said, "We're going to shuffle. If there's disproportion in the number of African-Americans in the front of the-- in the front of the voir dire panel." And so what the court says in Miller-El is that happenstance didn't explain why the things that happened in Miller-El happened and once again re-affirms we are going to look at everything that happened in the course of the case in order to make a determination. And Miller-El does nothing to disturb the notion that it's the trial court's judgment call when a Batson challenge is asserted.-

JUSTICE HECHT: When, when there is a claim of racial discrimination, and the claimant is African-American, and the part of the claim is that language was used which would be offensive, hopefully to most anybody, but at least certainly to an African-American. And

five of the six strikes are of African-Americans on the, in the venire. It just seems almost to stretch credibility too far to think that there wasn't some racial thinking in that process.

MR. GRAY: And so what we would submit is you have to look at the entirety of the voir dire and the fact that no one person was struck for any one reason. Mr. Randle, I started talking about that a little while ago, Mr. Randle, what I said was, "I know a lot about his employer." I never suggested, or meant to suggest, that I thought Mr. Randle knew something about my-- the fact that I tried a case against his employer in the past. In fact, I was quite certain Mr. Randle had no idea about that. But I knew enough about his employer to know that he was a custodian in a meat packing plant. We had a very nuanced case. We had a situation where our client could have made the decision for this discharge on a false notion. What he-- what the decision makers were told was that the petitioner was responsible for a-- what the Court of Appeals accurately described as a debacle on this job. And the petitioner was blamed for it. It was possible that the petitioner was blamed wrongfully. That was one of the positions that the petitioner was going to take. And yet our, our decision makers acted on that information. That would not make it race-motivated. And similarly, as the Court's probably aware, the shifting burdens in a race discrimination case. So we, going in, knew that we wanted jurors who were demonstrably intelligent. Give me 12 intelligent jurors and I'm either-- I convinced myself I'm going to be able to convince them of the merits of my client's cause or I'm not going to try the case. I'm going to settle the case. And in that particular instance, I'm standing in the ceremonial courtroom of the Harris County District Court with 50 prospective jurors out in the hallway and I'm supposed to tell Judge Walberg if that guy's not very smart. And probably, if I had to do over, I would have said, "Look, there's no way to conclude he's intelligent enough to sit on this jury panel." Not just because of the way he filled out his jury information card. Not just because of the fact he's an, an employee and a, a custodian in a meat packing plant. On top of that, with that particular instance, there was a, a-- Mr. Randle specifically said that he had been discriminated against in employment related issues in the past.

JUSTICE O'NEILL: Mr. Gray, let me just ask you. I know you offered some other reasons for striking the jurors in this case. But presume with me, if you will, that there were ten African-Americans in the-- on the panel on the venire. And in this case, all ten exhibited a very negative bodily reaction to the racial slur that was used in this case. Would that alone be sufficient to support a peremptory strike? Or do you acknowledge that it would not?

MR. GRAY: I would refer the court back to all of the Batson jurisprudence that says, you got to look at it, the totality of the circumstances -

JUSTICE O'NEILL: But if that were the -

MR. GRAY: - And admittedly -

JUSTICE O'NEILL: - that were the only, the only evidence we had -

MR. GRAY: But you're -

JUSTICE O'NEILL: - that there was a clear reaction that no other jurors had that only the African-American jurors had. Would that be a permissible Batson strike?

MR. GRAY: If that was the only evidence the court had, it would certainly be-- it would had to have much more weight, be given much more weight than it would in a circumstance like that presented here. And -

JUSTICE O'NEILL: But I guess, that's what gets me to the troubling feature of this case, is in that instance it seems like, clearly, the motivation is racial. It's racially motivated strike. There, there is, there is an emotional reaction that in a typical case would allow a strike. But in that instance, it seems as though it would be racially motivated. Now I'm trying to figure out how we would parse out those two.

MR. GRAY: You, you would need to look at all the circumstances. You would need to look at the situation like Mr. Daigle who petitioner brought up in her argument. Mr. Daigle was somebody that on paper looked to me like he would be a good juror for our, our client, somebody who could understand our client's position. And yet arguably, what Mr. Daigle said was that, "Continental Airlines engages in pervasive discriminatory employment practices, so much so that they have to have committees that referee disputes between the company and employees, including racial discrimination." And what, after hearing Mr. Daigle say that, I concluded, well he has, in his mind, that it's even possible that Continental Airlines engages in racially discriminatory employment practices. Maybe they do, maybe they don't. But what I believed in exercising peremptory challenges, there are plenty of people who don't think that about Continental Airlines. And I shouldn't have to have one of those on my jury as opposed to somebody who does think that -

JUSTICE MEDINA: So by -

MR. GRAY: - you know -

JUSTICE MEDINA: - but just by chance it was five of the six venire members who happened to be African-American, who caused you concern because they made some statement or some overtures about employment discrimination? Or was it -

MR. GRAY: Wel, well -

JUSTICE MEDINA: - some other[inaudible] ?

MR. GRAY: - I asked the question about whether anybody had suffered the sting of discrimination with the intention of following up on that to find out whether it was employment related. And then, interestingly, in Mr. Daigle's circumstance, he said, "Yes, he had been the highest-- paid employee in a-- a specific position at a company and that he had been removed from that position because he was Black." That's what he said -

JUSTICE MEDINA: Do you have any statistics -

MR. GRAY: - in the voir dire ...

JUSTICE MEDINA: - do you have any statistics as to whether or not minorities suffer more race discrimination or pursue more race discrimination than non-minorities?

MR. GRAY: No, and in fact I think the whole petitioner's case is built on a false premise that only minorities, African-American are offended by racism. I think that the notion that only African-Americans or only minorities are offended by racism is wrong. And that when you ask a question like whether people are offended by the use of a racial slur, it's wrong to say that only minorities are going to express offense. In this particular case, two of the three people who raised their hand and said, "I have a real big problem with that" did so in the context of everybody's got a problem with it. We, we all know it's inappropriate. And yes, there were two or three jurors who said, "I agree it's inappropriate. It's problematic. It's not proper." And after that, the question's asked, "So is anybody, based on everything you've heard so far, feel like they may have a hard time listening to the facts in this case?" And three people raised their hand. Two of them

were African-American, one of them was Hispanic and they said, "Yes, I have a real hard time with that." Or, "Yes, that's a really big deal." And so those two-- two of the strikes were exercised on those people.

CHIEF JUSTICE JEFFERSON: And yet No. 9, Juror No. 9 said, "I also feel the same way, and we all know that words are preceded by thoughts." So even before he said it those thoughts were there, and that was not a juror that was subject to peremptory challenge.

MR. GRAY: I'm thinking your, your-- the reference to No. 9 is-- No. Edmund? Edmund was No. 9, I believe, if my notes are correct. And yes, Edmund was one of the people challenged. The one who said, "We all know words are preceded by thoughts", was named Renaga. Her name was Claire Renaga. And she got a -

CHIEF JUSTICE JEFFERSON: She got a -

MR. GRAY: - Hispanic perspective.

CHIEF JUSTICE JEFFERSON: - who, who agreed with No. 9 about her-- the, the strength of, of her feeling against the use of that word?

MR. GRAY: She did. And that was the only thing that happened during the entire voir dire that would have made Ms. Renaga objectionable. And if I had seven strikes, Ms. Renaga probably would have been the seventh strike. But I only had six, and I'm trying to weigh all of the issues including the fact that you have somebody nodding their head, "Absolutely. I agree with the use of punitive damages in a case like this."

CHIEF JUSTICE JEFFERSON: Let me ask you this about body, body language. It's very hard for the record to demonstrate, you know, that a particular juror rolled his eyes or, or had a frown on, on his or her face. If that alone is enough to justify a strike, then what's left of Batson really?

MR. GRAY: Well, clearly it is. I mean the fact. That's exactly what happened in the Hernandez case I referenced a little while ago. In the 1991 United States Supreme Court case, the prosecutor says, "I, I know he said that he would just listen to the translator, but I didn't believe him because of his body language." And the Supreme Court of the United States accepted that. And I think that opinion and the concurrence by Justice O'Connor are both pretty, pretty -

CHIEF JUSTICE JEFFERSON: But we would never-- we'll never have another case like this once we, once we say body language is not assumed, rolled their eyes, and, and the case is over.

MR. GRAY: No -

CHIEF JUSTICE JEFFERSON: [Inaudible] -

MR. GRAY: - I, I don't agree to that. I, I do see where body language can be problematic in the overall setting. In this particular instance-- well, let me just back up and say, as a bigger policy matter, when somebody says, "body language", now it becomes on-- incumbent upon the petitioner in this case, the party who's asserting the Batson objection, to say, "I didn't see any body language." And even I could have been sworn in to testify, I could have had-- she could have cross-examined me on what body language I saw that I was objecting to in order to make a more clear record. And it's in the context of me having to get up there and say, "Body language", knowing full well that the trial court watched the entire voir dire so -

CHIEF JUSTICE JEFFERSON: Let me ask, let me ask one other point. You say that the trial court's finding must be given great deference. And, and I think the case just stands for that proposition. But are we to review what the trial court heard as your defense to the use of the peremptory strikes? Or, or, or is it our job to look at the entire record and determine whether there are other neutral reasons?

MR. GRAY: I think the totality of the circumstances can be considered by the trial court.

CHIEF JUSTICE JEFFERSON: So it's not just your explanation but everything else it's in the record?

MR. GRAY: A perfect example is Mr. Randle's handling of his jury information card.

CHIEF JUSTICE JEFFERSON: The reason I asked that is because of the Batson hearing. You make certain statements about why you exercised a peremptory strike. And they were limited to those statements at the hearing. And then, on appeal on the briefs, on the merits, there is a much more extended defense of those peremptory strikes.

MR. GRAY: And, and I would think-- I would argue that they are more in the nature of clarification. But as an example, on Ms. Edmund. Before I even got finished to giving my explanation, the trial court jumped in and said, "You know, there were about five different reasons why somebody would strike Ms. Edmund and, and I've heard enough." And once the trial court does that, now the burden shifts back to the party asserting a Batson objection to more fully develop the record. So once I've said enough that the trial judge believed, and the trial judge's discretion that it was credible about why we'd exercised peremptory challenge and that it didn't have anything to do with race, then the burden shifts back there, and the record should be more fully developed. But in terms of reviewing this, I mean, there had been cases where parties have urged the courts to look at the appellate record and make it what is basically a de novo review. I think there's some phrase that they use. Appellate review in the first instance or something along those lines. Well, the -

CHIEF JUSTICE JEFFERSON: You also, you also mentioned the sting of discrimination in the past. Do you think it would be appropriate to exclude all jurors who believe they had been subject to racial discrimination?

MR. GRAY: Not necessarily. I, I think it depends on other circumstances. In this case, it's an employment related case, so the next question is: Was it in connection with your employment? And then the next questions are intended to follow up and find out if they are particularly hostile to our client's point of view not for the purpose necessarily if challenge is for cause.

CHIEF JUSTICE JEFFERSON: Did you exclude all jurors who have been subject to racial discrimination in employment with the peremptory challenge?

MR. GRAY: Once again, I'm going to say the totality of the circumstances. It-- possibly you could, and in some circumstances, you might not be able -

CHIEF JUSTICE JEFFERSON: There's a whole category of cases of, of plaintiffs or citizens of the United States who are subject to racial discrimination during a period in our nation's history that, to this day, are potential jurors. Are they-- would they be subject to peremptory challenges on that basis?

MR. GRAY: In most instances, I would say probably not. I think I should say, and attack this sort of disparate questioning argument that's been presented although it hasn't been discussed, head on. And just say, you know, the, the rules say there's broad latitude in the questions that are going to be asked. But in-- if I was fashioning an opinion in this case, my concern would be were our questions directly related to either the subject matter of the trial that was-- of the case that was on trial, or to peculiar particular facts that were likely to come up. We didn't introduce the "N" word in this case. In

fact, petitioner's counsel in voir dire said, "There's going to be evidence that the 'N' word was used." And under those circumstances, our questions about it were particularly related to the facts. So does a, does a question relate to the subject matter on trial? Does the question relate to the facts that are on trial? Then the question should be something that Counsel can inquire into and -

JUSTICE MEDINA: And certainly a, a good lawyer such as yourself can work around that and ask the, the questions that pertain to the specific subject matter and, and specific facts. Just skirt around the, the Batson rules.

MR. GRAY: Well, and, and-- arguably that's right. And once again, the question should be on the-- to the burdens on the trial court's shoulders to find out why the, why the lawyer is asking questions, or why the lawyer's asking him, and why the lawyer is exercising peremptory challenges, the way the lawyer is exercising the peremptory challenges.

CHIEF JUSTICE JEFFERSON: But part of your, part of your explanation for striking some of these jurors is that they had a strong feeling on the subject, with the "N" word. That was part of the, the part of the, part of the defense that you gave in, in front of the trial court, why would we ever want a juror in a racial discrimination case that is not disturbed by the use of a racial epithet?

MR. GRAY: We wouldn't-- and nobody was-

CHIEF JUSTICE JEFFERSON: No, no matter the jurors were -

MR. GRAY: - and nobody was struck just because they-- they thought that it was improper.

CHIEF JUSTICE JEFFERSON: But that was one of your explanations of a neutral reason for the exercise of the strike.

MR. GRAY: May I answer the question?

CHIEF JUSTICE JEFFERSON: You may answer.

MR. GRAY: Thank you. But those particular jurors said, "It's a real big problem for me in the context of everybody already having agreed it's inappropriate."

JUSTICE WAINWRIGHT: You mentioned before that you believed all people should have a reaction to an alleged offensive racial act or statement. Not just minority jurors. Potential jurors, right?

MR. GRAY: Yes.

JUSTICE WAINWRIGHT: If that's the case, then talking about gestures, then every member of the panel you would expect to have some type of response, facial or otherwise, to such an alleged obnoxious racial statement. And those that didn't would be unusual.

MR. GRAY: Yes. And they would be struck. I mean this case were -

JUSTICE WAINWRIGHT: So then, to strike the ones that frowned upon referring to such a statement to a panel, how, how probative can that gesture be if you would expect all the people to have a similar uncommon reaction to such an alleged statement?

MR. GRAY: In your specific scenario it wouldn't be probative, and that's, that's not what happened here. But I agree with you. If that was all there was, it wouldn't be enough.

JUSTICE WAINWRIGHT: Do you agree that in the Batson hearing, counsel at least has to state what the gestures were?

MR. GRAY: I think that counsel has to convince the court that the reasons were race neutral for exercising the peremptory challenge.

JUSTICE WAINWRIGHT: Specifically with regard to gestures. Should counsel have to say what the gestures were that led counsel to that conclusion whatever it is?

MR. GRAY: The counsel should be able to, and if cross-examined it,

if asked about it specifically, "What gestures are you talking about?" the counsel would have to be able to do it in a credible way.

JUSTICE WAINWRIGHT: Only, only if objected-- if there's an objection and then he's challenged on it? Or should counsel have to say what the gestures are? If that's the basis for peremptory, when you're on a Batson hearing?

MR. GRAY: I, I do think it requires an objection. I think it has to have some-- there has to be some reason for counsel to make that record. We can't-- it, it would take too long to try these cases and certainly to do voir dire. If counsel was supposed to make a record to go down every rabbit trail that it would-- that nobody else is through questioning. Somebody is laughing out loud cynically, which is what happened here, then the trial court-- trial judge saw it. The trial judge noted it too; enough said. If somebody says, "I didn't see that. I want to hear more about it.", there needs to be an explanation from -

JUSTICE WAINWRIGHT: It wouldn't happen that much. Batson hearings are very rare.

MR. GRAY: Well, in the context of our civil cases, true. In the context of criminal cases, apparently not.

CHIEF JUSTICE JEFFERSON: Further questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF RENUKA V. JAIN ON BEHALF OF PETITIONER

MS. JAIN: I want to take up on the issue of jury shuffle. There were 50 people on the venire panel. There were seven African-American jurors in the front of the panel. After it was shuffled, there were only six. So arguably, at least there would have been one more juror on this panel that they hadn't been shuffled. Second, if you look at the references to Hernandez and Purkett, I'm not sure Hernandez and Purkett survived Miller-El versus Dretke. I thinks it's pretty evident, and there are a host of law review articles and opinions that have come out, including in the Fifth Circuit, that recognize that Miller-El has totally changed the landscape. Third, the explanation that is given for making the strike stands and falls on what Counsel offers. It is not up to the trial judge or the Appellate Court to come in and supply reasons. So -

JUSTICE O'NEILL: But, but we would have to find that Counsel's explanation was pre-textual as a matter of law.

MS. JAIN: Yes.

JUSTICE O'NEILL: And that's a very difficult thing to do when the trial court is listening to the arguments and able to observe the panel himself.

MS. JAIN: I agree, Justice O'Neill, that it is-- you would need to find that it is pretextual as a matter of law. But here, you have Counsel admitting that if you strike somebody only because of the fact that, that he reacted to the "N" word or they reacted to the fact that they suffered "the sting of discrimination," that would be pre-textual. And here, you have counsel admitting to [inaudible] voir dire specifically after Mr. Pickett -

JUSTICE O'NEILL: Well, but I, I don't think that there any jurors that were struck that there was an, an additional explanation offered for.

MS. JAIN: Yes. But the additional explanation was insignificant, and the Court of Appeals notes that. In the Court of Appeal's opinion,

the Court of Appeals recognizes that the significant reason for the strike was the fact of the reaction to the "N" word and examples of race discrimination, that they had experienced race discrimination. And as the majority opinion in Miller-El says, just because you can come up with some other silly or superstitious reasons doesn't mean that the pre-textual significance of the reason that is given simply disappears. -

JUSTICE MEDINA: Which is, you get away from the silly and other language that's in that, that case, but talk about here where you have a lawyer who's able to tie in the responses to the facts of his case to find another reason to strike. Help, help me with the test to decide whether or not that's correct or that's wrong, keeping in mind that the trial court has to have some discretion here, some broad discretion in making these decisions on what he or she views to be inappropriate behavior or response to a particular word or comment.

MS. JAIN: Justice Medina, I recognized, I've tried these cases for six years on the defense side. I recognized that in race discrimination cases, there are issues that come up and you need to be able to examine the panel about it. But if you look at the voir dire, there was little to no interest in examining the venire panel with respect to their views. Take the example of Mr. Pickett. All that was asked of him was, "Did you suffer race discrimination?" And just based upon his answer, "Yes", there is an assumption, this giant leap of logic made, that he suffered the exact same injury as Mr. Davis. Where are the facts to back it up? I would agree if one of these venire people had said, "I was terminated. I was denied a promotion because of my race." Something that could lead a reasonable person to conclude -

JUSTICE: Of course, -

MS. JAIN: - that an injury was -

JUSTICE BRISTER: - Of course, peremptory challenges are based on more of a feeling than-- even if the person says, "Oh, no. I'd be a fair juror." Lawyer strike them all the time anyway, right?

MS. JAIN: Yes. And that is why -

JUSTICE BRISTER: So now, let me ask you if this was-- if your client was suing for age discrimination and you struck-- the defendant struck all the senior citizens. That would be okay?

MS. JAIN: No, it would not be okay. But it -

JUSTICE BRISTER: But -

MS. JAIN: - would be okay in terms of Batson -

JUSTICE BRISTER: All right.

MS. JAIN: - because it hasn't been -

JUSTICE BRISTER: Nobody ever applied Batson to age.

MS. JAIN: That's correct.

JUSTICE BRISTER: So because there, old people are more likely to-- senior citizens are more likely to relate to your claim, strike them all. But because it's race, you can't. And the difference in the two cases is because the Constitution requires it.

MS. JAIN: Yes, because the Fourteen Amendment requires -

JUSTICE BRISTER: And so wouldn't-- why wouldn't we be better off obviously, that's too-- that's allow you, allowing you to get a more favorable jury in one kind of discriminication [sic] claim than another. Wouldn't the best way to make them even is just to have no peremptory strikes in those cases?

MS. JAIN: Well, yes if you adopt Justice Brier's-- or concurring opinions across the board including the case -

JUSTICE BRISTER: As long as we've got six peremptories, some of the most in the country, it's-- those cases are going to be skewed.

MS. JAIN: There is going to be an inherent tension because peremptory challenges are exercised for discretionary reasons, and you have-- and they may be exercised for reasons that are not-- you know that, that make in for discrimination. And that's where the trial judge comes in. And I want to go back to whether amicus is said in this case. It is difficult enough for minority jurors to serve in juries. And if we enact these rules and interpret laws to exclude them, then they are not going to be participants in civic life.

CHIEF JUSTICE JEFFERSON: Are there -

MS. JAIN: Thank you.

CHIEF JUSTICE JEFFERSON: - other questions? Thank you, Counsel.

MS. JAIN: It's a privilege.

CHIEF JUSTICE JEFFERSON: The cause is submitted and the Court will take a brief recess.

THE COURT MARSHALL: All rise.

2007 WL 5321666 (Tex.)