

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: DIONISIO HERNANDEZ, Petitioner
v. NEW YORK

CASE NO: 89-7645

PLACE: Washington, D.C.

DATE: February 25, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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DIONISIO HERNANDEZ, :
Petitioner :
v. : No. 89-7645
NEW YORK :
----- X

Washington, D.C.
Monday, February 25, 1991

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:04 a.m.

APPEARANCES:

KENNETH KIMERLING, ESQ., New York, New York; on behalf of
the Petitioner.

JAY M. COHEN, ESQ., Executive Assistant District Attorney
of Kings County, Brooklyn, New York; on behalf of the
Respondent.

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1 PROCEEDINGS

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in case No. 89-7645, Dionisio Hernandez v. New York.

5 Mr. Kimerling?

6 ORAL ARGUMENT OF KENNETH KIMERLING

7 ON BEHALF OF THE PETITIONER

8 MR. KIMERLING: Mr. Chief Justice, and may it
9 please the Court:

10 This case presents a narrow issue under the
11 Court's decision in Batson v. Kentucky, an issue important
12 not only the petitioner here but to every other Puerto
13 Rican and Latino in this county. The issue in this case
14 boils down to whether or not after a prima facie case of
15 discrimination in the selection of jurors, a prosecutor
16 can respond by simply saying, I did not exclude Latino
17 jurors because they were Latino. I excluded these jurors,
18 because they speak and understand Spanish.

19 The way that this issue arises in this case,
20 Your Honors, is as follows. The petitioner was on trial.
21 The prosecutor excluded every Latino juror that came
22 before him, using his peremptory challenges. Thus a
23 prima facie case of discrimination was established under
24 Batson. The prosecutor was called on to give his reasons
25 for excluding Latino jurors.

1 At that point the prosecutor said that he and
2 the court had questioned the jurors about an instruction
3 to follow an interpreter. There was going to be some
4 testimony in Spanish. And in essence he was asking them
5 whether or not -- the jurors -- whether or not they could
6 disregard what the witness was going to say in Spanish and
7 rely only on the English language rendition of that
8 testimony provided by the interpreter.

9 QUESTION: Well, now, if that reason is true
10 that that was the basis for the prosecutor's strike, are
11 you arguing that there can be no peremptory strike on that
12 basis?

13 MR. KIMERLING: That's correct, Your Honor. We
14 argue that is a per se violation of Batson, given that
15 reason.

16 If I might just continue to give you --

17 QUESTION: Well, that's rather a remarkable
18 position to take, isn't it? I mean ordinarily if, if a
19 prosecutor is aware that there's going to some foreign
20 language translation required, and if the prosecutor
21 thinks that some particular perspective juror will not
22 abide by the translation of the language and yet speaks
23 the language, I think it's quite remarkable to say that
24 there cannot be a peremptory challenge, maybe even a
25 challenge for cause --

1 MR. KIMERLING: We don't --

2 QUESTION: -- on that basis.

3 MR. KIMERLING: Your Honor, we don't -- we don't
4 dispute the opportunity challenge for cause, but we do
5 argue, as you said, that a prosecutor could not exercise a
6 peremptory challenge. And if I might explain why I think
7 that rule should be applied. It's very clearly because
8 the prosecutor has not learned anything about the
9 individual juror. The prosecutor has learned simply that
10 this juror has, as other bilingual jurors, an
11 understanding of Spanish that the --

12 QUESTION: Well, isn't --

13 QUESTION: There was some evidence here I
14 thought that the prosecutor challenge was based some of
15 the reaction of the particular jurors to the questions.

16 MR. KIMERLING: The prosecutor here said that he
17 believed that these jurors were hesitant in their
18 responses in that they said that I will try to follow that
19 instruction. Later, I must say that all these -- both
20 jurors affirmed that they could and would --

21 QUESTION: Well --

22 MR. KIMERLING: -- follow the instruction.

23 QUESTION: But didn't the trial judge find that
24 the prosecutor stated reason was his real reason? Isn't
25 that a finding of the trial court judge?

1 MR. KIMERLING: He made no specific finding,
2 Your Honor, but he did deny the motion. We are not
3 arguing, Your Honor, that the reason stated was not his
4 reason.

5 QUESTION: We assume in deciding this case that
6 the stated reason was his real reason.

7 MR. KIMERLING: That's correct, Your Honor, but
8 we believe that the real reason is the Spanish language
9 ability of these jurors.

10 QUESTION: Well, do you --

11 QUESTION: But then you're not accepting it.
12 Go ahead, Justice.

13 QUESTION: Do you understand Batson to require
14 some kind of disparate impact analysis as opposed to a
15 finding of intention discrimination?

16 MR. KIMERLING: No, we don't, Your Honor. We do
17 -- it does require finding an intent. But what is at
18 issue here is essentially that these jurors answered the
19 questions in the way that every other bilingual juror
20 would. That the nature of what's being asked and the
21 difficulty that bilingual jurors face in giving, as an
22 initial response, anything more than I will try, is an
23 honest response.

24 QUESTION: Well isn't that -- isn't your
25 statement itself a form of stereotype to suggest that all

1 bilingual jurors react exactly the same way?

2 MR. KIMERLING: Yes, it is, Your Honor. It is a
3 form of stereotype, but it's an appropriate one in this
4 setting, because -- let me examine -- let us examine
5 what's being asked of these jurors.

6 This Court has, on a number of occasions,
7 recognized the difficulty that jurors generally have in
8 disregarding things that are said in court, evidence
9 that's been provided in court even when instructed to do
10 so by the judge. It's particularly difficult for -- to do
11 what these bilingual jurors had been asked to do. They
12 had been asked, essentially, to disregard the words of the
13 witness from his or her mouth that they understand and
14 take instead an English language rendition of that.

15 To do so creates two problem in minimum for
16 these jurors. One, it runs against their natural
17 inclination.

18 QUESTION: But this -- this is true in any case,
19 when you've got a juror who is bilingual. I mean, there's
20 nothing peculiar to the situation in which the juror
21 happens to speak the same language as one of the witnesses
22 who is a member of the ethnic group that includes the
23 defendant.

24 MR. KIMERLING: That's our argument. That's
25 absolutely right. We believe that the reluctance

1 demonstrated or the -- or the I-will-try answers here are
2 the kinds of answers that would be given by every
3 bilingual juror --

4 QUESTION: Yeah, but --

5 MR. KIMERLING: -- who honestly -- excuse me --
6 who honestly reflects on the questions that he's being
7 asked to answer. Excuse me, Your Honor.

8 QUESTION: Well, what if -- so what. These may
9 be that kind of an answer, but I thought your argument was
10 that -- that it amounts to intentional discrimination
11 based on race or ethnic origin to say that because you're
12 bilingual, you can't sit on this jury.

13 MR. KIMERLING: That's absolutely correct, that
14 that relying --

15 QUESTION: To say that intentionally excluding a
16 juror by peremptory challenge because the juror is
17 bilingual --

18 MR. KIMERLING: That's correct.

19 QUESTION: -- is a discrimination based on race
20 or ethnic origin.

21 MR. KIMERLING: The connection between national
22 origin and language is a clear one, Your Honor. It is
23 something that -- that this Court has looked to and relied
24 on in Yu Cong Eng --

25 QUESTION: Well, let's assume that -- let's

1 assume that the witness or that a juror is from a certain
2 -- from a certain section of a foreign country, now a
3 nationalized citizen, but that foreign country has all
4 sorts of areas in it and people speak a different kind of
5 language in each area. I mean, they have a little nuances
6 -- different nuances -- dialects. Don't you think the --
7 do you think that a juror then should be required to
8 follow the official translations?

9 MR. KIMERLING: We don't dispute that in the
10 least, Your Honor. These jurors said that they would and
11 could and the court is -- would presume that they would
12 follow the court's instructions.

13 What we're saying is that initially, in response
14 to these questions, the hesitancy that triggered the
15 exclusion of these jurors is the natural and foreseeable
16 hesitancy that would be found in all bilingual people.

17 QUESTION: Well, you've -- you've argued the
18 case as if the juror was being asked to completely
19 disregard what he or she heard. But I'm not quite sure if
20 that's what the prosecutor said. He said, I want to be
21 sure that they would accept the interpreter as the final
22 arbiter, that is to say if there was, I suppose, some
23 dispute in the person's mind as to what he said. Now,
24 that's different from saying that he must disregard every
25 nuance. That's quite different it seems to me. We don't

1 -- and incidentally I take it we don't have the actual
2 transcript of what went on in the voir dire?

3 MR. KIMERLING: We do not, Your Honor. But the
4 instructions that -- that normally accompany an
5 interpreter are just that, that you have to disregard what
6 you hear in Spanish and rely on what you hear in English.
7 The problem --

8 QUESTION: Well, the prosecutor here said, I was
9 uncertain as to whether they could accept the interpreter
10 as the final arbiter, and it seems to me that's different
11 than saying completely disregard what you've heard.

12 MR. KIMERLING: Well, I don't know if it makes a
13 distinction in the minds of the juror, Your Honor, because
14 what's at issue is whether or not they can essentially
15 screen out what it is that they hear in Spanish. And I
16 don't -- I don't think that that's an easy process to do,
17 and I obviously the literature that we have cited to in
18 our briefs, one empirical study and a number of
19 linguistics -- experts have -- studies have demonstrated
20 that it's very difficult to do just that -- to identify at
21 some point what it is you've heard in one language as it
22 opposed to another, because it's coming in. It's
23 something that you're going to understand.

24 And what I -- what I don't want this Court to
25 believe is that we think that -- that a juror has a right

1 to disregard what the interpreter says. We're not saying
2 that. These -- these jurors agree that they could and
3 that they would rely on what the interpreter said. All
4 we're saying is that this initial response will impact on
5 every bilingual juror.

6 QUESTION: That's what I have some difference
7 with you, because that's all that the prosecutor was
8 asking that you would accept the interpretation. And he
9 said, I had great uncertainty -- a great deal of
10 uncertainty as to whether or not they could do that.

11 MR. KIMERLING: They said that they would try,
12 and then they affirmed that they would. And I --

13 QUESTION: He's entitled to interpret their
14 demeanor evidence to perhaps cast doubt on their
15 assurances.

16 MR. KIMERLING: Your Honor, if -- if that's the
17 distinction, then I don't think it's a very meaningful one
18 in most settings. If, in fact, you can point as a
19 prosecutor to these initial hesitant responses anytime
20 you'd want to, it means that -- that you can eliminate
21 bilingual Latino jurors from a jury anytime you want to.

22 QUESTION: Mr. Kimerling, there you're -- you
23 have to rely on the trial judge. I mean, you really have
24 two questions here, but you're only raising the second
25 one. The first question is is the prosecutor's reason

1 that he gives really the true reason why he made the
2 strike. And here you concede that that's correct. Now,
3 the trial judge can say, no, I don't believe the
4 prosecutor. You said it was the witnesses' hesitancy, but
5 I think you really wanted just to get rid of all the
6 Latinos. But here the finding on credibility is against
7 you.

8 MR. KIMERLING: Your Honor, we think that it's a
9 per se violation, that credibility has nothing to do with
10 it. That by relying on the I-will-try answers of these
11 jurors, the prosecutor's relying on the Spanish language
12 ability of these jurors.

13 The court of appeals, for example, recognized
14 that these jurors answered in the way they did as a result
15 of their Spanish language ability. And that same Spanish
16 language ability makes it difficult for every other
17 bilingual person to answer these questions.

18 QUESTION: Well, except that the correlation is
19 never going to be what you say it is, because in the first
20 place, as I understand, somewhere in the briefs, the
21 statement is made that about 25 percent of those who are
22 ethnically Latino do not speak Spanish. So you've --
23 you've got a class of 25 percent right off the bat, if
24 that's correct, it will not be eliminated.

25 And in addition to that, you cannot assume that

1 in every case in which there maybe a Latino defendant
2 there is going to be a translation problem. So you then
3 have another category that's eliminated. And once you
4 eliminate those two categories from your argument for
5 correlation, you don't have an argument that this
6 particular criterion is going to eliminate every Latino
7 juror.

8 MR. KIMERLING: Your Honor, I -- you're
9 absolutely correct. And we're not trying to argue that.
10 What we're arguing is that in cases in which there is
11 going to be testimony in Spanish or maybe testimony in
12 Spanish, a prosecutor with the will to do so can simply
13 ask these same kinds of questions, get these same types of
14 hesitant I-will-try responses, rely on those, and knock
15 out those jurors.

16 QUESTION: But you're now telling us that even
17 on the assumption that that is the prosecutor's real
18 reason and not merely a covert reason to eliminate an
19 ethnic group, that that cannot be done. And I thought the
20 reason you were telling us that could not be done is that
21 it would effectively eliminate or give prosecutors the
22 opportunity to eliminate, in this particular case, every
23 Latino juror from a case in which there's a Latino
24 defendant. And we know that's not so.

25 MR. KIMERLING: Your Honor, the -- there is no

1 difference between somebody who does it unconsciously and
2 somebody who does it consciously. The effect is that
3 you're relying on a trait of national origin to accomplish
4 what you want.

5 For example, if this prosecutor had said, I did
6 not exclude these jurors because they're Latino. I
7 excluded them because they have Spanish surnames. And
8 I've had real bad luck with Spanish surname jurors.
9 Spanish surnames doesn't include all Latinos. It includes
10 people who are not Latino, who -- many women who marry
11 Latino men, yet I think it would not be -- that this Court
12 would find under Batson that that would be a violation of
13 Batson.

14 QUESTION: Well, then the question is, what is
15 the permissible criterion and what is a impermissible one?
16 I think I infer from your earlier remarks that it's proper
17 for the judge to instruct the jurors, if you can
18 understand this foreign language, I am instructing you
19 that you must abide by what the interpreter said. That's
20 the record in this case, and that's how you must decide
21 this case. Do you agree that the judge could instruct the
22 jury that?

23 MR. KIMERLING: Absolutely, Your Honor.

24 QUESTION: Now, suppose a juror says, well,
25 judge, I can't do that.

1 MR. KIMERLING: Okay, and then what happens?

2 QUESTION: Is that grounds for excusing the
3 juror?

4 MR. KIMERLING: For cause.

5 QUESTION: For cause or peremptory either way.

6 MR. KIMERLING: For cause, because he says I
7 can't do that. I won't do that. Then --

8 QUESTION: Well, I -- suppose he says, I have --
9 I'm just not sure I can do that. I'll have great
10 difficulty doing that.

11 MR. KIMERLING: And if in the context of that
12 voir dire, he concedes that he will and can, our position
13 is that it makes no difference between that juror and one
14 shows less hesitancy. That the peremptory challenge is
15 still based on the language ability of that juror, and as
16 such, would impact and effectively mean that -- the
17 prosecutor in that same setting, if I might go back and
18 respond a little clearer -- there's another juror in that
19 case, too, who just says, I'll try. And he says, well,
20 you'll have to do more than try, you'll have to do it.
21 And I'll do it. So you have at one end of the spectrum
22 that the I will try, and at the other, grave, grave
23 difficulty.

24 I don't think this Court can distinguish between
25 those, or any court can distinguish between those, when

1 it's a peremptory challenge, because the prosecutor has to
2 do more than point to a reason for his peremptory
3 challenge. In both cases, he'd have a reason.

4 QUESTION: Well, it's a very odd proposition
5 that you concede that an instruction from the court, a
6 direction from the court, is correct, that it's binding.
7 And then you say that a prosecutor cannot either for cause
8 or peremptorily excuse a juror who can't comply with that.
9 I'm --

10 MR. KIMERLING: We don't argue that he can't for
11 cause, but we argue that by allowing a prosecutor to do it
12 with peremptory challenges, allows him in essence to
13 exclude any time he wants -- in which there -- anytime --
14 in a trial, as Judge Souter pointed out -- Justice Souter
15 pointed out -- where there's going to be testimony in
16 Spanish, a bilingual Latino.

17 QUESTION: Well, that just sounds to me like a
18 rule applying a disparate impact analysis as opposed to a
19 finding of intentional discrimination. I think you're
20 asking us for a -- some kind of a blanket rule, based on
21 disparate impact on Latinos.

22 MR. KIMERLING: I am not, Your Honor, and if I
23 might --

24 QUESTION: It sounds like it.

25 MR. KIMERLING: Fine, and I'll -- fine. If I

1 could try to give you why I think it's different from a
2 disparate impact analysis.

3 If, for example, a prosecutor was concerned with
4 cross-racial identifications. He had a black defendant
5 and -- to be tried -- and a white witness that was going
6 to make the identification, he might ask the jurors if
7 they could rely on the cross-racial identification of a
8 white witness of a black defendant.

9 It might be empirically true that more African-
10 Americans would say, I have some questions about the
11 reliability of whites identifying black defendants, with
12 my history that I've been misidentified, and I know that
13 it's maybe a problem. But I can put that aside, and I'll
14 try this case fairly.

15 The prosecutor exercises he peremptory
16 challenge, knocks off that black juror. Disparate impact
17 in a broad sense in that you could probably demonstrate
18 empirically that -- that more African-Americans might have
19 difficulty in that setting.

20 But at the same time I think the difference
21 between our case and that case is that it is an individual
22 determination that -- there's something individual in that
23 juror's response that is being brought forth from the voir
24 dire. Here, all that is coming forth is that I speak
25 Spanish. I can -- going to hear what that witness says.

1 I will try to follow the interpreter, and I will follow
2 the interpreter.

3 QUESTION: Mr. Kimerling, you're coming up to
4 your time limit, and I --

5 MR. KIMERLING: That was my 10-minute buzzer,
6 but --

7 QUESTION: Yeah, I'm worried that you haven't
8 said anything about the second question --

9 MR. KIMERLING: I really --

10 QUESTION: -- that you've taken this case for
11 and which to my mind is a -- is a more significant one as
12 far as its impact on other cases.

13 MR. KIMERLING: Your Honor, if I might just
14 finish -- finish my answer to Justice O'Connor.

15 QUESTION: Well, it's your time.

16 MR. KIMERLING: Thank you.

17 QUESTION: The difference I think is that the
18 jurors in our case were excluded because of a national
19 origin trait: Spanish speaking. The jurors in this
20 hypothetical are excluded because of their individual
21 responses to questions. We think that there's a causal
22 relationship, a direct causal relationship between
23 speaking Spanish and these I-will-try responses. In the
24 hypothetical, although there may be some impact, the fact
25 is that there's no direct causal relationship between the

1 hesitancy that that individual black juror showed -- Afro-
2 American juror showed -- and his or her responses.

3 Secondly, I think the distinction that -- that
4 in that case, there was a case-specific fact that is going
5 to be resolved by those jurors, that is, whether or not
6 this identification is accurate. In our case, it is not.
7 There is no issue presented in this case or cases in which
8 testimony is being provided in Spanish that is at issue.
9 It's not as if it's a case-specific issue.

10 And thirdly, there's a showing of specific bias,
11 and by that I mean the -- in the hypothetical case, the
12 black African-American juror, demonstrates a potential
13 bias against the prosecution or -- or favor for the
14 defendant.

15 In our case, the juror shows neither a -- bent
16 -- a partial bias for the defendant or an antithesis --
17 antithetical position to the State. I think that is what
18 really separates ours, and why we think it's very narrow.
19 While it's very important, it's very narrow at the same
20 time. We do not encompass disparate impact. And I think
21 it's my hypothetical --

22 QUESTION: May I just question that? You say
23 you don't encompass disparate impact. But doesn't your
24 Latino name example rest on a disparate analysis?

25 MR. KIMERLING: No, it rests on the fact that

1 that is a part of his national origin -- that is the name.

2 QUESTION: Well, but it isn't always.

3 MR. KIMERLING: That's correct.

4 QUESTION: And it may well be true that the
5 prosecutor is 100 percent sincere in believing that people
6 -- if he's had bad experience with the people with Latino
7 names.

8 MR. KIMERLING: Well, I think the difference is
9 that we're looking at traits in the Fourteenth Amendment
10 context that have led to discrimination. After all, the
11 most derogatory remark directed at Latinos is spic, and
12 that comes from -- from a -- a characterization of how
13 somebody might say I speak English, based on language.

14 The Congress has enacted numbers of provisions
15 and regulatory agencies to protect language minorities.
16 Spanish surname is a basis by which the census counts
17 Latinos.

18 QUESTION: Mr. Kimerling, I think that
19 hypothetical would come out the way you do -- the way you
20 suggest, that is, that it would be in violation of Batson.
21 But it -- to my mind, it -- that would be the result only
22 because no, no trial judge in his right mind would believe
23 that argument.

24 MR. KIMERLING: Well, Your Honor, that --

25 QUESTION: That's why that comes out.

1 MR. KIMERLING: That -- that might be, but I --
2 but I think that had a trial judge found so, it would
3 still be a per se question before this court, and not one
4 clearly erroneous. In the same way that we ask this Court
5 to address this question as a per se violation, the
6 reliance on a per se violation is very important, because
7 it -- you can't prove pretext, because if you go from the
8 will -- I will try to the very difficult, you always have
9 something on the record.

10 Secondly, as I point out, it doesn't undermine
11 -- a per se rule does not undermine the primary purpose of
12 peremptory challenges, which is to eliminate jurors that
13 are potentially biased.

14 QUESTION: You probably should address the
15 second question, Mr. Kimerling, the standard of review.

16 MR. KIMERLING: If I just might put one more
17 point on this, because we believe that the second question
18 doesn't affect us because we have a per se violation here.
19 But let me just put one more point here which is that the
20 -- there is a nondiscriminational alternative. I think in
21 the context of the Fourteenth Amendment, that's very
22 valid. They can be instructed if there's a difference to
23 -- to pass a note to the judge and the judge will clarify
24 it. You do not have to eliminate these people as a group.

25 QUESTION: Well, you would have a better case I

1 suppose if -- if one of these -- if the prosecutor asks,
2 can you follow the interpreter, and he says, of course, I
3 can and I will. Nevertheless, he's got -- the prosecutor
4 struck him.

5 MR. KIMERLING: Well, that -- that's right, but
6 we wouldn't be talking per se. We'd be talking pretext.
7 But -- but that's not our case, and that's what we think
8 the jurors would say, if they honestly answer the
9 question, Your Honor.

10 QUESTION: So, if there -- if there were six
11 jurors, Latino jurors, that he was examining and three of
12 them said, of course, I can. And he seated them and he
13 didn't strike them. And three others said, I will try,
14 but I'm going to have some difficulty. And he struck
15 them, you would still be here I guess?

16 MR. KIMERLING: One, there may be a question of
17 a prima facie case, but I would still be here.

18 QUESTION: You would still be here.

19 MR. KIMERLING: I would still be here, Your
20 Honor, because in the context of explaining those reasons,
21 for striking those jurors, he would say just what we've
22 said. And he could point to something on the record --

23 QUESTION: So it's hard to say -- it's hard to
24 say on those facts that he has an intentional
25 discrimination against all Latinos.

1 MR. KIMERLING: Your Honor, it's not a question
2 of motive being good or bad. It's a question about
3 whether the answer is a neutral one, and we believe that
4 an answer based on language cannot be neutral under the
5 Fourteenth Amendment and under Batson.

6 Quickly turning to point two -- I'm sorry.
7 Obviously we think we have per se violation here. We
8 think the plenary review, therefore, is appropriate by
9 this Court. This Court has, however -- if this Court does
10 not find per se -- consistently applied the independent
11 review in jury discrimination cases starting in Norris --
12 with Norris v. Alabama in 1935 continuing right up to the
13 present. We don't think that it any reason not to comply
14 with those earlier precedents. They're not --

15 QUESTION: You don't think any deference should
16 be accorded to the finding of the trial court who was
17 there as he obviously was at the time the prosecutor took
18 these actions as to the truthfulness of the prosecutor's
19 statement?

20 MR. KIMERLING: That -- absolutely should, Your
21 Honor. We believe that independent review as -- as -- and
22 its mixed question of law and fact -- that the appellate
23 court would give deference to findings of credibility and
24 other factual findings. But the ultimate question or the
25 question of constitutional importance is whether or not

1 that shows intent to discriminate. In most cases, it will
2 be simple.

3 QUESTION: Well, it's really -- we're looking
4 for, was it a race-neutral reason? Isn't that what Batson
5 said?

6 MR. KIMERLING: That's -- that's --

7 QUESTION: And that presumably is I suppose a
8 question of law. But the other question of whether the
9 reason assigned by the prosecutor is the truthful reason,
10 there you would agree deference should be given to the
11 finding of the trial judge?

12 MR. KIMERLING: That's correct, Your Honor.

13 That --

14 QUESTION: Apparently, it would have to be
15 clearly erroneous.

16 MR. KIMERLING: That's correct. It's an issue
17 of credibility. But if you take all that into account,
18 and then you -- let me back up by when you say truthful.
19 What I mean to say is that his denial of discrimination is
20 not sufficient. But if his reason is that I knocked off
21 juror 2, because he had some hesitancy about cross-racial
22 identification, the court can find that -- it to be his
23 reason. But if the appellate court sees that three non-
24 African-Americans show the same hesitancy as the African-
25 American that was knocked off, in light of all those

1 subsidiary facts, it could find --

2 QUESTION: -- clearly erroneous.

3 MR. KIMERLING: Clearly erroneous or it find as
4 -- without determining clearly erroneous under independent
5 review, that it would find discrimination regardless of
6 whether or not the trial court did not. So that the
7 credibility --

8 QUESTION: Well, is -- does that mean that the
9 appellate court is substituting its view, as it may on
10 some cases -- for the trial judges as to the truthfulness
11 of the prosecutor's statement?

12 MR. KIMERLING: The truthfulness as to his
13 statement is that he said this, that, and the other.

14 QUESTION: This is the reason I'm doing it.

15 MR. KIMERLING: But the constitutional question
16 is is whether his true reason is race or national origin,
17 and that I guess is where I --

18 QUESTION: To find out what is true, isn't it,
19 you first have to decide whether the reason he gives is or
20 is not his true reason.

21 MR. KIMERLING: It is -- it is what he says is
22 his reason, and therefore, the court will treat it as
23 such. But if there are other indicia in the record that
24 would lead a court to another conclusion that this Court
25 or any appellate court could rely on those other facts --

1 in the First Amendment area --

2 QUESTION: I think you've answered the question,
3 Mr. Kimerling. And your time has expired.

4 MR. KIMERLING: Thank you, Your Honor.

5 Mr. Cohen.

6 ORAL ARGUMENT OF JAY M. COHEN

7 ON BEHALF OF THE RESPONDENT

8 MR. COHEN: Mr. Chief Justice, and may it please
9 the Court:

10 The central premise of petitioner's case that
11 the peremptory challenges here must be rejected because
12 all bilingual Latinos will answer these questions in the
13 same way is fundamentally at odds with this Court's equal
14 protection analysis in three ways. First, he substitutes
15 a prediction of what caused the jurors to give the case-
16 related answers that they gave for proof of an intent to
17 discriminate on the part of the prosecutor.

18 Second, he rejects the individualized assessment
19 of each juror's ability to serve in this case that
20 actually occurred here in favor of an assumption, a group-
21 based assumption or stereotype, about the behavior of
22 bilingual Latinos in general -- the kind of stereotype
23 that this Court has condemned.

24 And third, acceptance of his argument would
25 require the acceptance of jurors even when they often

1 case-related -- a nondiscriminatory basis for their
2 challenge under certain circumstances.

3 QUESTION: Mr. Cohen, would it offend a race-
4 neutral reason for the prosecutor to strike every
5 bilingual juror without regard to any questions and
6 responses?

7 MR. COHEN: Not necessarily. However, if the
8 prosecutors -- it could be a race-neutral reason, but
9 there are a couple of circumstances under which it would
10 not be. If the basis for the prosecutor's challenge --

11 QUESTION: Well, the reason the prosecutor gives
12 when called under Batson is they're bilingual.

13 MR. COHEN: That reason could serve, depending
14 on how it's applied to the case, as a pretext for
15 discrimination on the basis of their national origin.

16 QUESTION: How about if he says the reason is
17 because they had an Hispanic surname?

18 MR. COHEN: Well, by the same token, that reason
19 could serve as a pretext, particularly with regard to the
20 second one. It would be very difficult for a prosecutor
21 to show that their surname had any relevance whatsoever to
22 the case and --

23 QUESTION: Mr. Cohen, any reason can serve as a
24 pretext.

25 MR. COHEN: Right.

1 QUESTION: I mean any reason.

2 MR. COHEN: That's correct.

3 QUESTION: You can give me the best reason in
4 the world and if I don't believe it, it's a pretext. I
5 mean, I don't see what --

6 MR. COHEN: Well, but what I mean though is that
7 --

8 QUESTION: -- it proves to say it could serve as
9 a pretext. Why isn't it reasonable for a prosecutor to
10 say look at -- I don't care whether he says confidently, I
11 can do it or not. The fact is it's very hard if you know
12 the language the fellow is speaking to believe the
13 translator who mistranslates it. It's very hard to do.
14 So I don't care whether this person says he can do it or
15 not. I would rather have people on the jury who don't
16 understand the language that's being translated.

17 MR. COHEN: That --

18 QUESTION: Can the prosecutor do that?

19 MR. COHEN: That -- challenging bilingual jurors
20 is on its face, race-neutral. However, if the prosecutor
21 uses that reason in a disparate way -- he uses it for
22 example to challenge only Latino bilinguals or if the
23 particular issue in the case doesn't really indicate that
24 their ability to speak another language will affect their
25 ability to serve as jurors --

1 QUESTION: Let me interpret if I may, Mr. Cohen.
2 Supposing there isn't any question about the bona fides of
3 the prosecutor's belief that bilingual jurors may have an
4 undue influence when they get in the jury room and they
5 may not believe the judge's instruction that they should
6 follow the translator's version rather than their own
7 view.

8 MR. COHEN: Correct.

9 QUESTION: And therefore, the prosecutor's
10 office adopts as a matter of office policy in writing,
11 always challenge bilingual jurors for that reason, would
12 we say that was a sufficient reason under -- no question
13 of pretext -- should we accept that as a sufficient
14 reason?

15 MR. COHEN: This Court in Batson said that
16 challenges to cognizable groups would raise an inference,
17 a prima facie case of discrimination and challenges on
18 that basis alone would reflect discrimination on the part
19 of the prosecutor.

20 Now, this Court has held and in fact --

21 QUESTION: Mr. Cohen, I know what we said in
22 Batson. I'm curious to know what your answer to my
23 question is.

24 MR. COHEN: The answer is challenging someone
25 simply on the basis of their language ability would not be

1 a discriminatory reason under Batson.

2 QUESTION: What you're saying is that that would be a
3 permissible reason on the facts I've given you?

4 MR. COHEN: If -- yes. If, however -- if,
5 however, that reason was used to challenge in either one
6 particular case or in a series of cases Latinos, the court
7 could still determine that the real reason for the
8 prosecutor's use of that -- of language ability was an
9 intent to discriminate in violation of Batson.

10 For example, if the prosecutor in this case, had
11 not asked the jury --

12 QUESTION: Of course, you could do that, but
13 you're suggesting that even if that's not the fact, they
14 regard the importance of not following the translator as
15 more important than the interest in having a diverse jury,
16 that's still permissible. And I -- it certainly fits
17 within the language of Batson, but I just wanted --

18 MR. COHEN: That's correct, Your Honor. Batson
19 --

20 QUESTION: Is there any limit on the sufficiency
21 of the reason that must be given as long as it's in good
22 faith? Supposing, for example, the prosecutor had a
23 prejudice against -- a prejudice against people who wore
24 bow ties --

25 (Laughter.)

1 QUESTION: -- that happened that all the blacks
2 on the jury wore bow ties, would that be a sufficient
3 reason, even it's truthful?

4 MR. COHEN: Yes.

5 QUESTION: Yes.

6 MR. COHEN: But in that situation if the court
7 could not determine why the fact that a juror wore a bow
8 tie was at all relevant to the case, and if it actual
9 happened in that particular case that the only jurors who
10 wore bow ties were black jurors, he could --

11 QUESTION: Infer prejudice -- but I'm assuming
12 that the -- I'm assuming that he knows the prosecutor and
13 he knows he wouldn't misrepresent something. He just
14 happens to have an idiosyncratic view about a particular
15 characteristic of people. And he just gets all those off,
16 but it happens in the case that's the only reason he -- he
17 excused all of the Latinos or all of the blacks. It's
18 nevertheless okay?

19 MR. COHEN: This Court in its Sixth Amendment
20 cases and in its Fourteenth Amendment cases has indicated
21 that Batson prohibits challenges exercised on the basis of
22 some discrimination and does not challenge -- prohibit
23 challenges exercised on the basis of other kinds of
24 assumptions based on other criteria.

25 QUESTION: I thought it was racial

1 discrimination, not just discrimination. It's -- Justice
2 Stevens is posing discrimination on the basis of the tie
3 that one wears. That's discrimination.

4 MR. COHEN: But there's nothing in Batson that
5 prohibits a prosecutor's reliance on that criteria so long
6 as his reliance on that criteria is not a pretext for
7 discrimination on the basis of some prohibited
8 characteristic.

9 Now, it's important to realize that in this case
10 the prosecutor did not rely on any of those kinds of
11 criteria. The prosecutor relied instead on the answers
12 that the jurors gave in response to questions about a
13 case-related concern. Petitioner concedes that they in
14 fact gave those answers, that they did express that
15 hesitation or equivocation, and he also concedes that the
16 concern that the prosecutor asked them about was related
17 to the case on trial.

18 But he nonetheless says that this Court is
19 required to find what he calls a per se violation of
20 Batson in the absence of any indication in the record that
21 the prosecutor used that case-related concern to
22 discriminate against Latinos.

23 QUESTION: Mr. Cohen, what -- what is the
24 standard of review that this Court should apply to the
25 determinations made in State court in this case concerning

1 the prosecutors' motives?

2 MR. COHEN: This Court should apply the clear
3 error standard.

4 QUESTION: Is that consistent, do you think,
5 with Norris against Alabama and some other cases from this
6 Court saying at least that we will conduct an independent
7 review of State court fact finding in jury discrimination
8 cases?

9 MR. COHEN: Yes, there is nothing inconsistent
10 with independent review of the record, including the
11 record on the facts, and deference to the trial court's
12 fact finding.

13 QUESTION: Do you think that a -- application of
14 the clearly erroneous rule is consistently with Norris
15 against Alabama?

16 MR. COHEN: Yes, in Norris this Court indicated
17 that it came to the conclusion that the facts compelled a
18 result from the result that the State court had found.
19 But that -- and that is not inconsistent with clear error
20 standard.

21 This Court has also indicated that even within
22 the clear error standard, if this Court or another
23 appellate court is left with the definite and firm
24 conviction that the result is incorrect that despite the
25 fact finding below, that this Court can still come to a

1 different conclusion. The standard of review that the New
2 York Court of Appeals applied in this case is the standard
3 of review that this Court cited in Batson, that this Court
4 has applied consistently in its discrimination cases.

5 QUESTION: Well, we're not concerned with the
6 standard of review applied by the State appellate court.
7 It's what standard does this Court apply.

8 MR. COHEN: But the standard that the New York
9 Court of Appeals has applied -- applied, Your Honor, is
10 the same standard that this Court has itself applied to
11 state court determinations of discrimination.

12 QUESTION: Mr. Cohen, may I just clarify one
13 thing? You stressed the case-related character of this
14 particular -- you're not conceding, I don't suppose, that
15 the reason must be case related? You just argue that
16 that's factor that tends to support the conclusion there
17 was not a pretext, is that right?

18 MR. COHEN: Well, in this case, the courts found
19 that a -- that a prima facie case was made out.

20 QUESTION: Right.

21 MR. COHEN: In response to that prima facie
22 case, this Court in Batson indicated that a prosecutor
23 must offer a race-neutral reason. And one of the ways
24 that this Court expressly judged whether or not a reason
25 is race neutral is whether or not it's related to the case

1 on trial.

2 QUESTION: No, but you're not conceding that the
3 universe of race-neutral reasons is limited to case-
4 related reasons?

5 MR. COHEN: No.

6 QUESTION: No. You could, for example, have a
7 prejudice against bank employees or something like that
8 and just challenge all those.

9 MR. COHEN: Well, yes, Your Honor. And once
10 again in this Court's expression in *Holland v. Illinois*,
11 for example, of its concern about extending the Sixth
12 Amendment -- applying a *Batson* analysis to Sixth Amendment
13 cases and its reference in *Batson* to cognizable racial
14 groups indicates that what the Court meant in *Batson* was
15 to prohibit discrimination under the Equal Protection
16 Clause. And I would believe that the kinds of
17 characteristics that this Court would prohibit would be
18 those kinds of characteristics that this Court has said
19 reflect an intent to discriminate under equal protection,
20 such as race or national origin.

21 And those characteristics can operate in two
22 ways. First, the prosecutor can offer them as the reason
23 and this Court has clearly said that that reason on its
24 face is a violation of *Batson*. But second, the prosecutor
25 can offer another reason that is race neutral on its face,

1 but nonetheless in the facts and circumstance of the
2 particular case reflect an intent to discriminate.

3 QUESTION: Oh, or even you've said not in the
4 facts and -- oh, I see. Discrimination has to be in the
5 case.

6 What if -- what if the prosecutor says, I have
7 no racial biases, but I have found in my experience that
8 people with dark skins are not as good jurors as other
9 people?

10 MR. COHEN: It would seem to --

11 QUESTION: You know, there are some swarthy
12 Caucasians who are eliminated, but overwhelmingly that
13 criterion leads to the categorical exclusion of blacks.

14 MR. COHEN: I believe that --

15 QUESTION: I mean, is that all right?

16 MR. COHEN: I believe that any judge would find
17 that a reliance on that criterion was a pretext for a
18 discrimination against blacks.

19 QUESTION: But if it wasn't a pretext, it would
20 be all right?

21 MR. COHEN: Well, but in order it not to be a
22 pretext, the prosecutor would have to demonstrate in some
23 way that skin color was relevant to the particular case on
24 trial, and I don't think a prosecutor could ever establish
25 that it would not --

1 QUESTION: No, you said -- you said the
2 prosecutor could adopt general rules before I think in
3 response to Justice Stevens. You said he could adopt a
4 general rule, that we are not going to ever allow to sit
5 on the jury somebody that -- in the case where there's a
6 translation necessary -- somebody who speaks that
7 language. And you said that was okay.

8 MR. COHEN: I believe that that general rule
9 reflect a pretext on the part of the prosecutor to
10 discriminate. And the fact that that rule has a certain
11 impact on blacks as opposed to others is not irrelevant to
12 the analysis.

13 QUESTION: Which rule are you talking about?
14 Now, mine or the language one?

15 MR. COHEN: Yours, Your Honor.

16 QUESTION: Oh, okay.

17 MR. COHEN: But even if the prosecutor adopts a
18 general rule, if a prima facie case of discrimination is
19 made out, the court is still required to determine that
20 the application of the general rule in the particular case
21 on trial does not reflect an intent to discriminate. And
22 one of the ways the court does that is to determine if, in
23 fact, the application of that rule is at all related to
24 the case in question.

25 In addition to --

1 QUESTION: I'd like to push Justice Scalia's
2 example one step further. Supposing his example of
3 swarthy, dark-skinned people -- supposing the prosecutor
4 could show and he tries dozens of cases before the same
5 judge and he'd done it. The judge had seen him regularly
6 exclude people with a swarthy complexion. So he knows
7 he's telling the truth. It just happens that about 70
8 percent of them were also Afro-Americans.

9 MR. COHEN: I believe that a judge -- if the
10 judge could not find -- first of all, that that would not
11 be the case. But second of all, that is a judge could not
12 find that that criteria was at all related to the case on
13 trial, that not only the trial judge, but the appellate
14 judge would be compelled to find that what the prosecutor
15 was in fact doing was --

16 QUESTION: Was pretext.

17 QUESTION: It doesn't have to be related to the
18 case on trial. What good is a peremptory unless you can
19 use it if you think it's related? The judge doesn't have
20 to agree that it's related. He can strike people because
21 he doesn't like the way they comb their hair, can't he?

22 MR. COHEN: But that kind of a factor, because
23 it has such an impact and because it is in general -- it
24 would seem to me it --

25 QUESTION: Like speaking a language.

1 MR. COHEN: Well, no, Your --

2 QUESTION: I mean, you ought to be careful where
3 you're going.

4 MR. COHEN: No, Your -- it would seem to me
5 appropriate in that particular case for the Court to
6 conclude that the prosecutor had intended to discriminate.
7 But if there is evidence before the court that the
8 prosecutor did not in fact intend to discriminate on the
9 basis of a prohibited characteristic like race or national
10 origin, then the use of that criteria would not be
11 prohibited by this Court's decision on that.

12 QUESTION: In other words you're saying the
13 impact is never enough, but the impact may be evidence
14 which on the total evidence of the case is sufficient to
15 tip it in favor of a conclusion that there was intentional
16 discrimination.

17 MR. COHEN: That's correct, Your Honor. It can
18 furnish very important evidence of intent, but in
19 petitioner's analysis it is the impact alone that
20 substitutes for proof of an intent to discriminate,
21 because he calls this -- this a per se violation of Batson
22 that doesn't require that there be any to -- intent to
23 discriminate found.

24 And another problem that's created by that
25 analysis is let's suppose that two bilingual jurors answer

1 the questions the same way in the same case. One of those
2 jurors is Latino and one of those is not Latino. The
3 prosecutor's reason -- the record -- and the prosecutor's
4 intent is the same. Under petitioner's analysis, it would
5 be open to show that if the hesitation, the equivocation
6 -- if the answers that they gave in the course of that
7 trial were somehow caused by their national origin, that
8 the Latino jurors would have to be seated, whereas the
9 non-Latino jurors would not have to be seated. And that
10 is not, I submit, what this Court's decision in Batson
11 requires.

12 In addition, if reliance on the juror's
13 hesitation and equivocation in this case is, as petitioner
14 calls it, a per se violation of Batson, there's no reason
15 to stop the analysis at a peremptory challenge. A
16 prosecutor could no more rely on race alone in the
17 exercise of a cause challenge, I submit, than a peremptory
18 challenge. But if this hesitation and equivocation is on
19 the same plane as race, then had the jurors in this case
20 said, no, Your Honor, we cannot do what we are being asked
21 to do. If it's a per se violation of Batson, the
22 prosecutor could not even rely on it for the exercise of a
23 cause challenge.

24 QUESTION: Your hypothetical about non-Latinos
25 having the same hesitation assumes that the prosecutor

1 asked the same question to the non-Latino, which I guess
2 he didn't even do in this case.

3 MR. COHEN: Well, in fact, Your Honor, the
4 evidence in the record indicates the prosecutor told the
5 court that he believed that at least one of the jurors in
6 this case might not have been Latino. And while that was
7 not central to the decision, because in New York even
8 challenging one Latino on the basis of --

9 QUESTION: Did he ask everybody on the panel if
10 they spoke Spanish?

11 MR. COHEN: There's no evidence in the record
12 one way or the other. Although the defendant, during the
13 course of the colloquy about the prosecutor's exercise of
14 challenges, the defense attorney raised no issue as to the
15 fact that the prosecutor might have treated certain kinds
16 of jurors different than other kinds of jurors. So there
17 was no evidence in the record of any disparate treatment
18 on his part.

19 QUESTION: Mr. Cohen, let me ask your -- ask you
20 a question about the way the rule that you would have us
21 apply might be applied to other ethnic groups. What if we
22 were dealing in a -- in a different time period in the
23 history of Latin emigration so that in fact it would be
24 true to say that virtually every juror with a Latin name
25 would be a Spanish speaker and it would also probably be

1 true that any case in which there was going to be a Latin
2 defendant would probably involve some translation so that
3 we would have on these -- on the criteria that you
4 proposed to allow, we would -- we would really have an
5 exclusion of every Latin surnamed juror who hesitate in
6 any way.

7 Is there anything in our jurisprudence that
8 would say, even assuming on these ethnically neutral
9 grounds, that the exclusion would be appropriate, we
10 nonetheless will not allow it? Would there be any reason
11 for us to conclude that?

12 MR. COHEN: No. An extension of this Court's
13 equal protection analysis beyond just national origin and
14 beyond language to a juror's hesitation or equivocation in
15 response to case -- questions about the juror's ability to
16 do the job in a particular case -- I don't believe there
17 is anything in this Court's equal protection analysis that
18 would extend the prohibited classifications for equal
19 protection purposes to that degree.

20 But I think it's important to realize, too, Your
21 Honor, and that is that there is no evidence whatsoever
22 that this assumption that all bilingual Latinos will
23 answer the same way, will in fact occur. It's already
24 been indicated here that some of the evidence in the
25 record is that not all Latinos are bilingual at all.

1 Other evidence in the record offered by petitioner --
2 other evidence on appeal offered by petitioner indicates
3 that there's a wide range of bilingualism from people who
4 have a great ability to speak and understand Spanish to
5 people to have very little ability to speak and understand
6 Spanish. And there's certainly no reason for this Court
7 to assume that within that range of ability to understand
8 this language, that every single one of the jurors who are
9 called for jury service are going to answer the questions
10 in the same way. That is exactly the kind of leap that
11 this Court rejected in Batson.

12 Petitioner has also not shown anything about the
13 relevant -- the eligible jury pool and how this issue of
14 bilingualism fits into that.

15 This case was not argued and asserted on the
16 basis of this per se Batson violation that -- that
17 petitioner offers. There was not even any evidence
18 entered into the record that every single bilingual juror
19 would answer the questions the same way that these jurors
20 did. So that that assumption is not only contrary to the
21 Court's equal protection principles but is by no means
22 shown and certainly not -- not proven.

23 In contrast to this new way that petitioner
24 would approach the equal protection clause, the record in
25 this case is entirely consistent with Batson. There was

1 lengthy questioning by both the district attorney and the
2 court on the issue of the juror's ability to follow the
3 interpreter.

4 There was a great deal of uncertainty as
5 characterized by the prosecutor in their answers. The
6 basis for the challenge was not just their demeanor but
7 the answers that they gave in response to these questions.

8 Petitioner concedes that the questions -- the
9 attribute that the prosecutor was seeking to question
10 about was related to the case on trial. And the reason
11 that the prosecutor offered was clear and specific, and
12 there's no evidence that it was pretext for
13 discrimination.

14 QUESTION: Mr. Cohen, can you tell me based on
15 your experience with these case, because I guess it's --
16 it is a problem that this sort of thing happens in New
17 York a great deal. Is there a standard instruction that
18 the trial judges give to the -- those who are bilingual to
19 say, be sure you adhere to the translation given by the
20 translator rather than your own views?

21 MR. COHEN: Well, I don't know, Your Honor.
22 Although I also don't know that this is a problem that --
23 how often the problem comes up -- at least as far as jury
24 challenge --

25 QUESTION: It must come up repeatedly I would

1 think, because there must a number of bilingual jurors and
2 I would think the prosecutor would always be concerned --
3 have the same concern you described.

4 MR. COHEN: Well, the prosecutors wouldn't in
5 each individual case necessarily have the same concern.
6 The court does charge the jury that they are required to
7 decide the case based on the evidence.

8 QUESTION: I know.

9 MR. COHEN: And the evidence in this case would
10 be the interpretation of the forum --

11 QUESTION: He doesn't explain it on -- as far as
12 you know there's not a standard -- it seems to me it might
13 be something -- be worth considering.

14 MR. COHEN: That's correct, Your Honor. I
15 presume that if the issue comes up in a particular trial
16 the court may very well explain to the jurors what their
17 particular responsibility -- responsibility is in that
18 case.

19 If I may conclude, we firmly reject the view
20 that this case represents any retreat from Batson, that it
21 creates, in the words of petitioner, any loophole or
22 exception to Batson or that it means that Batson does not
23 apply to Latinos? The reality is that the reason in this
24 case cannot be -- that Latinos will continue to be judged
25 by their individual ability to serve in a particular case.

1 All this case stands for we submit is the
2 proposition that Latinos, like other jurors, who actually
3 exhibit during the course of a voir dire, a case-related,
4 record-supported basis to question their ability to serve
5 as jurors in a particular case, that they can be subject
6 to a peremptory challenge in the absence of a finding that
7 the district attorney intended to discriminate in any way.
8 That's what the New York Court of Appeals found. That's
9 what this Court's equal protection analysis says,
10 identified in Batson holds, and therefore, we respectfully
11 urge that this Court affirm the holding of the New York
12 Court of Appeals in this case.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cohen.
14 The case is submitted.

15 (Whereupon, at 12:00 noon, the case in the
16 above-entitled matter was submitted.)
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CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that
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BY *Roger A. Harte*

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