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Dwayne Curtis Dorsey v. State of Florida

MARSHAL: PLEASE RISE.

CHIEF JUSTICE: GOOD MORNING. GOOD MORNING.

MARSHAL: PLEASE BE SEATED.

CHIEF JUSTICE: IT IS STILL MORNING, SO GOOD MORNING TO YOU. DORSEY VERSUS STATE, IF COUNSEL IS READY, YOU MAY PROCEED.

GOOD MORNING AND MAY IT PLEASE THE COURT. MY NAME IS ANDREW STANTON, AND I AM HERE ON PAVE OF -- ON BEHALF OF THE PETITIONER IN THIS CASE. IN 1981 IN WRIGHT, THIS COURT LOOKED AT WHAT IS ACCEPTABLE ON THE BARE RECORD ON THE COURT. THIS COURT FOUND THAT, IN THE PRETEXT OF ANALYSIS, IT FOUND PRETEXTURAL ON THE STATEMENT OF EYE CONTACT WITH BY THE JUROR. IT SAID IT BECAUSE SEAT OF THE PANTS JUDGMENTS BASED ON LOOSE AND GESTURES, ARE PARTICULARLY PRONE TO RACISM, AND IT SAID IT BECAUSE SLAPPY REQUIRED THAT A COURT EVALUATE, WHEN MAKING THE PRECOURT DETERMINATION -- NOT JUST ON THE DETERMINEABILITY OF OFFERING THE STRIKE AND NOT JUST THAT THE COURT DO SO BY NOT JUST WEIGHING THE TOTAL CIRCUMSTANCES AS REFLECTED.

DO YOU AGREE THAT, IN MELBOURNE, FOLLOWING THIS COURT'S CASE OF BURKETT, THAT THE FOCUS IS ON THE CREDIBILITY OF THE PROSECUTOR OR ON THE PERSON THAT IS MAKING THE OBJECTION, BE IT PROSECUTOR OR THE COUNSEL. I MEAN, THE FOCUS IS ON COUNSEL.

I DISAGREE WITH THAT FOR THE FOLLOWING REASON. WHAT THE COURT DID IN MELBOURNE WAS TO ELIMINATE THE REASONABLENESS INQUIRY. NO LONGER DO WE DETERMINE WHETHER OR NOT WE THINK THAT IS REALLY A REASONABLE REASON TO STRIKE SOMEONE, BUT IT DID NOT ELIMINATE THE GENNESS DETERMINATION AS TO THE -- GENUINENESS DETERMINATION AS TO THE REASON, ITSELF, NOT JUST PROSECUTOR.

THE GENUINENESS OF WHOM?

THE COURT TOLD THE JUDGES TO LOOK AT THE GENUINENESS OF BOTH, THE PERSON MAKING THE STRIKE AND THE REASON, ITSELF. IN, WITHIN MELBOURNE, ITSELF, THE COURT TENDS TO REFER THAT THIS DOES RELY PRIMARILY ON A DETERMINATION OF CREDIBILITY, BUT IT DOESN'T ELIMINATE THE FACT THAT, THROUGHOUT FLORIDA LAW, THAT CREDIBILITY QUESTION IS NOT ONE DIRECTED SOLELY AT THE CREDIBILITY OF THE PERSON MAKING THE STRIKE BUT, ALSO, THE CREDIBILITY OF THE REASON, ITSELF.

BUT YOUR PROBLEM HERE --.

SORRY.

IS THAT, NOT THAT THE ISSUE OF WHETHER IT IS THE CREDIBILITY OF THE PERSON MAKING THE STRIKE OR THE CREDIBILITY OF WHAT THE REASON IS. IS YOUR POINT IN THIS CASE, IS THAT THERE IS NO VERIFICATION, THERE IS NO RECORD TO SUPPORT, AND IN FACT THE JUDGE SAYS I DIDN'T OBSERVE THAT IS, IN ORDER TO, IT BECOMES VIRTUALLY UNREVIEWABLE.

IT IS CONTRADICTED BY THE RECORD, AS DEFENSE COUNSEL POINT YOU HAD OUT. THE REASON HERE WAS THAT THE PARTICULAR PERSON APPEARED DISINTERESTED.

BUT IF THE JUDGE SAID THAT I WAS WATCHING HER, AND ALTHOUGH I COULD SEE HOW YOU COULD FIND THIS OR THAT, I COULD UNDERSTAND THAT YOU COULD SEE HER BEING DISINTERESTED, SOMETHING THAT CONFIRMED THE JUDGE HAD AT LEAST UNDERSTOOD THE BASIS FOR WHAT THE PROSECUTOR WAS SAYING?

THAT'S RIGHT. IF THE JUDGE HAD A BASIS IN THE RECORD TO DO THIS, EVEN IF THE JUDGE DIDN'T AGREE THAT THAT WAS A GOOD REASON TO BE STRIKING, TO SAY, WELL, YOU KNOW, I SAW THAT JUROR'S BEHAVIOR, AND WHILE I WOULDN'T BE STRIKING BASED UPON THAT, I AM NOT EVEN SURE IT MEANS THERE IS GOING TO BE AN INATTENTIVE JUROR IN THIS CASE. I CERTAINLY SAW WHAT THE PROSECUTOR WAS TALKING ABOUT. I WILL PERMIT THE STRIKE. THAT DOESN'T SECOND-GUESS THE PROSECUTOR.

DOESN'T THAT MAKE THE CASE UPON WHETHER OR NOT THE JUDGE HAPPENED TO BE LOOKING AT THAT PARTICULAR JUROR AT THE SAME TIME AND IN THE SAME MANNER THAT THE PROSECUTOR WAS LOOKING AT THE JUROR? MAYBE THE JUDGE JUST WASN'T PAYING AT TONES THAT PARTICULAR JUROR, AT THE TIME THAT THE JUROR MADE SOME KIND OF GESTURE ON WHICH THE PROSECUTOR LATER BASED THE STRIKE.

WELL, YOU KNOW, AGAIN, IN THIS CASE, IT IS A REASON THAT APPLIES TO THE ENTIRE KOUFERS THE VOIR DIRE. -- ENTIRE COURSE OF THE VIE DOIR. SHE WAS IN ATENT -- VOIR DIRE. SHE WAS INATTENTIVE FOR THE ENTIRE VOIR DIRE. AS A SPECIFIC EXAMPLE IN ONE OF THE CASES, A RUDE GESTURE IS MADE TO THE PROSECUTOR. THERE IT IS UP TO THE PARTY THAT SEES IT TO SUBMIT IT TO THE RECORD. I WOULD SUGGEST THAT, IN VOIR DIRE'S WHERE THERE IS A GESTURE THAT IS OF SOME CONCERN TO THE PARTY, WHICH HAS VIRTUALLY UNLIMITED VOIR DIRE IN FLORIDA, THEY WOULD WANT TO FOLLOW UP ON IT AND SEE WHAT IS GOING ON WITH THAT GESTURE.

HOW WOULD YOU EVALUATE, IN THIS INSTANCE WHERE THE PROSECUTOR SAID THIS PERSON WAS INATTENTIVE, THE DEFENSE ATTORNEY DOING WHAT A DEFENSE ATTORNEY SHOULD DO, AND THAT IS TAKING ISSUE WITH THAT, AND SAYING, WELL, THIS LADY ACTUALLY WAS PAYING ATTENTION. SHE IS THE ONLY ONE WHO ANSWERED WHEN WE ASKED ABOUT WHO REALLY WANTED TO BE HERE AND WAS HAPPY TO BE A JUROR AND THOSE KINDS OF THINGS. HOW ARE WE TO EVALUATE WHAT THE TRIAL JUDGE DID? I MEAN, THE TRIAL JUDGE HEARD BOTH OF THESE STATEMENTS, AND THEN WHAT SHOULD A TRIAL JUDGE, WHAT SHOULD THE TRIAL JUDGE HAVE DONE AT THAT POINT?

AT THAT POINT, THE, BECAUSE THE RECORD WAS AFFIRMATIVELY CONTRARY TO WHAT THE PROSECUTOR SAID, THE TRIAL COURT SHOULD HAVE DISALLOWED --

WE CAN'T SEE WHAT THE PROSECUTOR SAID FROM THE COLD RECORD. CAN WE SEE, FROM THE COLD RECORD, WHAT THE DEFENSE ATTORNEY SAID?

WE CAN SEE FROM THE COLD RECORD, WHAT THE PROSPECTIVE JUROR SAID.

OKAY. WHICH WAS?

AND IN THIS CASE, AS THE DEFENSE ATTORNEY OPPONENTED OUT, SHE MAN FESTTED HER -- SHE MANIFESTED HER INTEREST IN THE VOIR DIRE, AS OPPOSED TO THE PROSECUTOR'S ASSERTION.

ISN'T WHAT THIS LEADS US TO IS BACK IN THE PREMELBOURNE SITUATION OF DISTRICT COURTS TRYING TO MAKE DECISIONS FOR WHAT THE TRIAL COURT WAS LOOKING AT AS REASONABLE, AND THE TRIAL COURT, FOR THIS REASON, YOU SAY THAT, EVEN, THAT THE TRIAL JUDGE, IF HE HAD OBSERVED THIS PERSON AND DISAGREED WITH THE PROSECUTOR, THAT THE TRIAL JUDGE

COULD STILL HAVE SEND THE CREDIBILITY -- COULD STILL HAVE ACCEPTED THE CREDIBILITY OF THE PROSECUTOR. WOULD YOU AGREE WITH THAT?

YES.

OKAY. AND SO WHAT WE END UP WITH, THEN, IS A SITUATION IN WHICH THERE WOULD BE, EVEN THOUGH THAT THE JUDGE DIDN'T HAVE TO AGREE, WITH WHAT HE, WITH THE PROSECUTOR'S ASSESSMENT, BECAUSE OF HIS PERSONAL OBSERVATION, THAT THE TRIAL JUDGE COULD STILL MAKE IT, BUT YET THERE IS GOING TO BE SOME KIND OF REVERSAL OF THIS TRIAL, BECAUSE OF THE FACT THAT THE JUDGE DIDN'T MAKE A STATEMENT ON THE RECORD THAT I SAW THE SAME THING YOU DID. THAT DOESN'T MAKE, THAT DOESN'T COMPUTE.

WELL, THERE IS A DIFFERENCE. THERE IS A LOT OF THINGS I WOULD LIKE TO ANSWER IN THAT QUESTION. THERE IS A DIFFERENCE BETWEEN THE JUDGE HAVING SEEN AND FAILING TO MAKE THE STATEMENT, OH, BY THE WAY, I SAW IT, TOO, WHERE THE DISPUTE ISN'T PROPERLY DEVELOPED IN THE RECORD, BUT IT IS NOT A QUESTION OF TAKING US BACK TO PREMELBOURNE. IT IS A QUESTION OF TAKING US BACK TO EXACTLY WHERE WE HAVE BEEN, SINCE BEFORE WRIGHT. THIS HAS BEEN THE LAW SINCE EVEN BEFORE WRIGHT. SLAPPY MADE IT PRETTY CLEAR THAT THIS RECORD BASIS WAS REQUIRED, SO THIS WOULD NOT BE AN INNOVATION, TO CONTINUE TO ENFORCE THE LAW AS THE COURT HAS ENFORCED IT CONTINUOUSLY FOR THE PAST TWELVE YEARS. ED IN, THIS COURT WAS APPLYING WRIGHT IN ITS DECISIONS, IN THE YEAR 2002, WHERE IT WAS NOT SAYING HEY, YOU KNOW, THERE IS A CASE CALLED FLOYD, A 2002 CASE WHERE THE COURT SAID GEE, HE IS SAYING THAT, BECAUSE THE JUDGE DIDN'T NOTE FOR THE RECORD, THIS BEHAVIOR, THAT THE PROSECUTOR IS RELYING ON, WE SHOULD REVERSE. THE COURT DIDN'T SAY, WELL, THAT IS KRAETS YOU, ON-THAT IS CRAZY, BECAUSE -- THAT IS CRAZY, BECAUSE WRIGHT IS NO LONGER GOOD LAW, BUT IN FACT THE SUPPORT IS USED FOR THE PROSECUTOR. THE PROSECUTOR, THE JUROR WAS EQUIVOCAL, IN THAT CASE, ABOUT THE DEATH PENALTY, BUT THE ESSENCE OF JUDICIAL REVIEW, BOTH AT THE TRIAL COURT LEVEL AND AT THE APPELLATE LEVEL, HAAS HAS GOT TO BE LOOKING FOR WHETHER OR NOT THERE IS SOME SORT OF RECORD OF SUPPORT FOR THE REASONS BEING PUT FORWARD.

EXCUSE ME. WHOSE BURDEN WAS IT TO PUT IT ON THE RECORD, TO DEVELOP THE RECORD. ONCE THE PROSECUTOR GAVE THEIR REASONING, DOESN'T THE CASE LAW PUT THE BURDEN UPON THE OTHER SIDE TO THEN COME FORWARD AND DEVELOP THE RECORD?

WELL, YES.

WHAT WAS DONE, OTHER THAN SAYING I ASSUME, AT THE BEGINNING OF THE VOIR DIRE PROCESS, THIS ONE WITNESS WAS THE ONLY ONE WHO HAS RESPONDED.

NO. WHAT, WHERE THAT HAPPENED ACTUALLY WAS IN THE MIDST OF THE DEFENDANT'S VOIR DIRE.

OKAY. EXCUSE ME.

THE DEFENDANT DISPUTED, BOTH ON HIS OBSERVATION, BUT BY POINTING TO THE FACT THAT, IN THE RECORD, THIS JUROR WAS IN FACT ASSERTING HER INTEREST IN THE PROCEEDINGS. IT IS ALSO SUPPORTED IN THE RECORD BY THE FACT THAT THIS JUROR WAS VOLUNTEERING INFORMATION THAT WAS RELEVANT TO THE QUESTIONS BEING ASKED BY THE PROSECUTOR IN THIS CASE. IN FACT, THE REASON WAS A VERY TYPICAL REASON FOR STRIKING A JUROR. THIS WAS A JUROR THAT HAD A BAD EXPERIENCE WITH A POLICE OFFICER, BUT THE PROSECUTOR DIDN'T STRIKE HER FOR THAT REASON.

BUT DID DEFENSE COUNSEL POINT THAT OUT TO THE JUDGE?

DIDN'T POINT OUT --

WHEN THEY WERE MAKING THE ARGUMENT WITH REGARD TO THE STRIKE.

ONE OF THE THINGS HE POINTED OUT WAS SHE WAS VOLUNTEERING ABOUT BEING EXCITED ABOUT BEING A JUROR.

OTHER THAN THAT.

THIS BEHAVIOR WAS CONTRARY TO THE RECORD AND THE STATE IS GOING TO HAVE TO DO MORE THAN THAT, THAN JUST TO SAY, WELL, TO ME SHE SEEMS UNINTERESTED. THE JUDGE SEEMED TO BE A LITTLE BIT TROUBLED BY, THIS, TOO BECAUSE THE JUDGE SAID, WELL, DO YOU HAVE ANYTHING MORE, STATE? THE STATE DIDN'T HAVE ANYTHING MORE. AND FINE AERBLINGS THE JUDGE, I THINK, ULTIMATELY -- AND FINALLY, THE JUDGE, I THINK, ULTIMATELY DIDN'T RELY ON THE CREDIBILITY OF THE PROSECUTOR AND THE STATE. HE SAID ARE YOU SAYING THIS AS AN OFFICER OF THE COURT? THE PROSECUTOR IS NOT GOING TO SAY NORMALLY I LIE TO YOU, JUDGE, BUT WHEN YOU PUT IT TO ME THAT WAY, I WILL TELL YOU THE TRUTH. OKAY, JUDGE, I WILL ADMIT IT. SORRY.

I AM TRYING TO FIGURE OUT HERE HOW FAR YOU WANT US TO GO WITH, THIS BECAUSE IF THE SAME ARGUMENT IS MADE BY THE PROSECUTOR, ABOUT A JUROR, OBSERVATIONS THAT ARE MADE, ABOUT THE JUROR'S INATTENTIVENESS OR ANYTHING ELSE, AND IF THE DEFENSE ATTORNEY HAD NOT SAID WHAT WAS SAID IN THIS CASE, DO YOU STILL NEED RECORD SUPPORT FOR THE JUROR BEING INATTENTIVE, OR SOME AGREEMENT BY SOMEONE?

IF THE DEFENSE ATTORNEY HAD NOT CHALLENGED THIS AT THE TRIAL COURT LEVEL AND PUT IT IN ISSUE BEFORE THE TRIAL COURT, THEN THERE WOULDN'T BE A REVERSAL. YOU KNOW, IF YOU LOOK AT BODIT, WHICH THE THIRD DISTRICT SUPPORTS ITS OPINION, THE FIRST DISTRICT'S OPINION, THERE THEY ARE SAYING, LOOK, MELBOURNE TELLS US WE ARE NOT LOOKING FOR ARCANE REVERSIBLE ERROR TRAPS AND WE SHOULDN'T TREAT WRIGHT AS THAT. IF THE READING OF WRIGHT IS THAT AN APPELLATE COUNSEL, WHEREVER HE CAN FIND A REASON THAT WASN'T OBSERVED BY THE TRIAL JUDGE, EVEN THOUGH IT WASN'T IN DISPUTE BELOW, CAN POP-UP AND SAY GUESS WHAT? PRETRIAL WE NEED TO REJECT THAT, AND I THINK BODIT REJECTED THAT CORRECTLY. I THINK THIS COURT REJECTED IT CORRECTLY IN THE FLOYD CASE THAT I MENTIONED, BECAUSE THAT IS NOT A REASONABLE REING OF WRIGHT, BUT WHAT IT -- READING OF WRIGHT, BUT WHAT IT DOES MEAN IS THAT WHOEVER IS MAKING A STRIKE, WHETHER IT BE A PROSECUTOR OR A DEFENSE ATTORNEY, HAS THE RESPONSIBILITY FOR DEVELOPING THE RECORD FOR THOSE REASONS, AND THE SAME REASONS THAT MADE THE COURT ADOPT THIS RULE ARE STILL IN EFFECT. IT HAS ONLY BEEN TWELVE YEARS, AND WE NEED TO ASK OURSELVES, WHAT IS IT THAT HAS CHANGED THAT WOULD MAKE US REJECT THIS RULE? AND THIS COURT HAS SPOKEN ON SISTER I DESIZEIES RECENT -- ON STERI DECISIS IN RECENT YEARS, AND YOU LOOK FROM WHETHER THE COURT IS GOING TO RECEDE FROM ITS OPINIONS AND WHETHER THERE IS LEGAL ANALYSIS. THERE HAS REALLY BEEN NO ERROR IN LEGAL ANALYSIS HERE.

LET ME ASK YOU THIS, ABOUT PRACTICALLY SPEAKING WHAT HAPPENED IN THIS CASE, IS THEY GO ON THROUGH THE JURY SELECTION HERE, AND AS I UNDERSTAND IT, THERE ARE TWO OTHER AFRICAN-AMERICAN WOMEN THAT ARE CHALLENGED, AND THOSE CHALLENGES ARE NOT RAISED HERE.

THEY ARE NOT AT ISSUE HERE. THEY WEREN'T CHALLENGED IN THE TRIAL COURT.

THEN THE DEFENSE COUNSEL STATES, WHEN THE JURY IS BEING SWORN, THAT THERE, HE JUST READOPTS ALL OF THE OBJECTIONS HE HAS PREVIOUSLY MADE, CORRECT?

HE TWICE RENEWED HIS OBJECTIONS.

RIGHT. BUT WAS THERE EVER, AT THAT POINT, AN OBJECTION TO THE ACTUAL COMPOSITION OF THE JURY?

WELL, I THINK THAT TOOK THE FORM OF THE RENEWAL OF HIS OBJECTIONS. THIS COURT HAS NEVER REQUIRED --

BUT I AM ASKING --

DIFFERENT WORDS FOR --

AT THIS POINT, FACTUALLY WHAT HAPPENED HERE, WAS IT RAISED WITH THE TRIAL COURT THAT THERE WAS AN OBJECTION BASED UPON THE RACIAL COMPOSITION OF THIS JURY, THAT WAS BEING SWORN?

I BELIEVE THAT THAT WAS, THAT IS THE PURPOSE OF THE OBJECTION THAT YOU ARE MAKING. THIS COURT HAS SAID THAT, IF YOU DON'T MAKE THAT OBJECTION, WHAT YOU ARE TELLING THE COURT IS THERE IS NO NEED TO RECONSIDER ALL OF THE STRIKES THAT I HAVE BEEN OBJECTING TO, BUT ULTIMATELY I AM HAPPY WITH THE RACIAL COMPOSITION.

BUT THE OPTION THAT -- BUT THE OBJECTION THAT WAS MADE AS TO THIS JUROR WAS, WAS A CONTEST OVER WHETHER THIS PARTICULAR JUROR'S DEMEANOR WAS SUCH THAT WHAT THE TRIAL JUDGE WAS TOLD BY THE PROSECUTOR WAS PROTECTURAL, CORRECT?

YES.

AND ISN'T THAT DIFFERENT THAN WHEN YOU GET TO THE END AND YOU SEE THE JURY THAT IS BEING EMPANELED, AND WHETHER YOU ARE STANDING ON THAT PRIOR OBJECTION OR YOU ARE MAKING AN OBJECTION TO THE JURY AS COMPOSED?

I DON'T, YOU SEE, I AM NOT SATISFYING THE COURT BUT I DON'T THINK THERE IS A MEANINGFUL DISTINCTION BETWEEN THOSE TWO THINGS.

I THOUGHT THE WHOLE BASIS OF THE NEAL CASES AND ITS PROGENY IS REALLY NOT THE DIFFERENCE OF WHETHER THE JURY IS A GOOD CROSS-SECTION OF THE COMMUNITY, BUT IT PERTAINS TO THAT, IN THIS CASE, MS. GEORGE'S RIGHT NOT TO BE DISCRIMINATED AGAINST AND TO BE ABLE TO SIT ON A JURY.

AS WELL AS THE DEFENDANT'S RIGHT NOT TO BE DISCRIMINATED AGAINST. AND IT IS REPEATEDLY SAID THAT THE STRIKING OF A SINGLE JUROR IS --

ONCE SHE IS GONE, THEN THE DEFENSE ATTORNEY, I MEAN, ONCE THE JUDGE EXCUSES HER, SHE IS OFF THE --

AT THE TIME HE RENEWED HIS OBJECTIONS, THE COURT COULD HAVE RECONSIDERED, IN LIGHT OF THE COURSE OF THE VOIR DIRE, BUT IT DIDN'T. IT CHOSE NOT TO. I JUST WANT TO SUGGEST, I REALIZE I AM INTO MY REBUTTAL TIME, THAT, GOING BACK TO JUSTICE WELLS'S EARLIER QUESTION, WHAT IT TAKES US BACK TO, NOT ONLY IS THIS NOT A QUESTION OF TAKING US BACK TO SOMEWHERE WHERE WE AREN'T ALREADY, BECAUSE WRIGHT IS THE LAW OF THE LAND. THE COURT HAS NOT RECEDED FROM THAT AND IT HAS NOT RECEDED FROM THAT PORTION OF SLAPPY WHICH CONTROLS THIS QUESTION. WHAT WE WOULD BE TAKEN BACK TO, IN EFFECT, IS THE PREBATSEN, NEAL, SLAPPY WORLD, BECAUSE IF IT IS GOING TO BE ENOUGH FOR A JUDGE TO STAND THERE AND SAY, WELL, PROSECUTOR, I DON'T KNOW ANYTHING ABOUT YOUR REASONS. I DIDN'T SEE T THEY ARE POINTING OUT THAT IT IS NOT TRUE -- I DIDN'T SEE IT. THEY ARE POINTING OUT THAT IT IS NOT TRUE, BUT WILL YOU PROMISE THE COURT THAT THAT IS YOUR REASON AND

THAT IS THE TRUTH, AND IF I THINK YOU DO A GOOD JOB OF PROMISING THAT, I WILL ALLOW IT. THEN WHERE, HOW ARE WE EVER GOING TO MEET STANDARD? WE ARE GOING TO HAVE TO PROVE A PATTERN OVER A SERIES OF CASES, PERHAPS, OF DISCRIMINATION, BUT THAT IS EXACTLY WHAT BAT IS HE NOT SAYS WE DON'T HAVE TO -- WHAT BATSEN SAYS WE DON'T HAVE TO DO AND WHAT SLAPPY SAYS WE DON'T HAVE TO DO, AND THAT IS EXACTLY WHAT THESE COURTS HAVE SAID WE DON'T HAVE TO DO. CHIEF CHIEF GOOD MORNING.

GOOD MORNING, YOUR HONORS. PAULETTE TAYLOR ON BEHALF OF THE STATE.

WOULD YOU ADDRESS THAT LAST POINT YOUR OPPONENT MADE BEFORE SITTING DOWN, AND THAT IS I THINK HE IS POSITING THE SITUATION THAT, WHERE IF WE ACCEPT THAT A PROSECUTOR OR A DEFENSE LAWYER OR WHOEVER CAN REPRESENT TO THE COURT THEIR OPINION, THAT THEY DID NOT BELIEVE A PARTICULAR JUROR WAS PAYING ATTENTION, TO THEIR SATISFACTION, THAT THAT CAN BE FOUND AS A BASIS FOR A LEGITIMATE EXCUSE HERE, AND THAT IF THAT IS THE CASE, WOULDN'T WE BE IN THE SITUATION, I BELIEVE HE IS POSITING, THAT WE HAVE REALLY OPENED IT UP SO BROADLY, TO HAVING ANY REASON FOR EXCUSING A JUROR, THAT WE HAVE REALLY DUNAWAY, THEN, WITH THE RULE -- DONE AWAY, THEN, WITH THE RULE AND THE UNDERLYING PURPOSE IT WAS ESTABLISHED, IF SOMEBODY IS SAYING I REALLY REALIZED. NOBODY ELSE NOTICED, BUT I NOTICED THIS JUROR LOOKING AWAY OR HAVING A SMIRK ON HER FACE OR SOMETHING, THAT WE REALLY, NOW, HAVE GOTTEN INTO THE REALM OF, WELL, YOU JUST AS WELL JUST SAY IF THERE IS AN OBJECTION, THEN THAT IS IT.

I DON'T THINK THAT WE HAVE EVER GOTTEN AWAY FROM THE FACT THAT A JUROR CAN BE EXCUSED FOR ANY REASON OR NO REASON AT ALL. WE HAVE NEVER GOTTEN AWAY FROM THAT. WHAT THE COURTS HAVE IMPOSED IS THAT YOU CANNOT, A PEREMPTORY CHALLENGE CANNOT BE EXERCISED FOR A SKIMTARY MANNER OR A DISCRIMINATORY REASON. IN MELBOURNE, IN FOOTNOTE 11, I BELIEVE, THIS COURT CITED TO JUSTICE O'CONNOR'S CONCURRING OPINION IN HERNANDEZ, WHERE IN JUSTICE O'CONNOR SAYS THAT THE PEREMPTORY CHALLENGE, AND I QUOTE, ABSENT INTENTIONAL DISCRIMINATION, PARTIES SHOULD BE FREE TO EXERCISE THEIR PEREMPTORY STRIKES FOR ANY REASON OR NO REASON AT ALL. THE PEREMPTORY CHALLENGE IS, AS BLACKSTONE SAYS, A ARBITRARY AND CAP RISH US RIGHT, AND IT MUST BE EXERCISED IN FULL FREEDOM FOR ITS PURPOSE.

WE HAVE ELIMINATED THAT, IN THE PROCESS OF TRYING TO SET UP SOMETHING, THEN, THAT BALANCES THIS CONCERN THAT WAS EVIDENCED, I BELIEVE, BY PROSECUTORS, FOR INSTANCE, OPENLY ADMITTING THAT THAT WAS THE POLICY IN THEIR OFFICES OF, IF YOU HAD A MINORITY DEFENDANT ON TRIAL, YOU DIDN'T, IF YOU COULD CONTROL IT, YOU DIDN'T WANT ANY MINORITIES ON A JURY, SO WE WERE LOOKING AT VERY SERIOUS CONCERNS, WHEN WE DID THAT, BUT DIDN'T WE REQUIRE AT LEAST TWO THINGS. ONE WAS THE LEGITIMACY OF THE OBJECTION, THAT IS THAT, YES, THIS IS, IF PEOPLE AREN'T GOING TO PAY ATTENTION OR WHATEVER, THE MATTER MIGHT BE, THEN THAT THE LEGITIMACY OF THAT HAS TO BE ESTABLISHED AS A VALID REASON FOR EXCUSING, BUT, ALSO, THAT THERE BE A, SOME KIND OF RECORD OF SUPPORT FOR THAT BASIS BEING ASSERTED, AND HERE DON'T WE HAVE A PROBLEM WITH THE RECORD SUPPORT FOR THE BASIS IT IS BEING ASSERTED? THAT IS SOME ALLEGED MISCONDUCT, REALLY, BY THE JUROR, THAT IS NOT SUPPORTED BY THE RECORD?

YOU ARE ASKING ME TWO QUESTIONS.

DON'T WE HAVE THOSE TWO REQUIREMENTSA?

WE HAD, IN WRIGHT, AND THE QUESTION IS WHETHER OR NOT WRIGHT SURVIVES MELBOURNE, AND OUR CONTENTION IS THAT WRIGHT DOES NOT SURVIVE MELBOURNE N WRIGHT, AND IN FEDERAL COURT AND IN MANY OTHER STATE'S COURT, IN ORDER TO SATISFY THE FIRST STEP OF THE INQUIRY, THE OPPONENT OF THE STRIKE MUST ESTABLISH A PRIMA FACIE CASE THAT THE

CHALLENGE IS BEING MADE FOR DISCRIMINATORY REASON. THERE IS INITIAL BURDEN THAT THEY MUST MEET, TO OVERCOME THE PRESUMPTION THAT THE STRIKE IS BEING EXERCISED IN A NONDISCRIMINATORY MANNER. IN MELBOURNE, THIS COURT SAID WE ARE GOING TO BEGIN WITH THAT PRESUMPTION, AND MELBOURNE ELIMINATED, ACTUALLY I THINK IT WAS YOHANS ELIMINATED THE PRIMA FACIE SHOWING OF INTENT, BEFORE THE COURT REQUIRES THE PROPONENT OF THE STRIKE TO COME FORWARD WITH A NEUTRAL REASON. ASIDE FROM THE ELIMINATION OF THE PRIMA FACIE SHOWING OF DISCRIMINATORY INTENT, MELBOURNE, ALSO, REQUIRES THAT THE TRIAL COURT ENGAGE AN ANALYSIS TO DETERMINE WHETHER OR NOT THE REASON, THE RACE NEUTRAL REASON AS PROFFERED IS A GENUINE REASON.

SO THE REASON HAS TO BE GENUINE.

NOT THE REASON.

I THOUGHT YOU SAID THAT THE JUDGE HAS TO DETERMINE THE REASON AS GENUINE.

RIGHT. BUT IN MAKING THAT DETERMINATION, THAT TURNS ON THE CREDIBILITY OF THE PROPONENT OF THE STRIKE.

IS THAT, IN OTHER WORDS, AND THAT IS WHERE MY CONCERN IS, ABOUT WHAT WE WOULD BE PUTTING TRIAL JUDGES IN THE POSITION OF, THE TRIAL JUDGE, FOR WHATEVER REASON, HASN'T OEPD OBSERVED, WE ARE NOT WORRYING -- HASN'T OBSERVED, WE ARE NOT WORRIED ABOUT ANSWERS BECAUSE ANSWERS ARE ON THE RECORD AND CAN BE READ BACK. WE ARE TALKING ABOUT THE BARE GESTURES, SOMEBODY TWIDDLING THEIR THUMBS, EYE CONTACT, LOOKING AROUND, THE THINGS THAT, AS AN APPELLATE COURT YOU DON'T SEE, AND WE ARE SAYING THERE IS NO RECORD SUPPORT, OTHER THAN THE STATE SAYS, TO ME SHE APPEARED DISINTERESTED, AND THEN THE DEFENSE SAYS NO.

CORRECT.

WHAT WE HAVE GOT IS, IF THE JUDGE HASN'T BEEN ABLE TO OBSERVE IT, THEN THE SUPERIOR VANTAGE POINT OF THE JUDGE, FOR PURPOSES OF APPELLATE REVIEW, SORT OF GO DOWN THE TUBES, BUT MORE IMPORTANTLY TO ME, IS THAT WE ARE PUTTING JUDGES IN A POSITION OF HAVING TO SAY IS THE PROSECUTOR BEING TRUTHFUL OR NOT TRUTHFUL ABOUT WHAT IS IN THEIR MIND? I MEAN MAYBE THEY DO WANT TO GET THIS AFRICAN-AMERICAN OFF, AND YOU KNOW, THAT IS ANOTHER MOTIVE, BECAUSE WE HAVE GOT A DEFENDANT WHO IS AFRICAN-AMERICAN. THEY WOULD RATHER NOT HAVE THAT IDENTIFICATION. HOW DO WE SAY THAT A JUDGE IS SUPPOSED TO LOOK AT THE PROSECUTOR AND SAY YOU ARE AN OFFICER OF THE COURT, BUT WHAT I HAVE TO DO IS DECIDE THAT WHAT YOU SAID ISN'T REALLY YOUR REAL MOTIVE. ISN'T THAT MORE DANGEROUS THAN JUST SIMPLE REQUIREMENT THAT HAS BEEN AROUND SINCE THESE CASES STARTED, THAT CONTINUED IN WRIGHT, THAT WAS NOT RECEDED FROM IN MELBOURNE, AND YOU KNOW, THAT CONTINUES ONTO THIS DAY THAT THERE BE SOME VERIFICATION IN THE RECORD ABOUT, THAT WHAT SOMEONE HAS OBSERVED ACTUALLY OCCURRED?

THERE ARE A COUPLE OF REASONS WHY THE STATE WOULD DISAGREE WITH THAT PROPOSITION. THE FIRST BEING, AS I ARGUED BEFORE, UNDER WRIGHT, THERE WAS A REQUIREMENT THAT THE OPPONENT OF THE STRIKE OFFER SOME REASON TO BELIEVE THAT THE STRIKE WAS BEING ENTERED IN -- WAS BEING EXERCISED IN A DISCRIMINATORY MANNER. THAT WAS THE INITIAL BURDEN THAT WAS REQUIRED. SO ONCE THAT IS MADE, THEN WE ARE NOW GOING ON THE ASSUMPTION THAT IT IS BEING EXERCISED THIS A DISCRIMINATORY MANNER. THE PROPONENT OF THE STRIKE, UNDER WRIGHT, WAS THEN REQUIRED TO COME FORWARD WITH CLEAR AND REASONABLY-SPECIFIC RACIALLY-NEUTRAL EXPLANATION OF LEGITIMATE REASONS THAT THE COURT FOUND UNDER WRIGHT, WOULD BE THE SHOWING THAT THE PROPONENT WOULD NEED TO MAKE, TO OVERCOME THE PRIMA FACIE SHOWING OF DISCRIMINATORY INTENT. UNDER

MELBOURNE, THERE IS NO ANALYSIS OF WHETHER OR NOT OPPONENT OF THE STRIKE HAD MADE PRIMA FACIE SHOWING THAT. DOESN'T COME INTO EFFECT UNTIL UNDER THE THIRD PRONG OF MELBOURNE. IT IS UNDER THE THIRD PRONG THAT THE COURT MUST LOOK, NOW, TO SEE WHETHER OR NOT FIRST, IS THERE ANY EVIDENCE ON THIS RECORD THAT THIS STRIKE IS BEING EXERCISED IN A DISCRIMINATORY MANNER, AND THAT IS EXACTLY WHAT THE COURT DID IN THIS CASE. THE COURT SAID, WELL, LET ME LOOK AT WHAT HAS HAPPENED IN THIS JURY SELECTION PROCESS THUS FAR. I SEE THAT THE FIRST TRIKE THAT THE STATE EXERCISED WAS -- THE FIRST STRIKE THAT THE STATE EXERCISED WAS AGAINST AN HISPANIC FEMALE, FOR WHICH DEFENSE COUNSEL INTERPOSED AN OBJECTION. THE STATE OFFERED A NEUTRAL REASON, IN THAT THE BROTHER WAS INVOLVED IN A CASE THAT THE DEFENSE COUNSEL HAD ON APPEAL. THE NEXT STRIKE WAS AS TO THIS AFRICAN-AMERICAN FEMALE, AT WHICH POINT DEFENSE COUNSEL OBJECTED TO THE STRIKE. DEFENSE COUNSEL OFFERED NOTHING TO SUPPORT THE CLAIM OR ANY INFERENCE THAT THE STRIKE IS BEING EXERCISED IN A DISCRIMINATORY MANNER, OTHER THAN THE FACT THAT THIS IS AN AFRICAN-AMERICAN FEMALE. AT THAT POINT, THE JUDGE SAYS I DON'T SEE ANY EVIDENCE HERE, THAT THE STRIKE, THAT THE STATE IS EXERCISE A STRIKE IN ANY DISCRIMINATORY MANNER.

SO YOU ARE SEEING A PATTERN HERE? THE FIRST STRIKE, BEING THE CREDIBILITY OF THE FIRST STRIKE, AND THE JUDGE DIDN'T KNOW THERE WAS AN AFRICAN-AMERICAN WOMAN COMING ALONG AND THERE COULDN'T AND PATTERN AT THIS TIME, OF SAYING I DIDN'T OBSERVE T I DON'T BELIEVE YOU. WHY WOULD WE WANT TO PUT JUDGES IN THE POSITION, AGAIN, OF EITHER THEY SEE IT ON THE RECORD. I SAW THAT SMIRK. I DON'T KNOW. I AM NOT AS SENSITIVE AS YOU ARE, BUT YOU ARE THE PROSECUTOR. I SAW THE SMIRK. I DIDN'T INTERPRET IT THAT WAY. THAT IS ONE SCENARIO. I WATCHED THAT WHOLE VOIR DIRE. I DIDN'T SEE ANYTHING. DEFENSE ATTORNEY SAYS IT IS, YOU KNOW, IT WAS AFFIRMATIVELY THE OTHER WAY, AND THE JUDGE HAS NOTHING AT ALL BUT TO HAVE TO EITHER SAY ARE YOU GOING TO SAY THIS IS A SAY THIS, AS AN OFFICER OF THE COURT, SO WHY WOULD THE JUDGE WANT TO BE IN A POSITION TO SAY WHETHER OR NOT THIS IS TRUTHFUL? THAT BEING THE RECORD SUPPORT, THERE IS NOT A SAFETY NET FOR THE JUDGE, IF THE JUDGE DECIDES TO SAY I DON'T AGREE WITH YOU, WHAT WE ARE SAYING IS THE JUDGE WOULD HAVE TO MAKE A FINDING THAT THE PROSECUTOR IS NOT BEING TRUTHFUL, AS AN OFFICER OF THE COURT, AND THAT SEEMS, TO ME, FAR, THAT IS VERY DANGEROUS, TO PUT THE JUDGES IN A POSITION OF HAVING TO MAKE THAT TYPE OF A CREDIBILITY DETERMINATION, IF THEY HAVE NOT OBSERVED ANYTHING OF IT, AND THEN FOR THE APPELLATE COURT, IT BECOMES VIRTUALLY UNREVIEWABLE, BECAUSE THERE IS NO RECORD TO EVEN SUPPORT IT.

WELL, I THINK THAT IS WHAT MELBOURNE ASKED THE TRIAL COURTS TO DO, TO MAKE THAT CREDIBILITY DETERMINE NATION OF BOTH --

OF THE PROSECUTOR.

-- OF BOTH THE PROSECUTOR AND OF THE REASON. IF THE COURT FINDS THAT THE PROSECUTOR IS CREDIBLE, THEN OF COURSE THE DETERMINATION OF WHETHER THE REASON IS CREDIBLE OR NOT, BECOMES EASIER BUT THE PROBLEM WITH THESE KINDS OF CASES AND WHAT THE DEFENSE IS PROPOSING, IS THAT IF WE HAD JURY SELECTION, WHERE WE HAD TO HAVE EVERY GESTURE, EVERY MOVEMENT OF EVERY PROSPECTIVE JUROR DOCUMENTED IN THE RECORD, WE WOULD NEVER GET THROUGH JURY SELECTION.

ISN'T THAT WHY, THOUGH, THE SECOND CATEGORY OF WHY YOU CAN STRIKE THE BARE GESTURES ARE A LITTLE MORE SUSCEPTIBLE TO BEING QUESTIONED THAN THE OTHER REASONS, WHICH ARE, I MEAN, THERE ARE PLENTY OF REASONS THAT JURORS GIVE THAT SEEM NOT VERY REASONABLE BECAUSE THEY ARE GENUINE BECAUSE THEY ARE THERE IN THE RECORD. WE ARE REALLY JUST TALKING ABOUT THIS OTHER CATEGORY, AND ALONG THAT LINE, IS THE TRIAL JUDGE SUPPOSED TO SAY, SAY IT IS A DEFENSE LAWYER MAKING THE STRIKE. YOU KNOW, MR.

SO-AND-SO, YOU KNOW, YOU HAVE DONE THIS BEFORE, IN FIVE OTHER CASES. YOU ARE ALWAYS SAYING IT IS DISINTEREST, AND I NEVER SEE IT, SO NOW, FINALLY, I AM GOING TO SAY IN THIS CASE I DON'T FIND YOU CREDIBLE, BECAUSE OF WHAT YOU DID IN FIVE OTHER CASES. WOULD WE WANT THE JUDGE TO BE USING HIS OR HER PRIOR EXPERIENCE WITH THAT PROSECUTOR OR DEFENSE LAWYER, TO MAKE A DECISION?

WELL, I THINK A JUDGE MAKING A CREDIBILITY DETERMINATION, COMES TO THAT DECISION WITH ALL OF HIS PRIOR EXPERIENCES, AND THAT IS ONE OF THE REASONS WHERE, IF A JUDGE MAKES A CREDIBILITY DETERMINATION, THE REVIEWING COURT HAS TO ACCEPT THAT. THE COURT KNOWS ALL OF THE EVENTS THAT OCCURRED IN, DURING THE SELECTION PROCESS THAT WERE NOT IN THE RECORD. THERE HIS BODY LANGUAGE. THERE IS TONE OF VOICE. THERE IS A JUDGE'S PRIOR EXPERIENCE WITH THAT PROSECUTOR, WITH THAT DEFENSE COUNSEL. THERE IS WHAT ACTUALLY OCCURRED IN THE RECORD. THESE ARE THE THINGS THAT THE TRIAL JUDGE CAN LOOK AT, TO DETERMINE WHETHER OR NOT THE PERSON WAS OFFERING THE REASON AS LEGITIMATE, AS CREDIBLE.

DOES THE JUDGE HAVE TO LOOK AT THE OTHER CIRCUMSTANCES IN THAT PARTICULAR CASE OF WHAT THE PROSECUTOR DID IN STRIKING OTHER JURORS? FOR EXAMPLE, IF THE PROSECUTOR HAD, EITHER BEFORE OR AFTER, STRICKEN OTHER MINORITIES FROM THE JURY, WOULD THE JUDGE TAKE THAT INTO ACCOUNT IN ASSESSING CREDIBILITY?

I THINK THE JUDGE WOULD HAVE TO TAKE EVERYTHING THAT OCCURRED, INCLUDING THE FACTORS THAT YOU HAVE SUGGESTED, AND I THINK THE COURT, ALSO, WOULD HAVE TO TAKE INTO ACCOUNT THAT THE FACT THAT, AND LET ME POINT OUT THAT, IN THIS CASE, DEFENSE COUNSEL DID NOT MAKE A RECORD TO INDICATE WHAT THE COMPOSITION OF THE JURY WAS. WHAT WE DO KNOW IS THAT, AT THE TIME THAT THE STATE ATTEMPTED TO STRIKE MS. GEORGE, THE FIRST AFRICAN-AMERICAN, THAT THERE WAS ANOTHER AFRICAN-AMERICAN ON THE PANEL AT THAT POINT, WHERE THE STATE DID NOT ATTEMPT TO STRIKE. WE KNOW THAT THE PANEL THAT WAS ACTUALLY SEATED CONSISTED OF FOUR FEMALES, AND WE DON'T KNOW THE RACIAL, WHAT RACE THOSE FEMALES WERE. THE TRIAL JUDGE KNOWS. I THINK, IF DEFENSE COUNSEL WANTED TO MAKE A RECORD, A PROPER ERROR, WHAT HE SHOULD HAVE DONE WAS, PRIOR TO THE JURY BEING SWORN, OBJECT AND SAY, JUDGE, I NOTE FOR THE RECORD THAT THIS JURY CONSISTS OF NO AFRICAN-AMERICANS, AND THE STATE STRUCK ALL THREE.

IS THAT IMPORTANT? AS I HAVE UNDERSTOOD THIS WHOLE LINE OF CASES STARTING WITH KNEEL, IT DOESN'T REALLY MATT -- WITH NIL, IT DOESN'T -- WITH NEIL, IT DOESN'T MATTER WHAT THE COMPOSITION OF THE JURY IS AT THAT PARTICULAR POINT. IT IS ONLY WHETHER THIS PARTICULAR PERSON IS BEING DISCRIMINATED AGAINST.

THAT IS WELL ENOUGH, BUT WHEN WE ARE TALKING ABOUT THE DISCRIMINATORY INTENT, IF THE INTENT IS TO REMOVE THAT PERSON BECAUSE OF THE RACE --

I WANT TO GO BACK, REALLY, TO THE WHOLE THING ABOUT THE CREDIBILITY OF THE PROSECUTOR, AND I WOULD LIKE YOU TO KIND OF POINT OUT THE LANGUAGE IN MELBOURNE THAT SAYS THAT IS THE CASE, BECAUSE IT BOTHERS ME THAT, IN THIS SITUATION, WE HAVE A PROSECUTOR WHO SAYS ONE THING, A DEFENSE ATTORNEY WHO SAYS ANOTHER THING, AND SO IN THIS CASE, THE TRIAL JUDGE, THEN SAY I DON'T FIND THE DEFENSE ATTORNEY CREDIBLE? I MEAN, IS THE OPPOSITE ALSO BEING DONE IN THIS PARTICULAR CASE?

NO. THE ISSUE BEFORE THE TRIAL COURT WAS REALLY NEVER AN ISSUE ABOUT WHO IS TELLING THE TRUTH, WHETHER IT WAS DEFENSE COUNSEL OR WHETHER IT WAS THE STATE. THAT WASN'T THE ISSUE. THE ISSUE WAS WHETHER OR NOT THE PROSECUTOR, IN OFFERING THAT REASON, THE REASON BEING THAT THIS JUROR WAS DISINTERESTED, WHETHER THAT WAS A GENUINE REASON OR WHETHER OR NOT THE PROSECUTOR WAS USING THAT TO MASK DISCRIMINATION.

SO WHEN THE DEFENSE ATTORNEY SAYS, LOOK, HERE ON THE RECORD, THERE IS DEMONSTRATION THAT THIS IS NOT TRUE, AND THEN THE PROSECUTOR SAYS I AM OFFERING THIS AS AN OFFICER OF THE COURT, IN ANSWER TO THE COURT'S QUESTION, I AM NOT SURE THAT LEAVES US WITH ANYTHING OTHER THAN THE PROSECUTOR SAYING I BELIEVE, I AM OFFERING THIS TO YOU, BECAUSE I AM AN OFFICER OF THE COURT.

RIGHT. AND THE TRIAL COURT, IN LOOKING AT THAT ANSWER, MAKES A CREDIBILITY DETERMINATION AS TO WHETHER OR NOT THAT IS A TRUTHFUL ANSWER.

DID THE DEFENSE ATTORNEY HEARSAY, WELL, I LOOKED AT THIS, MS. GEORGE, AND I SAW HER PAYING CLOSE ATTENTION AT EVERY POINT IN THE PROCEEDINGS. I DID NOT SEE HER LOOKING AROUND OR CLOSING HER EYES OR SEEMING TO BE READING A BOOK OR ANYTHING LIKE. THAT I SAW HER PAYING CLOSE ATTENTION?

HE DID NOT SAY. THAT WHAT HE IS HE WAS, WHEN I WAS UP THERE TALKING, SHE WAS PAYING ATTENTION, AND SHE WAS SMILING IN A LIGHT-HEARTED MANNER. WHAT THE STATE SAID WAS, WHEN I LOOKED AT HER, SHE WAS STARING AT THE WALL. SHE WASN'T PAYING ATTENTION. DEFENSE COUNSEL NEVER SAID THE PROSECUTOR SAID, I WAS WATCHING HER THE ENTIRE TIME, THROUGHOUT THE ENTIRE VOIR DIRE, I NEVER TOOK MY EYES OFF HER AND THIS IS WHAT I SAW, BUT THE FACT THAT DEFENSE COUNSEL SAW HER AND INTERPRETED HER DEMEANOR AS BEING SMILING ALL THE TIME AND PAYING ATTENTION, THE PROSECUTOR COULD STILL LOOK AT THAT AND SEE SOMETHING DIFFERENT. THIS IS A SUBJECTIVE EVALUATION OF WHAT THEY BOTH SAW, AND THEY BOTH COULD HAVE LOOKED AT IT AND SEEN DIFFERENT THINGS, BUT THE QUESTION IS WHETHER OR NOT, WHEN YOU SAY THIS IS WHY YOU ARE DOING IT, IS THAT THE REAL REASON WHY YOU ARE DOING IT. IF THE REAL REASON WHY YOU ARE DOING IT IS TO DISCRIMINATE AGAINST THIS PERSON, THEN THAT IS INVALID REASON, AND THAT IS WHAT THE TRIAL COURT IS TRYING TO FIND OUT. IS THAT YOUR REAL REASON, OR ARE YOU TRYING TO ELIMINATE HER BECAUSE OF HER RACE?

LET ME ASK THE QUESTION WHAT FACTS OF THIS CASE ARE THERE THAT MAKE RACE AN IMPORTANT ELEMENT? I AM JUST TRYING TO UNDERSTAND THE CIRCUMSTANCES OF THE CASE.

THERE IS NOTHING IN THIS CASE THAT WOULD MAKE RACE AN ISSUE. THIS WAS A BATTERY ON A LAW ENFORCEMENT OFFICER, AND A RECESSING OFFICER WITH VIOLENCE. THE DEFENDANT -- AND A RESISTING OFFICER WITH VIOLENCE. THE DEFENDANT IS AFRICAN-AMERICAN. AND WE KNOW THAT, AND THIS IS JUST GOING BY THE NAME, THAT THE VICTIM OF THE BATTERY ON A LAW ENFORCEMENT OFFICER, THE POLICE OFFICER'S NAME IS FEHR ARE A OUT OF DADE COUNTY -- IS FARER. OUT OF DADE COUNTY WE COULD MAKE THE ASSUMPTION THAT THIS IS AN HISPANIC MAIL -- HISPANIC MALE, AND THAT IS ALL WE KNOW.

IS THERE ANYTHING DURING VOIR DIRE BY THE COUNSEL 2458D MAKE THIS A RACE -- THAT WOULD MAKE THIS A RACE OR OTHER ISSUE?

NO. THERE IS NOTHING, AND THIS IS WHY WE ARE SAYING THAT WRIGHT DOES NOT SURVIVE MELBOURNE, BECAUSE THERE IS NOTHING IN THIS RECORD. THE DEFENSE IS NOT REQUIRED OR THE OPPONENT OF THE STRIKE IS NOT REQUIRED TO, UP FRONT, COME FORWARD WITH ANY REASON TO BELIEVE THAT THE STRIKE IS BEING EXERCISED IN A DISCRIMINATORY MANNER. THAT BURDEN IS NOT ON THEM, SO WE CAN HAVE, AND THIS IS WHAT HAPPENS, THIS IS WHAT IS HAPPENING AFTER MELBOURNE. EVERY TIME, IT IS EVIDENT IN THIS CASE, EVERY TIME THE STATE ATTEMPTED TO EXERCISE AN AFRICAN-AMERICAN, THERE IS, JUDGE, WE NEED A RACE NEUTRAL REASON. THIS IS AN AFRICAN-AMERICAN. THERE IS NOTHING ON THE RECORD THAT WOULD SUPPORT OR EVEN GIVE ANY KIND OF INFERENCE THAT THE CHALLENGE IS BEING RAISED BECAUSE OF RACE, BUT JUST BECAUSE THIS IS AFRICAN-AMERICAN, WE NEED A RACE-NEUTRAL REASON.

CHIEF JUSTICE: YOUR TIME IS UP. WE HAVE TO RELY ON YOUR BRIEFS. THANK YOU VERY MUCH. HOW MUCH TIME DOES COUNSEL HAVE ON REBUTTAL? A LITTLE OVER TWO MINUTES.

I THINK THE STATE HAS PROVEN TOO MUCH. THEY ARE NOT JUST SAYING THAT WRIGHT DIDN'T SURVIVE MELBOURNE. THEY ARE SAYING THAT SLAPPY DIDN'T SURVIVE MELBOURNE, INDEPENDENT OF THE REASONABLES. THEY ARE NOT SAYING THAT BADSEN SURVIVED MELBOURNE. WHAT THEY ARE THAT I SAYING IS WE -- WHAT THEY ARE SAYING IS WE NEED PROOF THAT THERE WAS DISCRIMINATION APPLIED. THAT IS NOT WHAT THE CASE LAW SAID IN MELBOURNE. ANOTHER REASON IS HOW FAR DOES THE STATE TAKE THIS? WE HAVE LOOSE AND GESTURES. AS TO LOOSE AND GESTURES, THERE IS NO APPELLATE REVIEW WHATSOEVER, BECAUSE IF THE TRIAL JUDGE SAYS I BELIEVE YOU, THAT IS ENOUGH. WELL, IF THE ULTIMATE QUESTION IS, IS THE TRIAL JUDGE WILLING TO SAY, OKAY, I BELIEVE YOU, WHY WOULDN'T THAT APPLY TO HUNCHES? WHY WOULDN'T THAT APPLY TO NONGESTURE-BASED FEELINGS? WHY WOULDN'T IT EVEN APPLY TO WHAT PEOPLE DID OR DIDN'T SAY ON THE RECORD? WE COULD SAVE SOME TIME HERE AND FORGET ABOUT WHETHER OR NOT THEY REALLY SAID WHAT THEY ARE SUPPOSED TO HAVE SAID ON VOIR DIRE. THIS GUY SAID HE HATES COPS. NO, HE DIDN'T. WELL, YOU KNOW, THE QUESTION FOR ME AS A JUDGE ULTIMATELY IS WHETHER OR NOT I BELIEVE THAT THE PROSECUTOR IS DISCRIMINATING HERE, AND IT DOESN'T MATTER WHETHER THEY HAVE GOT IT WRONG, WHETHER THAT IS REALLY WHAT THE PERSON SAID. I JUST HAPPEN TO BELIEVE THIS PROSECUTOR. I SEE HIM IN MY COURTROOM EVERY TIME. THERE IS NO PRINCIPLE DISTINCTION THERE, IF WE ARE GOING TO ELIMINATE THE EVALUATION OF THE CREDIBILITY OF THE REASON, AS WELL AS THE PERSON RAISING THE REASON. AND THE STATE SAYS, WELL, YOU KNOW, WE ARE GOING TO CREATE A WHOLE NEW SLEW OF PROBLEMS WITH PEOPLE HAVING TO MAKE A RECORD. WE AREN'T CREATING ANYTHING. WE ARE KEEPING IN PLACE THE EXISTING RULE OF LAW, AND THERE IS NO PROBLEM! IF YOU LOOK AT WHAT HAS HAPPENED WITH THE RULE IN WRIGHT, THERE ARE, I THINK, TWO CASES CITING WRIGHT DIRECTLY AND REVERSING ON THIS ISSUE. YOU CAN GET TOGETHER, MAYBE, NINE POST-WRIGHT DECISIONS THAT ARE SIMILAR, SAYING THESE ARE LOOSE OR GESTURES CAYENNE OF THING, WHERE THERE WAS NO -- GESTURES KIND OF THING, WHERE THERE WAS NO SUPPORT IN THE RECORD. NINE IN THE PAST SEVERAL YEARS.

HOW DOES THAT APPLY TO WHERE THE TRIAL COURT SAID HE DOES NOT BELIEVE THE PROSECUTOR, AND THE TRIAL COURT REFUSED TO STRIKE THE JUROR? THERE COULD BE THOUSANDS OF THOSE CASES THAT NEVER WENT ON APPEAL AND WE DON'T KNOW ABOUT THOSE, CORRECT?

THAT'S CORRECT, AND LET ME COMPLETE AN ANSWER TO THAT, THAT WHAT WE ARE GOING TO DO IS OPEN A WHOLE NEW SET OF PROBLEMS BY CHANGING THE LAW IN THIS AREA AND INVITING A WHOLE NEW CLASS OF UNREVIEWABLE STRIKES.

CHIEF JUSTICE: THANK YOU, BOTH, VERY MUCH THE THE COURT WILL NOW BE IN RECESS UNTIL NINE O'CLOCK TOMORROW MORNING.

MARSHAL: PLEASE RISE.