NO. 06-0162

IN THE
SUPREME COURT OF TEXAS

DONALD DAVIS,

Petitioner,

V.

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

Respondent.

ON PETITION FOR REVIEW FROM THE FOURTEENTH COURT OF APPEALS
NO. 14-04-00790-CV

BRIEF OF AMICUS CURIAE TEXAS APPLESEED IN SUPPORT OF DONALD DAVIS

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STATEMENT OF IDENTITY

Texas Appleseed is a non-profit, public interest law organization that focuses on systemic reform of broad-based social issues, and has been a leader in the effort to ensure that all citizens, regardless of race or income, are given adequate representation and a fair trial before a jury of their peers. Texas Appleseed's mission is to further the public interest in the development and application of the law and public policy by courts, agencies, legislative bodies, and others in Texas; advance and improve the administration of justice; and advance the cause of social, political, and economic justice in Texas. The Texas Appleseed board comprises distinguished legal practitioners from various sectors of the Texas Bar who are committed to pursuit of these goals. Brown McCarroll, L.L.P. represents Texas Appleseed pro bono for purposes of filing this brief as an amicus curiae.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Texas Appleseed respectfully submits this amicus brief in support of Donald Davis. Any fees incurred for the preparation and filing of this brief are to be paid by Texas Appleseed.

INTRODUCTION

It is a well-known fact that minorities are underrepresented on both jury panels and in juries throughout the United States and specifically within Texas. The causes for this are many, and the Court obviously cannot tackle each cause here. However, through this case, the Court can ensure that the final method by which a party can prevent minorities from serving on juries – through peremptory strikes – is exercised in a fair, race-neutral manner.

Batson and its progeny established a detailed procedure in order to prevent racially-motivated peremptory strikes. However, as many courts have since recognized, the procedure by itself does not prevent creative lawyers from hiding a racially-motivated strike behind pretextual, race-neutral rationale. These courts have therefore required that an evaluation of the race-neutral reasoning be conducted in light of the entire *voir dire* instead of looking at the reasoning in isolation. In order to prevent racial discrimination in the use of peremptory challenges, this Court should do likewise.

A review of the *voir dire* record in this case will show that the peremptory strikes made by Fisk Electric Company ("Fisk") were based largely on race. Fisk used five of its six peremptory strikes to remove African Americans from the front of the jury pool.

Although Fisk attempted to provide race-neutral reasons for the use of these peremptory strikes, a review of its rationale in the context of the entire *voir dire* proves that the reasons were a mere pretext for the true rationale behind the exercise of the strikes. Such pretexts are not permitted under the U.S. Supreme Court's recent decisions on racially-motivated peremptory strikes. This Court should refuse to allow such discrimination in determining who shall serve on juries in Texas.

SUMMARY OF ARGUMENT

Equal protection is denied when race is a factor in counsel's exercise of a peremptory challenge to a prospective juror. This Court has previously recognized that automatic invocation of racial stereotypes retards our process as a multiracial democracy and causes continued hurt and injury. Powers v. Palacios, 813 S.W.2d 489, 491 (Tex. 1991) (per curiam) (applying the *Batson* procedure to civil cases in Texas). Yet, a close analysis of the voir dire in this case reveals that counsel for Fisk made race a factor in exercising peremptory strikes. They gave pretextual reasons for use of the strikes to remove five African Americans from the jury panel. This practice cannot continue in Texas courts.

Minorities are substantially underrepresented on jury panels from the outset, and strategic use of the jury shuffle only decreases the already disproportionately low number that serve on juries. If parties are permitted to exercise peremptory challenges based on race, as was done in this case, Texas will continue failing to provide minorities with the adequate representation on juries to which the equal protection clause entitles them. The Court should correct this abuse by adopting the U.S. Supreme Court's more vigorous application of *Batson* and looking beyond the pretextual rationale that any creative lawyer could provide for striking a potential juror based on race.

ARGUMENT

The *Batson* case established a detailed procedure that attempted to prevent racially-based exercise of peremptory strikes. In practice, however, the *Batson* procedure, by itself, was limited in its ability to curb racial discrimination in the selection of a jury. Any creative lawyer could establish a race-neutral reason for striking a jury member, even if that reason was not the true basis for exercising the strike.

In many early *Batson* cases, as long as the striking party gave some race-neutral reason, regardless of how silly or irrational, the *Batson* challenge failed. *See, e.g., United States v. Tucker*, 90 F.3d 1135, 1142 (6th Cir. 1996). However, as the *Batson* doctrine evolved, courts across the country began to recognize that to prevent racial discrimination in the exercise of peremptory strikes, courts must rigorously review the reasons given for exercising a peremptory strike. Those reasons cannot be taken at face value but must instead be supported by race-neutral questioning and equal application of the peremptory strikes. Only by this method can courts ensure that peremptory strikes are exercised fairly.

This Court should adopt the more rigorous *Batson* standard to ensure that racial discrimination is not a factor in Texas jury selection, particularly given both the underrepresentation of minorities on jury panels and the exacerbating practice of allowing a jury shuffle. Failure to require the more rigorous *Batson* standard, in the context of the larger systemic problem with minority representation and participation in Texas juries, would disenfranchise minorities from jury participation, compromise the right to an impartial jury, and reinforce stereotypes rooted in historical prejudice.

I. The Court should adopt a rigorous application of *Batson* that prohibits the pre-textual explanations Fisk used to justify its peremptory strikes of the five African Americans in this case.

The recent companion cases of Johnson v. California and Miller-El v. Dretke represent an effort by the U.S. Supreme Court to require a more rigorous application of *Batson*, and ultimately prevent discrimination in jury selection. Brian W. Wais, Actions Speak Louder Than *Words:* Revisions to the Batson Doctrine and Peremptory Challenges in the Wake of Johnson v. California and Miller-El v. Dretke, 45 BRANDEIS L.J. 437, 438-39 (2007). In each of those cases, the Court overturned death sentences based on its determination that the prosecutors' use of peremptory challenges was racially-motivated. Miller-El v. Dretke, 545 U.S. 231, 265 (2005); Johnson v. California, 545 U.S. 162, 173 (2005).

A close look at the facts in Miller-El v. Dretke reveals that the prosecutor there gave many of the same reasons for striking panel members as counsel for Fisk did in this case. While on their face, those reasons appeared to be race-neutral, the Court in *Miller-El* looked beyond the stated reasons for striking the panel members, recognizing that "if any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than Swain," which was the law regarding racially-motivated peremptory strikes prior to *Batson*. Miller-El, 545 U.S. at 240.

Instead of relying only on the stated reasons for exercising the peremptory strike, the Court looked at the entire context of voir dire. It compared the manner in which white members and non-white members were questioned. Miller-El, 545 U.S. at 255. It analyzed whether the reasons given for striking African-American members also applied

to white members of the venire that were impaneled on the jury. Id., 545 U.S. at 241. And it looked beyond the questions and answers for other evidence, like use of the jury shuffle, that helped prove that the peremptory strikes were racially-motivated. Id., 545 U.S. at 253. While concluding that the reasons given by the prosecution appeared race-neutral on their face, the Court held that a review of the entire voir dire process proved that the prosecutor was racially-motivated in exercising peremptory strikes. The same conclusion should apply to this case.

A. The disparate questioning of white and nonwhite members of the jury panel proves that Fisk was racially-motivated in exercising its peremptory strikes.

Reviewing the voir dire in this case likewise shows that the peremptory challenges were based on race. As the Court in Miller-El explained, "contrasting voir dire questions posed respectively to black and nonblack panel members" can provide evidence of an attempt to avoid a certain race of jurors. 545 U.S. at 255. During the beginning of his *voir* dire, counsel for Fisk stood before the jury and stated, "I'm the first to stand up here and say obviously it's unlikely that I have ever in my lifetime felt the sting of racial discrimination..."[1] Though he did not explain why this was obvious, presumably he assumed that it was obvious because he was not a minority. He then asked the jury: "Are there any of you who have felt the sting of racial discrimination in your lifetime?"[2] By prefacing his question with an assumption that whites are unlikely to be the subject of discrimination, this question was clearly directed only to minority members of the panel.

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[1] *See* Trans. of Voir Dire, at 59:2-5.
[2] *See* Trans. of Voir Dire, at 59:8-9.

B. Because the rationale Fisk gave for striking African Americans could have equally applied to impaneled white jurors, it is clear that Fisk's stated rationale was only a pretext for its race-based strikes.

A party can generally establish pretext by demonstrating that similarly situated members of another race were seated on the jury. *Payton* v. *Kearse,* 495 S.W.2d 205, 208 (S.C. 1998). Other evidence demonstrative of a pretext includes: explanations for challenges not related to the case, a lawyer's failure to meaningfully question or question a juror at all, disparate treatment in the questioning of African-American jurors, explanations that are suggestive of race or gender such as an assumption on the attorney's part that an African American would be less likely to convict another African American, or a vague explanation for the strike such as "teachers are liberal" without any questioning to suggest the particular juror is liberal. William C. Slusser, *Batson, J.E.B. and Purkett: A Step-by Step Guide to Making and Challenging Peremptory Challenges in Federal Court,* 37 *TEX. L.* REV. 127, 152-55 (1996). Fisk rationalized its use of peremptory strikes against African Americans with reasoning that should have applied equally to white panel members who were seated on the jury.

In striking Juror No. 5, Mr. Pickett, Fisk's only rationale was "because he is a musician" and would therefore "not be a very good Defense juror in this case where the issue is people getting laid off."[3] First, Fisk used this explanation without any showing that this musician stereotype applied to Mr. Pickett. He asked no specific questions to Mr. Pickett during *voir dire* to determine whether the stereotype was applicable. Failure to engage in any meaningful *voir dire* examination on a subject about which a party

[3] See Trans. of Voir Dire, at 109:15-17.

voices concern is evidence suggesting that the explanation is a sham and a pretext for discrimination. See, *e.g.,* Ex parte Travis, 776 So.2d 874, 881 (Ala. 2000). An explanation based on a group bias where the group trait is not shown to apply to the challenged juror is evidence that can prove pretext. Clark v. State, 896 So. 2d 584, 609-10 (Ala. 2003).

Furthermore, other white panel members who were seated on the jury had direct evidence suggesting they would be sympathetic to a plaintiff who lost his job. Three other jurors who were impaneled had themselves either been laid off or terminated, and a fourth's spouse had a history of lay-offs. Despite that there was no evidence that Mr. Pickett had himself ever been laid off, Fisk struck him instead of the others who had personal experience with layoffs. Thus, there can be no other conclusion than that Fisk's rationale for striking Mr. Pickett was purely pretextual.

Similarly, in striking Juror No. 21, Ms. Harts, Fisk mischaracterized her testimony in order to offer a reason for striking the juror. At the end of voir dire, Fisk called Ms. Harts into the courtroom separately and initiated the following exchange:

[Fisk]: Ms. Harts, during the questioning you answered – there was the "tired of picking people up" comment that you made.

Ms Harts: Uh-huh.

[Fisk]: It gave me the notion or the idea that maybe you were not happy with your employment?

Ms. Harts: No, that's not true.

[Fisk]: You're okay with your employment?

Ms. Harts: Ilovemyjob.

However, in attempting to provide a race-neutral explanation for using a strike against her, Fisk again voiced concern over the fact that she did not like her job.[4] Given that her only comments about her job were the exact opposite, the Court can only conclude that this rationale was a pretext for why Fisk chose to strike her from the jury

C. Fisk's use of the jury shuffle prior to the commencement of *voir dire* confirmed the racially-motivated exercise of peremptory strikes.

Finally, Fisk chose at the outset of the voir dire to shuffle the panel. Although this process did not substantially change the number of African Americans in the front of the jury pool, it did reduce the number by one. In *Miller-El*, the U.S. Supreme Court used the jury shuffle as additional evidence of racial bias, stating, "[t]he first clue to the prosecutor's intentions, distinct from the peremptory challenges themselves, is their resort during voir dire to a procedure known in Texas as the jury shuffle." 545 U.S. at 253.

Fisk's inquiry into "the sting of racial discrimination" and use of the "N word," its disparate application of the rationale for why panel members should be struck, and its use of the jury shuffle all indicate that the decision to use all but one peremptory strike on African Americans was based on race. For those same reasons, the U.S. Supreme Court reversed judgment against an African American and remanded his case for a new trial. Using Miller-El as a guide, this Court should do likewise in regards to Donald Davis.

[4] *See* Trans. of Voir Dire, at 114:10-18.

11. Permitting peremptory challenges to be exercised as they were in this case effectively prohibits African Americans from serving on certain juries and further exacerbates the lack of minority representation on Texas juries.

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. *Smith v. Texas*, 311 U.S. 128, 130 (1940). Although the most blatant forms of discrimination that prevent African Americans from serving on juries have been ruled unconstitutional, the fact remains that minorities are underrepresented on jury panels and in juries in Texas and nationwide. Joshua Wilkenfeld, *Reexamining the Judicial Construction of Juries in the Aftermath of* Grutter v. Bollinger, 104 COLUM. L. REV. 2291, 2996 (2004). While the Court may not have the authority to remedy all of the many reasons for this disparity, it can ensure that peremptory challenges are exercised in a nondiscriminatory manner that allows minorities the same rights as non-minorities have to serve on juries and have their cases decided by a representative cross-section of their community

A. Even before parties are entitled to exercise their peremptory strikes, minorities are regularly underrepresented on the jury panels from which the parties select their jury.

From the outset, minorities are unlikely to be proportionately represented on juries because they are underrepresented in the jury venires. Recent data confirms that in two Texas jurisdictions – Dallas and Harris counties – jury panels or jury venires are not representative of the local communities. ROBERT C. WALTERS, MICHAEL D. MARIN & MARK CURRIDEN, *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 S.M.U. L. REV. 319, 319 (2005). An independent report conducted by the Houston Chronicle found:

> Residents of Harris County's predominately white, affluent neighborhoods are up to seven times more likely to show up for jury duty than those in the county's lower-income, mostly minority neighborhoods... The low turnout from some pockets of the county skews the racial, cultural and economic makeup of the jury panels from which juries are chosen.

Andrew Tilghman, Turnout Skews Juries' Makeup, HOUSTON CHRON., March 6, 2005, available at http://www.chron.comlCDt"Varchiveslarchive.mpl?id=2005_3850404.

Furthermore, an informal survey of Texas case law reveals the frequency with which minorities are underrepresented in Texas jury panels. See, *e.g.,* F'eagins v. State, 142 S.W.3d 532, 536 (Tex. App.—Austin 2004, pet. ref d.) ("[A]lthough 9.2% of Travis County residents are African American, not one member of the 52-member jury panel was."); *Strawn* v. State, No. 2-02-170-CR, 2003 Tex. App. LEXIS 4571, at *1-2 (Tex. App.—Fort Worth May 29, 2003, pet. denied) ("African Americans represent 10.2% of the total population of Wichita County," but the venire panel "included only one African American out of forty-eight potential jurors."); Lacy *v.* State, 899 S.W.2d 284, 287-88 (Tex. App.—Tyler 1995, no writ) ("African-American population in Smith County is close to 25%," while only 6% of the venire was African American.)

The reasons why minorities are underrepresented in jury panels are many, but a few explanations account for a large portion of the disproportionate percentage of non-minority jury panel members. The first is how jurors are summoned – through registered mail, certified mail and personal delivery. This process discriminates against groups with a high level of residential mobility, which include racial minorities. Kevin Jon Heller, Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use

of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases, 26 AM. J. CRIM. L. 1, 35 (1998). The second reason is that the jury selection process disproportionately excuses lower-income citizens from jury service because they cannot afford to lose their daily wage. Id. Because minorities are disproportionately lower-income, they are more likely to be excused from jury service. Thus, from the outset, minorities are not adequately represented in the jury pool.

B. The jury shuffle, available only in Texas and used by Defendants in this case, increases the likelihood that minorities will not be represented on a jury.

The Texas jury shuffle, if requested, permits a party to randomly shuffle the names of the jury pool members at a point after they have viewed the jury panel and evaluated whether those at the top of the panel list are visibly-favorable potential jurors. TEX. R. CIV. P. 223; TEX. CODE CRIM. PROC. art. 35.11. Although it was initially enacted to promote randomness in jury selection, the jury shuffle request is entirely strategic. The U.S. Supreme Court itself has recognized that a party's decision to use the Texas jury shuffle is commonly based on a desire to exclude African Americans or other minority groups from the jury that may have initially been located at the front of the jury panel. Miller-El v. Dretke, 545 U.S. 231, 253 (2005). In Miller-El, the Court pointed to undisputed evidence indicating that Texas attorneys had requested jury shuffles "to manipulate the racial composition of the jury." Miller-El v. *Cockrell*, 537 U.S. 322, 346 (2003). While there may be factors aside from the panel's racial composition that motivate a party to request a jury shuffle, the jury shuffle can be utilized to purposefully discriminate. See Lyon v. State, 885 S.W.2d 506, 520 (Tex. App.—El Paso 1994, pet

ref'd n.r.e.); Michael M. Gallagher, Abolishing the Texas Jury Shuffle, 35 ST. MARY'S L.J. 303, 318 (2004).

The method by which a party might use the jury shuffle to discriminate is obvious. When the front of a jury panel is loaded with minorities or non-minorities, a jury shuffle will almost certainly result in some of those minorities or non-minorities being moved to the back of the jury panel. In that situation, a party inclined to discriminate will deliberately request a jury shuffle in order to do so. When that party deliberately requests a jury shuffle to achieve a statistically likely outcome – fewer minorities or non-minorities in the front of the jury pool – the jury shuffle fails to achieve randomness and only enables discrimination. The very fact that the shuffle request requires no explanation allows it to be a subtle mechanism to subvert the Court's mandate under *Batson*. Donna M. Bobbit, The Texas Jury *Shuffle: A Question* of Constitutionality, 57 TEX. B. J. 596, 598 (1994). Strategic use of the jury shuffle, when combined with the disproportionately low percentage of minorities serving on jury panels, only increases the likelihood that African Americans and other minorities will not be adequately represented on juries.

C. The ability to use peremptory strikes to remove any remaining minority panel members effectively prohibits minorities from representation on certain Texas juries.

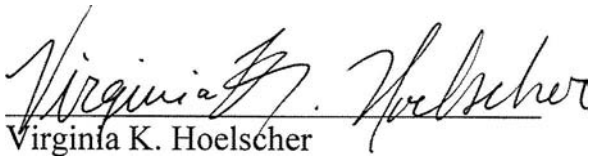
When minorities, from the outset, are underrepresented on jury panels, and when the jury shuffle can further decrease the likelihood that minorities will be represented on juries, racially-motivated peremptory strikes are the final method by which a party can prevent the jury from adequately representing African Americans and other minorities.

Parties are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury. But racial minorities are harmed more generally, for parties drawing racial lines in picking juries establish group stereotypes rooted in, and reflective of, historical prejudice. *J.* E. B. v. Alabama ex *rel. T.* B., 511 U.S. 127, 128 (1994). Such discrimination undermines the public confidence in adjudication. Georgia v. *McCollum*, 505 U.S. 42, 49 (1992). The Court should therefore ensure that peremptory challenges are not exercised based on race by adopting a *Batson* procedure that looks beyond the stated, race-neutral reasons for a party's use of a peremptory strike. Any creative lawyer can develop a race-neutral reason to strike even the most favorable jurors. Instead, the Court should review the entire voir dire process to determine whether a party was racially-motivated in exercising peremptory strikes.

CONCLUSION

For the foregoing reasons, Texas Appleseed, as an amicus curiae, requests that the Court reverse the Court of Appeals decision and require the vigorous *Batson* application that the U.S. Supreme Court has mandated.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Amicus Curiae Texas Appleseed has been forwarded by certified mail, return receipt requested, to all counsel of record listed below on this the 4th day of April, 2007.

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