IN THE SUPREME COURT OF TEXAS

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NO. 06-0162
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DONALD DAVIS, PETITIONER,

v.

FISK ELECTRIC COMPANY, FISK TECHNOLOGIES & FISK MANAGEMENT INC., RESPONDENTS

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ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS
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Argued April 10, 2007

JUSTICE BRISTER, joined by JUSTICE MEDINA as to Part III, concurring.

I disagree with the Court's conclusion that defense counsel's peremptory strikes were racially motivated. Neutral reasons were given for them but were not properly preserved, in part because the rules changed during this appeal. The difference between not having neutral reasons and merely not preserving them is no technicality; charges of discrimination (like discrimination itself) can have far-reaching effects, including use in future trials.[1]

If we are to blame rather than just decide, we ought to be more even-handed. The plaintiff's strikes here were even more "remarkable" than the defendant's, as plaintiff's counsel used all six of

[1] *See Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) ("*Miller-El II*") (holding discrimination could be inferred from policies that existed decades earlier in Dallas County District Attorney's office, as discrimination may be inferred from "all relevant circumstances" including "look[ing] beyond the case at hand").

her peremptory strikes (100 percent) to exclude white males.[2] In Harris County, where this case was tried, every racial group is a minority.[3] The Court's extra effort to censure one counsel after disregarding his explanations on procedural grounds is simply too one-sided.

I agree that peremptory strikes provide an opportunity for discrimination. But they also provide an opportunity to accuse an opponent of discrimination and get a new trial if the first one turns out badly. As these strikes have outlived their original purpose, it is time we did something about them. Rather than using this case as an opportunity to disparage one attorney, I would use it as an opportunity to discontinue a practice inherently based on stereotypes. As the Court misses that opportunity, I concur only in the judgment.

I. "Guilty" or "Not Proven"?

Davis established a prima facie *Batson* violation by showing that 5 of Fisk's 6 strikes were used against African-Americans.[4] But disproportionate impact alone does not violate *Batson*.[5]

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[2] One of these six had a Hispanic surname, but identified his race on his juror card as "white."

[3] *See* U.S. Census Bureau, State & County Quickfacts, *available at* http://quickfacts.census.gov/qfd/states/48/48201.html (reporting 2006 demographic figures for Harris County, Texas as: Hispanic/Latino 38.2%, White non-Hispanic 36.9%, Black 19.0%, Asian 5.4%).

[4] *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003) ("*Miller-El I*") ("[S]tatistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors."); *Batson v. Kentucky*, 476 U.S. 79, 97 (1986) ("For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination.").

[5] *See Hernandez v. New York*, 500 U.S. 352, 359-60 (1991) ("[A]ction will not be held unconstitutional solely because it results in a racially disproportionate impact . . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.") (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977)).

Instead, it shifts the burden to the striking party to "come forward with a neutral explanation."[6] Fisk did so, but procedural errors require us to disregard those explanations with respect to at least one juror, which is all it takes.[7]

Fisk's first explanation for striking Patrick Daigle was nonverbal conduct suggesting he strongly favored punitive damages. But two years after this trial occurred, the Supreme Court held in *Snyder v. Louisiana* that a juror's nonverbal conduct can support a strike only if the trial judge expressly states that the *Batson* challenge was denied on that basis.[8] The trial judge here expressly denied the challenge regarding Michael Pickett based on nonverbal conduct, but he did not say the same regarding Daigle. While the nonverbal conduct might have been an entirely valid and neutral explanation for this strike at the time of trial, we cannot consider it now because the trial judge's findings do not comply with the new rule.

Fisk's second explanation was that Daigle did not seem sufficiently skeptical about the potential for racial discrimination by his employer, Continental Airlines. Nothing in the written record supports this explanation. Perhaps it was based on nonverbal conduct, but if so it again cannot count in the absence of an express trial court finding.

Fisk's final explanation is that Daigle said he had been the victim of job discrimination — the precise claim made by the plaintiff. It goes without saying that peremptory strikes are often used

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[6] *Batson*, 476 U.S. at 97 ("Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors."); *see also Miller-El II*, 545 U.S. at 252.

[7] *Snyder v. Louisiana*, ___ U.S. ___, ___ (2008).

[8] *Id*. at ___.

against jurors whose personal experiences (as opposed to their race or gender) might cause them to identify with an opposing party.[9] But this ground was first stated after trial, not during the *Batson* hearing. As a party must come forward with a neutral explanation during the *Batson* hearing, we cannot consider this ground either.

Rather than acknowledging that Fisk's counsel may have had perfectly neutral reasons but simply failed to preserve them (in part because the rules for doing so changed), the Court seems to go out of its way to heap up arguments that Fisk's strikes were racially motivated. In fact, there is little reason to doubt the neutral explanations by Fisk's counsel, except that those grounds were not properly preserved.

It is one thing to hold that an attorney failed to prove a neutral explanation, and quite another to hold that an attorney excluded black jurors solely because of their race. On this record, the former is established but the latter is not. Davis is entitled to a new trial because Fisk did not carry its burden. But I would not be so certain that we know defense counsel's true motives.

II. Scrutinizing Jurors' Shrugs

The Court also goes overboard by prohibiting peremptory strikes based on a juror's nonverbal conduct unless (1) the conduct is identified on the record "with some specificity," and (2) the juror is questioned about it.[10] Neither has ever been required by any constitutional or procedural rule, and both exalt appellate-level clarity over trial-level reality.

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[9] In fact, Daigle's discrimination complaint was unusual, as it involved the "havoc" that resulted when his non-black co-supervisors found out he was making more money than they were. But his perception of himself as a victim of discrimination provided a neutral reason for a strike.

[10] ___ S.W.3d ___, ___.

The United States Supreme Court has never imposed these restrictions. For example, in *Rice v. Collins,* the Court upheld an explanation that a juror "rolled her eyes" during voir dire, even though the trial judge did not see it and no one questioned the juror about it.[11] In *Snyder v. Louisiana*, there again was no questioning about physical conduct that "looked very nervous to me"; the Court rejected this explanation only because the trial judge did not expressly adopt it.[12] If the Constitution requires precise specification and explicit interrogation about nonverbal reactions, it is odd that the Supreme Court has never said so.

Nor has the Court of Criminal Appeals, despite what the Court claims. *Hill v. State* cannot support such a claim, as the reason our sister court rejected the explanation that "He's black, he's male, and I didn't like the way he responded to my questions,"[13] had nothing to do with body language. The actual rule in Texas criminal courts is that claims about a juror's nonverbal conduct are taken as true if: (1) the conduct could not have been missed, and (2) opposing counsel would have denied the claim had it been untrue.[14] Here, no one denied at trial, or denies even today, that the struck jurors reacted just as Fisk's counsel said they did. Davis's only response has been that the conduct was "not supported by the record" — which of course nonverbal conduct rarely is. If we

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[11] 546 U.S. 333, 339 (2006).

[12] ___ U.S. ___, ___ (2008).

[13] 827 S.W.2d 860, 869 (Tex. Crim. App. 1992).

[14] *Thieleman v. State*, 187 S.W.3d 455, 458 (Tex. Crim. App. 2005).

adopt our sister court's rules, not only is Fisk's explanation of the jurors' nonverbal conduct sufficiently specific, it is (as the court of appeals held) established as a matter of law.[15]

The Court's new requirements are completely impractical. Most of us recognize surprise, disgust, or eagerness when we see it, but giving a "clear and reasonably specific" explanation of which muscles twitched is another matter. Yet the Court says attorneys must publicly announce any reaction they saw on the record, question the juror about it, allow opposing counsel to rebut, and obtain a ruling that the conduct occurred. This sounds like a good way to antagonize jurors; any attorney who complies can expect exchanges like the following:

Counsel:	Juror No. 7, I notice that you are yawning. Why is that?
Juror No. 7:	I wasn't yawning.
Counsel:	Judge, I want the record to reflect that Juror No. 7 was yawning, even though he denies it.
Opposing Counsel:	No he was not.
Counsel:	Yes he was. Judge, may I have a ruling?
Court:	I wasn't watching him, so your request is denied. And now you can't strike Juror No. 7, even though you have thoroughly embarrassed him.

This will never work. If the Court wants to prohibit peremptory strikes based on nonverbal conduct, it should say so directly rather than imposing an impractical test that does so indirectly.

[15] 187 S.W.3d 570, 584.

III. Ending Peremptory Strikes

Yet the Court's opinion does not go far enough to ensure every American citizen the opportunity to sit on a jury.

If the composition of a jury is a matter of pure chance, neither litigants nor jurors can complain that the system has treated them unfairly.[16] But peremptory strikes allow litigants to change the complexion of a jury, which is why they provoke charges and suspicions of discrimination. The only way to reduce or eliminate discrimination and suspicion is to reduce or eliminate these strikes.

Texas allows more peremptory strikes than most of our sister states.[17] Twenty years after *Batson*, it is now clear we cannot always detect how many of those strikes are racially motivated, no matter how hard we try. Nor can we guarantee equal protection if we focus only on cases like this one where "too many" minority jurors were struck.[18] In the meantime, we are doing neither the jury system nor racial harmony any favors by encouraging lawyers to accuse each other of racial motives so they can get a second trial if they lose the first one.

Haphazard success in removing race from jury selection might be the best we could expect if peremptory strikes were absolutely necessary for a fair and impartial jury. But they are not.

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[16] *See Holland v. Illinois*, 493 U.S. 474, 499 (1990) (Marshall, J., dissenting) ("Public confidence is undermined by the appearance that the government is trying to stack the deck against criminal defendants and to remove Afro-Americans from jury service solely because of their race. No similar inference can be drawn from the operations of chance.").

[17] *Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc*., 159 S.W.3d 87, 90 (Tex. 2005).

[18] *See Batson*, 476 U.S. at 105 (Marshall, J., concurring) ("Prosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an 'acceptable' level.").

Peremptory strikes were an important part of older jury systems in which panels were not randomly selected. Each side in ancient Rome could strike 50 jurors because each side got to propose 100 jurors for the panel.[19] Parties needed peremptory strikes in early Texas because potential jurors were hand-picked by the local sheriff,[20] and later by jury commissioners,[21] and tended to reflect a limited part of the community.[22]

But today jury venires are randomly selected,[23] and anyone who is related to, interested in, or biased against a party or case is disqualified.[24] It is hard to see why litigants need to remove *half* of the *unbiased* jurors to get an impartial jury — especially when peremptories are based mostly on instinct, intuition, and inference.[25] This is especially true in civil cases, as a fractious juror or two cannot keep the rest from rendering a verdict.[26]

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[19] *See id.* at 119 (Burger, C.J., dissenting).

[20] *See Gulf, C. & S.F. Ry. Co. v. Greenlee*, 8 S.W. 129, 130 (Tex. 1888) ("[T]he leading object of our present jury law was to avoid the evils resulting from the summoning of juries by sheriffs . . . .").

[21] *See* Act approved Aug. 1, 1876, 15th Leg., R.S., ch. 76, §§ 4, 7, 1876 Tex. Gen. Laws 78, 79 *reprinted in* 8 *H.P.M.N. Gammel*, *The Laws of Texas 1822-1897*, at 914, 915 (Austin, Gammel Book Co. 1898), available at http://texashistory.unt.edu/permalink/meta-pth-6731:916?search=peremptory]. *See also* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 99 (1994) (noting that the federal courts used the "key man" system of selecting notable citizens who were "men of recognized intelligence and probity" as recently as 1960).

[22] *See Swain v. Alabama*, 380 U.S. 202, 207 (1965); Joanna Sobol, Note, *Hardship Excuses and Occupational Exemptions: The Impairment of the "Fair Cross-Section of the Community"*, 69 S. CAL. L. REV. 155, 161 n.17 (1995).

[23] *See* TEX. GOV'T CODE § 62.004.

[24] *See* TEX. GOV'T CODE § 62.105.

[25] Because each side gets six peremptory strikes against a twelve person jury, *see* TEX. R. CIV. P. 233, the two sides can remove half of the eligible jurors.

[26] *See Powers v. Ohio*, 499 U.S. 400, 425 (1991) (Scalia, J., dissenting) ("In a criminal-law system in which a single biased juror can prevent a deserved conviction or a deserved acquittal, the importance of [peremptory challenges] should not be minimized.").

There is no constitutional right to peremptory strikes.[27] Indeed, recent cases suggest the opposite may be true, as several justices have already concluded.[28] The Equal Protection Clause protects citizens from arbitrary and capricious state action.[29] In 1991 peremptory challenges were declared to be "state action";[30] they have always been recognized as "arbitrary and capricious" by their very nature.[31] As Justice Scalia has written, "[t]o affirm that the Equal Protection Clause applies to strikes of individual jurors is effectively to abolish the peremptory challenge."[32]

A majority of this Court could curb peremptory strikes today, as they stem entirely from our Rules of Civil Procedure.[33] The reason we hesitate to do so is that lawyers are tenaciously protective of them, believing they can use these strikes to mold a favorable jury.[34] Study after study has shown

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[27] *See Georgia v. McCollum*, 505 U.S. 42, 57 (1992) ("[P]eremptory challenges are not constitutionally protected fundamental rights . . . . This Court repeatedly has stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial."); *Batson v. Kentucky*, 476 U.S. 79, 91 (1986) ("[T]he Constitution does not confer a right to peremptory challenges"); *Tamburello v. Welch*, 392 S.W.2d 114, 117 (Tex. 1965) (noting that peremptory challenges in Texas are provided solely by rules of civil procedure).

[28] *See Rice v. Collins*, 546 U.S. 333, 344 (2006) (Breyer, J., concurring); *Batson*, 476 U.S. at 102-03 (Marshall, J., concurring) ("The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.").

[29] *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 320-21 (2004); *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, W. Va.*, 488 U.S. 336, 344 (1989); *Baker v. Carr*, 369 U.S. 186, 207 (1962).

[30] *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622 (1991).

[31] *Lewis v. United States*, 146 U.S. 370, 378 (1892) (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 346 (1769)); *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (same).

[32] *Powers v. Ohio*, 499 U.S. 400, 425 (1991) (Scalia, J., dissenting).

[33] *See* TEX. R. CIV. P. 223, 232, 233.

[34] *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 750 (Tex. 2006) ("Peremptory challenges allow parties to reject jurors they perceive to be unsympathetic to their position."); *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 919 (Tex. 1979) (noting that peremptory challenges "are intended to permit a party to reject certain jurors based upon a subjective perception that those particular jurors might be unsympathetic to his position") (emphasis omitted);

this belief to be unfounded.[35] But even if it were true, that reason is not enough: "Peremptory strikes are not intended . . . to permit a party to 'select' a favorable jury."[36]

All these problems — discriminating against minorities, disrupting trial, and discarding perfectly good jurors — are particularly acute in Texas. Whether because of the state's diversity, the generous allowance of peremptory strikes, or something else, *Batson* challenges are far more frequent here than anywhere else. A recent Westlaw search for state court cases citing to *Batson* yields:

- 4 cases from Idaho,
- 17 from Alaska,
- 43 from Colorado,

Tamburello v. Welch, 392 S.W.2d 114, 117 (Tex. 1965) (noting that peremptory challenges are used to ensure "that the controversy is decided by a jury whose members are not predisposed by reason of temperament or prior experience to look with disfavor upon his side of the case"); *see also J.E.B. v. Alabama*, 511 U.S. 127, 160 (1994) (Scalia, J., dissenting) (noting that peremptory strikes reflected "each side's desire to get a jury favorably disposed to its case"); *Edmonson*, 500 U.S. at 642 (O'Connor, J., dissenting) ("[A] peremptory strike is a traditional adversarial act; parties use these strikes to further their own perceived interests . . . .").

[35] *See* Reid Hastie, *Is Attorney-Conducted Voir Dire An Effective Procedure for the Selection of Impartial Juries?*, 40 AM. U. L. REV. 703, 722 (1991) ("[A]ttorney-conducted voir dire is not an effective procedure for selection of impartial juries. Although none of the empirical studies is perfect, all evidence demonstrates a consistent lack of impressive attorney performance in this regard. Attorneys disagree substantially about what information to rely on and which jurors to select, and consistently produce low levels of accuracy in judging juror verdict preference prejudices."); Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 699 (1991); Solomon M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection: What Works?*, 17 OHIO N. U. L. REV. 229, 250 (1990); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 232 (1989); Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 517 (1978); Michael J. Saks, *The Limits of Scientific Jury Selection: Ethical and Empirical*, 17 JURIMETRICS J. 3, 21–22 (1976); Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 505-06 (1965).

[36] *Hyundai*, 189 S.W.3d at 750; *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 94 (Tex. 2005) ("Litigants have the right to an impartial jury, not a favorable one.").

- 58 from Oklahoma.
- 74 from Minnesota,
- 90 from Florida,
- 181 from Pennsylvania,
- 342 from Illinois,
- 676 from California, and
- 1,364 cases from Texas.

More than any other state, we in Texas must consider whether peremptory strikes are worth the price they impose.

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Scott Brister, Justice

OPINION DELIVERED: September 26, 2008