Batson Basics

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BATSON BASICS:

WHAT, HOW, WHEN, WHO, AND WHY

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BATSON BASICS:

WHAT, HOW, WHEN, WHO, AND WHY

WHAT

I. WHAT IS A BATSON CHALLENGE?

A Batson challenge is a complaint that one's trial opponent improperly exercised peremptory strikes on the basis of race or gender. It is so called because of the landmark case of *Batson v. Kentucky*, 476 U.S. 79 (1986), which prohibited racially motivated peremptory strikes.

Batson was extended to cover discrimination on the basis of gender. So, for Batson purposes, gender is a protected class and one may not peremptorily strike a person on that basis. *J.E.B. v. Alabama,* 511 U.S. at 146; *Fritz*, 946 S.W.2d at 847.

The term "race" is broadly construed, and Batson applies to ethnicity and ancestral line. *See Wamget*, 67 S.W.3d at 857. But note that one's national origin, by itself, may not have ethnic or racial implications. *Wamget,* 67 S.W.3d at 859.

At trial, a Batson challenge has three components: (1) the opponent of a strike must establish a prima facie case of discrimination, (2) the respondent must rebut the prima facie case by providing race or gender-neutral reasons for each challenged strike, and (3) the opponent must then prove that the reasons are merely a pretext for discrimination. *Purkett v. Elem*, 514 U.S. at 766-68.

II. WHAT ESTABLISHES A PRIMA FACIE CASE?

Batson challenges are analyzed according to a three-step process. In the first step, the opponent of a strike must establish a prima facie showing of discrimination. *Purkett*, 514 U.S. at 767; *Johnson*, 68 S.W.3d at 649; *Mathis*, 67 S.W.3d at 924.

The opponent of the strike must establish *purposeful or intentional* discrimination on the basis of race or gender. (emphasis added) *See Arlington Heights*, 429 U.S. at 265; *U.S. v. Maseratti*, 1 F.3d at 335; *Hutchinson*, 42 S.W.3d at 339.

The opponent must produce just enough evidence to support a rational inference of purposeful discrimination. The burden is not onerous. *Linscomb*, 829 S.W.2d at 167; *Wardlow*, 6 S.W.3d at 787.

A. Elements of Prima Facie Case

The controlling statute on Batson only deals with racially motivated strikes and only prohibits prosecutorial misconduct. According to its terms, a defendant must show three elements:

1. The defendant belongs to an identifiable racial group;
2. The prosecutor exercised strikes to exclude jurors on the basis of their race; and
3. The defendant has introduced relevant facts that tend to show the challenges were made for reasons based on race.

See TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon 1989). Case law tends to set forth similar elements of a prima facie case, which could be used against either party and also applied to strikes based upon gender discrimination. *See, e.g., Wamget*, 67 S.W.3d at 857; *Hutchinson*, 42 S.W.3d at 340.

B. Presumed Prima Facie Case

If a party removes all persons of a protected class from the jury panel, most courts will find that a prima facie case has been established.

Removal of all African Americans establishes a prima facie case. *Robbins*, 27 S.W.3d at 249; *Wardlow*, 6 S.W.3d at 788.

Removal of all women establishes a prima facie case of discrimination. *Garza*, 10 S.W.3d at 769.

III. WHAT INFERENCES SUPPORT A PRIMA FACIE CASE?

Certain facts can be used to substantiate a prima facie case of discrimination. Common examples include the following:

A. Conduct of Voir Dire Examination.

If the party makes statements or asks questions designed to elicit damaging information from protected classes of people, the court may find a discriminatory purpose inherent in

the voir dire. Failure to question the removed jurors is also suspicious. *See Whitsey*, 796 S.W.2d at 717.

B. Historical Evidence.

Batson findings are largely dependent upon the credibility of the attorneys. Thus, a prosecutor's or defense attorney's behavior in past cases may help establish an inference of discrimination. *Morris*, 940 S.W.2d at 612.

C. Nature of the Crime.

Certain types of crimes may have racial or gender-based overtones. For example, attorneys in domestic violence cases may prefer jurors of one gender over another. *See, e.g., Guzman*, 20 S.W.3d at 242. Racially-motivated hate crimes might raise issues of discrimination.

D. Quantitative Guidelines

The racial or gender composition of the petit jury may raise an inference of discrimination, particularly where it is significantly different from the composition of the venire panel. *Cook*, 858 S.W.2d at 472 (finding a prima facie case where strikes exercised against a "disproportionate number" of minority veniremembers); *Linscomb*, 829 S.W.2d at 166 (holding that a "suspiciously high rate" of removal establishes a prima facie case pattern of challenges).

But notice that the State's acceptance of other jurors of the same race may support an inference *against* discrimination. *Estrada*, 945 S.W.2d at 273.

IV. WHAT FALLS SHORT OF ESTABLISHING A PRIMA FACIE CASE?

An opponent's blanket statement that the party struck a member of an identifiable racial group, without evidence or inference of racial motivation, is insufficient to establish a prima facie case. *Coggeshall*, 961 S.W.2d at 645 (citing *Staley*, 887 S.W.2d at 890-891). The *Emerson* opinion discusses at length the type of comparative analysis sufficient to establish a prima facie case. *See Emerson*, 851 S.W.2d at 270-71.

A defendant who cites only numbers and statistics may fail to make a prima facie case. *See Anderson*, 227 F.3d at 901; *Luckett*, 203 F.3d at 1054; *Collado*, 157 F.Supp.2d at 233. It is also necessary to introduce facts supporting the inference of discrimination. TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon 1989); *see also Central Alabama*, 236 F.3d at 634; *Brown*, 237 F.3d at 563 (finding that opponent failed to establish a

prima facie case by merely alleging that party struck four white jurors where 75% of the original jury pool was white).

Practical tip: Don't forget to deny that the opponent has established a prima facie case, if appropriate. But be aware that this is a risky maneuver. If you take that position, you must stand. You cannot continue to defend the motivations behind your strikes. Once you begin to introduce reasons for the strikes into the record - even after voir dire is over - you have waived the argument that the opponent failed to establish a prima facie case. *Malone*, 919 S.W.2d at 412.

Advanced tip: Be aware that after the appeals process is over, the defendant may still file for habeas corpus relief in Federal court on his Batson claim. Some Federal courts will analyze the issue of whether a prima facie case was established, despite the fact that the prosecutor gave reasons for the strike. *See, e.g., Copperwood*, 245 F.3d at 1047-48. Courts also review the reasons for a strike, regardless of the trial court's ruling, because habeas involves a *de novo* review. *See, e.g., Riley*, 277 F.3d at 278-87; *McClain,* 217 F.3d at 1220-24. For long-term planning, it is usually better to give race and gender-neutral reasons for peremptory strikes.

V. WHAT REBUTS A PRIMA FACIE CASE?

The second step of a Batson analysis is rebuttal of the opponent's prima facie case. *Mathis*, 67 S.W.3d at 924. Once a prima facie case is made, the burden of production shifts to the respondent to produce a race-neutral reason for challenging that is "clear and reasonably specific" and related to the case. *Purkett*, 514 U.S. at 766-67.

At this stage of the proceedings, **the only question is whether the explanation offered by the respondent is facially race or gender-neutral.** A respondent's explanation need not be persuasive or even plausible. It may be superstitious or silly. It need only be facially race-neutral. *Purkett*, 514 U.S. at 767-68.

A. The Explanation Must Be Specific

Purkett v. Elem is less stringent than some of the earlier cases. "Clear, specific, legitimate reason" only means a reason that does not deny equal protection. The reason need not make sense. *Purkett*, 514 U.S. at 769.

B. Facially Valid Explanation

An explanation is deemed race-neutral so long as there was no discriminatory intent inherent in the explanation, even if it was fantastic or implausible. *Ramirez*, 976 S.W.2d

at 225; *Carter,* 946 S.W.2d at 511. But be aware that a fantastic explanation will invite greater scrutiny by the court.

C. Not a General Denial of Discriminatory Intent

A blanket denial of discriminatory intent will be insufficient to rebut a prima facie case. *Emerson,* 851 S.W.2d at 272. For example, "I didn't like the way he looked" is not specific enough. "I didn't like the way he looked because he had unkempt hair and wore both a mustache and a goatee," however, is likely to be valid. *See Mandujano*, 966 S.W.2d at 821.

D. Explanations Based on Mistake or Misunderstanding of Juror Responses

A prosecutor's strike may be race-neutral, despite the fact that it was based upon a mistaken idea. *Harris,* 996 S.W.2d at 235; *see also Robbins*, 27 S.W.3d at 249 (finding that prosecutor's unfounded assumption that juror's counselor husband worked with wayward youth did not establish insincerity or racial discrimination).

E. Dual Motivation Analysis

What if the respondent strikes a venire member because he is a "single male with no children"? This shows a dual motivation: part of the motive for striking is permissible (single, no children) and part of the motive is not (male).

Dual motivation is an affirmative defense to a strike that was partially due to an improper purpose. *Gattis*, 278 F.3d at 233. The Federal test for dual motivation is that the respondent must prove by a preponderance of the evidence that he would have stricken that juror in any event, regardless of the racial or gender implications. *U.S. v. Tokars*, 95 F.3d at 1533. **Texas has just adopted the Federal test.** *Guzman v. State*, No. 1101-00 (Tex. Crim. App. May 22, 2002).

In the past, dual motivation for a strike was reversible error in Texas. *See, e.g., Fritz*, 946 S.W.2d at 844 (prosecutor struck all males under age thirty); *Guzman*, 20 S.W.3d at 242 (prosecutor struck a single male with no children who slept during voir dire); *Sparks*, 68 S.W.3d at 11-12 (prosecutor struck all males under age thirty).

This year, however, the Court of Criminal Appeals changed the way dual motivation strikes are analyzed on review. If one of the reasons for a peremptory strike was race or gender, the respondent must show, by a preponderance of the evidence, that the action would have been taken regardless of the non-neutral purpose. *Guzman*, slip. op. at 18 n. 47.

In other words, using the above example of striking a single male with no children, the attorney must be able to demonstrate by a preponderance of the evidence that he would have exercised the same strike merely because the juror was single with no children.

Note, however, that *Guzman* only applies to criminal proceedings. The Texas Supreme Court opinion of *Powers v. Palacios* still governs civil cases. *Powers* holds that a strike motivated in part by race or gender violates equal protection. *See Guzman*, slip op. at 5; *Powers*, 813 S.W.2d at 491.

VII. WHAT MUST THE TRIAL COURT DECIDE? PRETEXT.

Once the State has presented a race-neutral reason for the challenged strike, the burden shifts back to the defendant to persuade the trial court that the State's explanation was really a pretext for discrimination. This is the third step of the Batson analysis. *Mathis*, 67 S.W.3d at 924.

The burden of *production* shifts from the defendant to the State once a prima facie case is made, but the burden of *persuasion* never shifts from the defendant. TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon 1989); *see Purkett*, 514 U.S. at 767-768; *Ford*, 1 S.W.3d at 693.

General rule: There is no evidence of pretext or sham when, after the prosecutor provides a race-neutral explanation, the defense does not respond to the assertions, cross-examine or impeach the prosecutor, or provide other controverting evidence; thus, the appellate court will not overturn the trial court's Batson ruling in the absence of controverting evidence. *See Ford*, 1 S.W.3d at 693-694; *Victor*, 995 S.W.2d at 222; *Magee*, 994 S.W.2d at 889-890; *Yarborough*, 983 S.W.2d at 357.

The opponent of a strike is entitled to an opportunity to cross examine the respondent and introduce relevant evidence. *See Jordan*, 206 F.3d at 200; *Goode*, 943 S.W.2d at 452; *see also Riley*, 277 F.3d at 277 (defense attorney called the juror himself as a rebuttal witness). Failure to offer any rebuttal evidence can be fatal to a Batson challenge. *Johnson*, 68 S.W.3d at 649.

A mere statement that defense counsel disagrees with the State's explanation is not sufficient to overcome a race-neutral reason. *See Lopez*, 954 S.W.2d at 776; *Ramirez*, 976 S.W.2d at 225; *Johnson*, 959 S.W.2d at 290; *Bridges*, 909 S.W.2d at 156. Likewise, an opponent's showing that an explanation was incorrect, by itself, is insufficient to prove that it was a racially motivated pretext. *Johnson*, 68 S.W.3d at 649; *Ford*, 1 S.W.3d at 694. *Chiles*, 57 S.W.3d at 517. There is no pretext or sham where the striking party made an honest mistake in recollection of voir dire. *Hughes*, 962 S.W.2d at 694.

VIII. WHAT MUST BE TENDERED INTO THE RECORD?

Be sure to tender explanations regarding *every* challenged juror. Overlooking a juror can cause a case to be reversed for failure to meet the burden of producing race-neutral reasons for each challenged strike. *See Wright*, 832 S.W.2d at 604-05; *Brooks*, 802 S.W.2d at 695; *see also Galarza*, 252 F.3d at 639-41 (reversing conviction because trial court omitted some jurors and failed to issue rulings on each one); *Hutchinson*, 42 S.W.3d at 341-42 (currently under review to determine whether the prosecutor can have a second chance to state his explanations).

A prosecutor must tender voir dire notes to the defendant if they were used to refresh his or her memory on the stand during the Batson hearing. TEX. R. EVID. 611; *Franklin*, 986 S.W.2d at 355.

Prosecutorial notes have been used to substantiate the prosecutor's impartiality where the notes did not reflect the races of the individuals. *Matthews*, 979 S.W.2d at 721. Conversely, notations of race in a prosecutor's notes may be strong evidence of racial consideration. *Emerson*, 851 S.W.2d at 272; *Whitsey*, 796 S.W.2d at 714-15.

The lawyers need not be sworn in as witnesses; unsworn statements of counsel are sufficient evidence. *Yarborough*, 947 S.W.2d at 895; *White*, 982 S.W.2d at 645.

Findings of fact and conclusions of law are highly recommended. Please encourage the judge to enter them into the record. *Yarborough*, 947 S.W.2d at 901 (Mansfield, J., concurring); *Hutchinson*, 42 S.W.3d at 339.

IX. WHAT IS NOT GOVERNED BY BATSON?

It is important to remember the distinction between peremptory strikes and challenges for cause.

A. Peremptory Challenge (Strike) vs. Challenge for Cause

Batson deals solely with peremptory strikes. *See DeBlanc*, 732 S.W.2d at 641. Challenges for cause or by agreement do not invoke the limitations of Batson. *Staley*, 887 S.W.2d at 891 n.4.

The State's ability to challenge jurors for cause is broader than the defendant's. The State may challenge jurors who are biased either for or against the defendant, because its

interest is to ensure that justice is done. This requires procuring fair and impartial jurors. *Johnson*, 68 S.W.3d at 649-50. Likewise, the State's ability to exercise peremptory strikes is broad, allowing the prosecutor to remove jurors who are unfavorable to the defendant. *Johnson*, 68 S.W.3d at 650.

B. Reasons for Peremptory Strikes vs. Challenges for Cause

The reasons a juror may be challenged for cause are listed in article 35.16. They include major substantive reasons such as severe physical incapacity, prior convictions, insanity, bias against the law, relation to the defendant or the victim, conflict of interest, and illiteracy. *See* TEX. CODE CRIM. PROC. ANN. art. 35.16 (Vernon 1989 and Vernon Supp. 2002).

Peremptory challenges, on the other hand, may be exercised for far less important reasons. For Batson purposes, **an explanation of a strike need not rise to the level of a challenge for cause**. *Batson*, 46 U.S. at 97; *U.S. v. Miller-El*, 261 F.3d at 451; *Tate*, 939 S.W.2d at 746-747.

C. Failure to Use Peremptory Strikes.

Batson does not apply to failure to use strikes. *Williams*, 834 S.W.2d at 508. Thus, an opponent cannot complain that a party reserved some of his strikes to exclude a venire member who was seated near the end of the strike zone.

HOW

X. HOW MIGHT AN OPPONENT DEMONSTRATE PRETEXT?

The trial court may consider these factors in determining whether an explanation is pretextual: (1) explanations not related to the facts of the case; (2) a lack of meaningful questioning of the challenged juror; (3) disparate treatment; (4) disparate examination of veniremembers; and (5) an explanation based on a group bias where the trait is not shown to apply to the challenged juror specifically. Any one of these factors may tend to show an impermissible pretext, but they are not dispositive. *See Brumfield,* 63 S.W.3d at 917 *Contreras*, 56 S.W.3d at 278-79.

A. Illogical and Subjective Explanations

Subjective explanations can expect more scrutiny. *See Purkett*, 514 U.S. at 768.

Courts recognize that "the [voir dire] process falls somewhere between science and superstition and it is a rare jury which is selected without the influence of the lawyers' highly personalized notions of good and bad luck, their 'seat of the pants' psychological insights, and their favorable and unfavorable anecdotal experiences. Not every strike based on such explanation can be summarily disbelieved; they simply merit closer scrutiny." *Branch*, 774 S.W.2d at 782-83.

Yet "bad vibration" type explanations are the most ripe for abuse and subterfuge. *Branch*, 774 S.W.2d at 782. Therefore, the more jurors who have been removed for subjective reasons, the more skeptical the court will be. *Branch*, 774 S.W.2d at 783.

B. Disproportionate Impact on Minorities

Even a facially race or gender-neutral explanation can be a pretext for discrimination if that reason applies to a particular race or gender most of the time.

For example, a juror's area of residence may be a proxy for race, particularly if it is not connected to the facts of the case. *U.S. v. Wynn*, 20 F.Supp.2d at 15. One may expect scrutiny if he or she strikes a juror based upon where they live and the neighborhood is predominantly populated by a particular race.

C. Disparate Treatment and Questioning

According to Webster's Dictionary, "disparate" means "one of two or more things so unequal or unlike that they cannot be compared with each other."

Factors that might indicate disparate treatment include: (1) failing to question any of the minority venirepersons, yet striking them anyway; (2) striking minority venirepersons who gave answers similar to those of majority venirepersons who were not struck; or (3) striking minority venirepersons who had the same characteristics professionally, socially, religiously, etc. as majority venirepersons who were not struck. *Chiles*, 57 S.W.3d at 517.

A recent example appears in *Brown v. Kinney*. A party struck an African American juror because he "had been in a lawsuit and would be hostile." But that party did not challenge two other white jurors who had also been parties to litigation. The court upheld the opponent's Batson challenge on the basis of disparate treatment. *Brown*, 237 F.3d at 563.

Disparate treatment is not automatically imputed in every situation. *Pondexter*, 942 S.W.2d at 582; *Cantu*, 842 S.W.2d at 689. For example, if the ethnicity or gender of the

remaining jurors is not in the record, an opponent cannot show disparate treatment. *See Contreras*, 56 S.W.3d at 280.

General rule: When more than one race-neutral reason is offered for striking a person, the reasons are reviewed together, in their entirety, considering the interaction of those characteristics. *See Harris*, 996 S.W.2d at 235; *Whitaker*, 977 S.W.2d at 876; *Ealoms*, 983 S.W.2d at 857.

It is not disparate treatment merely because the same explanation might apply to others; rarely do different individuals possess the same characteristic in the same degree. *Harris*, 996 S.W.2d at 236. This is particularly true where a juror is stricken for a combination of several permissible reasons. *See Hicks,* 186 F.3d at 637 (finding that stricken juror was "not similarly situated" to other jurors who were not stricken because none of the others possessed the same combination of negative qualities that this particular juror had).

Disparate *questioning* occurs where the explanation for the strike has nothing to do with the questions asked of that particular juror. It may also occur where a party asks certain questions, designed to elicit damaging information, of minorities but not to other jurors.

The Fifth Circuit recently found it to be a "close issue" where the prosecutor struck an African American juror because she lacked intelligence, but the record showed she was employed at a university, she had previously served as a juror, and the only question that the prosecutor asked her was whether she had children. *U.S. v. Montgomery*, 210 F.3d at 453-54.

Conversely, bear in mind that although lack of questioning may expose weakness in the State's explanation, the State is not required to ask any specific questions. *Whitaker*, 977 S.W.2d at 876.

D. Group Bias

One particular facet of disparate treatment is raised when an attorney imputes a characteristic to a juror because the juror is a member of some group. The problem arises when the attorney fails to question the person or otherwise prove that the trait applies to that individual juror.

General rule: An explanation based on group bias tends to show pretext where the group trait is not shown to apply to the challenged juror specifically. *Emerson*, 851 S.W.2d at 273-74 (discussing group bias analysis). *See, e.g., Leahy*, 17 F.Supp.2d at 995-97 (although prosecutor struck a Native American juror because those who are employed by the tribe are "sometimes resistive of the criminal justice system," and they are more

prone to associate themselves with tribal culture than mainstream society, he failed to show that this juror had either of those traits and the conviction was reversed).

If a party strikes a juror based upon that juror's membership in some group, he must show that the objectionable group trait applies to that particular juror. *See, e.g., Robbins*, 27 S.W.3d at 249 (group bias analysis invoked because the prosecutor struck a youth counselor's wife, assuming that she would also be sympathetic to young defendants, but he could not prove it).

XI. How Might A Respondent Demonstrate Valid Reasons for Strikes?

The respondent demonstrates valid peremptory strikes by giving reasons which are motivated by anything other than race, ethnicity, or gender. The following are all examples of explanations that have been held to be facially race or gender-neutral:

A. Appearance

Male "had a 1970s hairdo." *Contreras*, 59 S.W.3d at 363.

Male wearing earrings in both ears. *Lee*, 949 S.W.2d at 850; *Bryant*, 923 S.W.2d at 209.

Grooming. *U.S. v. Jones*, 245 F.3d at 993.

Long, unkempt hair and a goatee. *Purkett*, 514 U.S. at 769; *Lee*, 949 S.W.2d at 851.

Sunglasses. *Alexander*, 866 S.W.2d at 8-9.

Wearing a T-shirt. *Hernandez*, 808 S.W.2d at 544. Or sweatshirt. *Latimore*, 994 F.Supp. at 64.

"Bad Boys Club" jacket, pink hat, and snakeskin belt are all race-neutral reasons. *Ealoms*, 983 S.W.2d at 856.

Nose ring. *Whitaker*, 977 S.W.2d at 876.

Two jurors were obese, which prosecutor felt was equivalent to being lenient on punishment. *Walker*, 859 S.W.2d at 568.

Juror a very pretty girl, who might be attracted to the defendant or defense counsel. *Hernandez*, 808 S.W.2d at 543.

Wore a "Malcolm X" hat. The prosecutor explained the strike hinged on the militant, anti-government aspect of Malcolm X's philosophy. *U.S. v. Hinton*, 94 F.3d at 396.

B. Intelligence and Educational Background

Difficulty with the English language is a race-neutral reason. *U.S. v. Murillo*, 288 F.3d at 1136; *U.S. v. Taylor*, 92 F.3d at 1330.

Juror lacked the necessary intelligence to sit on a circumstantial evidence case. *U.S. v. Montgomery*, 210 F.3d at 453.

Panel member who misspelled his religious preference, didn't understand the questionnaire, and had less-than-average intelligence, perhaps mentally disabled, was stricken for a race-neutral reason. *Yarborough*, 983 S.W.2d at 356.

Juror claimed to be illiterate and had seventh-grade education. *Marx*, 953 S.W.2d at 332.

Juror had trouble understanding the law, especially as it related to the insanity defense. *Chiles,* 57 SW.3d at 515.

Juror left his papers in the courtroom during lunch break and put illogical answers on the juror questionnaire. *Mandujano*, 966 S.W.2d at 819-820.

Jurors were confused about concept of beyond a reasonable doubt or had other communication problems. *Williams*, 939 S.W.2d at 706; *Atkins*, 919 S.W.2d at 776.

Juror didn't show up and was escorted to court by the deputy sheriff 1 to 2 hours later. *Adanadus*, 947 F.Supp. at1071.

Juror had prior legal training, including criminal pre-law courses, and had taken the LSAT. *U.S. v. Feemster*, 98 F.3d at 1091.

C. Employment or Lack Thereof

Lack of employment is a race-neutral reason. *Ealoms*, 983 S.W.2d at 856; *Hernandez*, 808 S.W.2d at 542.

Short employment history, or "she just barely got a job." *Carson*, 986 S.W.2d at 26; *Dennis*, 925 S.W.2d at 39.

Juror changed jobs frequently. *Branch*, 774 S.W.2d at 783.

Prosecutor unfamiliar with juror's occupation, a race-neutral reason. *Harris*, 996 S.W.2d at 235.

Concerns about reasons why juror left last place of employment. *Goode*, 943 S.W.2d at 447.

Juror worked in a casino. *U.S. v. Murillo*, 288 F.3d at 1135.

"Mechanics aren't very honest." *Brown*, 56 S.W.3d at 917.

Employed as a social worker. *Yarborough*, 983 S.W.2d at 356. Guidance counselor. *U.S. v. Davis*, 154 F.3d at 781-82.

Employed at a labor union. *Brumfield*, 63 S.W.3d at 916.

Juror a teacher of disabled persons, working where drug problems were common. *U.S. v. Parsee*, 178 F.3d at 378.

Concerns about work might distract the juror and cause inattentiveness. *U.S. v. Castorena Jaime*, 285 F.3d at 928.

Postal workers. *Williams v. Groose*, 77 F.3d at 261.

Educators or teachers. *Williams*, 939 S.W.2d at 706. Teachers are often perceived as being sympathetic to defendants. *U.S. v. Brown*, 289 F.3d 989 at ___.

Panel members in the medical field. *Carter*, 946 S.W.2d at 511.

Self-employed as a sculptor and welder. *Lee*, 949 S.W.2d at 850.

Psychologist. *Pondexter*, 942 S.W.2d at 581.

Juror a courthouse employee who had a prior altercation with prosecutor. *Hudson*, 956 S.W.2d at 105.

City auditor in an expense voucher fraud case. *U.S. v. Evans*, 980 F.Supp. at 951.

D. Behavior and Demeanor During Voir Dire

Body language. *McCurdy*, 240 F.3d at 520; *Blades*, 167 F.Supp.2d at 637.

Defense counsel asked who already thought the defendant was guilty and juror raised his hand and nodded his head animatedly. *Craig*, slip op. at 3,6.

Juror smiling at defendant. *U.S. v. Williams*, 264 F.3d at 571.

Chewing gum. *Ealoms*, 983 S.W.2d at 856.

Juror filed her fingernails. *Belton*, 900 S.W.2d at 897.

"Quiet spoken" and "meek" demeanor. *Magee*, 994 S.W.2d at 889.

Inattentive during voir dire. *Whitaker*, 977 S.W.2d at 876. Disinterested. *Holt*, 912 S.W.2d at 300.

Unresponsive to questions. *Kennerson*, 984 S.W.2d at 708.

Fell asleep. *Matthews*, 979 S.W.2d at 721.

The person did not wish to serve. *Williams*, 937 S.W.2d at 485.

Confusing and conflicting answers during voir dire. *Edwards*, 981 S.W.2d 366.

"Poor facial expressions" and "wouldn't meet my gaze." *Yarborough*, 983 S.W.2d at 355, 357. Juror looked at the defendant but not at the prosecutor. *U.S. v. Jones*, 224 F.3d at 625.

Juror seen communicating with people on the defense team. *Emerson*, 851 S.W.2d at 272.

Refused to answer questions. *Matthews*, 979 S.W.2d at 721.

Returned to court twelve minutes late. *Ingram*, 978 S.W.2d at 630.

Didn't speak, "didn't do anything . . . stared straight ahead." *Davis*, 964 S.W.2d at 355.

Very vocal, nodded in agreement when another juror needed more evidence to convict. *Davis*, 964 S.W.2d at 355. Nodded head, agreeing that defendant should receive more than the benefit of the doubt. *Tate*, 939 S.W.2d at 744.

Laughed out loud when asked a question about prosecutors. *Tate*, 939 S.W.2d at 747.

Seemed to be a loner; expressionless. Answered questions too quickly. *U.S. v. Collins*, 90 F.3d at 1430.

Looked "mad about being here." *U.S. v. James*, 113 F.3d at 729.

Juror trying to establish rapport with defense attorney, exhibited animosity toward prosecutor. *U.S. v. Webster*, 162 F.3d at 349.

Juror giving flirtatious looks to the defendant. *U.S. v. Fields*, 72 F.3d at 1206.

Juror obstinate and angrily defensive of his opinions. Attorney felt juror would be unable to cooperate with the other jurors. *Washington*, 90 F.3d at 954.

Attitude is race-neutral. *Ingram*, 978 S.W.2d at 630.

E. Criminal Background

General rule: Juror who has a criminal history is a race-neutral strike. This is particularly true if the juror denied having a criminal record. *See Harris*, 996 S.W.2d at 235; *Yarborough*, 983 S.W.2d at 355; *Hodge*, 940 S.W.2d at 319; *Bolden*, 923 S.W.2d at 734.

General rule: If a juror has relatives with a criminal history, particularly if for the same offense, it is a race-neutral reason. *See Ladd*, 3 S.W.3d at 563; *Yarborough*, 983 S.W.2d at 356; *Buhl*, 960 S.W.2d at 935 (where same prosecutor had prosecuted juror's husband in several criminal cases).

General rule: Kinship with a person who has had "trouble with the law" is a race-neutral reason. *See Whitaker*, 977 S.W.2d at 875; *Rhoades*, 934 S.W.2d at 124-125; *Ingram*, 978 S.W.2d at 630; *Dorsey*, 940 S.W.2d at 175.

Bad experience with police officers. *Davis*, 964 S.W.2d at 355; *Lee*, 949 S.W.2d at 851 (where juror chuckled when prosecutor asked another person whether they had any prior bad experiences with police).

Failed to disclose that she had been a witness to a violent crime. *Stubbs*, 189 F.3d at 1101. There are many cases holding that crime victims and their family members may hold resentments about the way their cases were handled; thus this is a race-neutral explanation. *See. e.g., Crider*, 153 F.Supp.2d at 218.

F. Religious Practices

No religious preference. *U.S. v. Jimenez*, 77 F.3d at 100.

Juror misspelled the name of his religion. *Barnes*, 855 S.W.2d at 174.

Participated in church activities, and therefore might be sympathetic to the defendant. *U.S. v. Hill*, 249 F.3d at 714.

Juror very involved with church and watches gospel television programs. *U.S. v. Stafford*, 136 F3d at 1113.

Juror's choice of reading material consisted solely of mystery and romance novels and the Bible; she distrusted newspapers. *U.S. v. Buchanan*, 213 F.3d at 309. Juror refused to watch television or read magazines, read only the Bible. *U.S. v. Morrow*, 177 F.3d at 294.

Juror was a rabbi and case was a fraud conspiracy in which defendants established a nonexistent Jewish seminary and collected federal funds. *U.S. v. Friesel*, 224 F.3d at 111-12.

G. Age

Youth is a race-neutral reason. *Hidalgo*, 206 F.3d at 1019; *Ealoms*, 983 S.W.2d at 856; *Lee*, 949 S.W.2d at 851.

Elderly is race-neutral. *U.S. v. Grimmond*, 137 F.3d at 834.

Striking everyone under a certain age. *Lopez*, 960 S.W.2d at 952 (struck everyone under 25); *Brown*, 960 S.W.2d at 269 (struck everyone under 30).

Juror close in age to the defendant. *Campbell*, 775 S.W.2d at 422.

Juror 32 years-old and unmarried with seven children. *Carson*, 986 S.W.3d at 26.

Juror was elderly and had trouble with the juror information card. *Harper*, 930 S.W.2d at 634.

Juror's children were the same age as the other party. *Montanez*, 33 F.Supp.2d at 108.

H. Bias Against a Law

Practical tip: Bias against an applicable law is sufficient reason to challenge a juror for cause pursuant to article 35.16. **Attempt to challenge such a juror for cause.** First, you reserve your peremptory strikes for other jurors. Moreover, even if the court denies the challenge for cause, your opponent will have great difficulty showing that a strike of that juror was racially-motivated. *See, e.g., U.S. v. Brown*, 289 F.3d 989 at ___.

Juror refused to nod his head in agreement when asked whether he could commit to follow the law. *Matthews*, 979 S.W.2d at 721.

Juror needed "proof beyond any doubt." *Mathis*, 67 S.W.3d at 924.

Attorney was concerned that juror "might violate his oath." *Ladd*, 3 S.W.3d at 562-63.

I. Lifestyle Concerns

Juror's friends smoked weed. *U.S. v. Novaton*, 271 F.3d at 1001.

Had never read a book and her favorite television show was Judge Judy. *U.S. v. Murillo*, 288 F.3d at 1135.

A health problem would interfere with the juror's ability to concentrate on the case or ability to sit still. *Pondexter*, 942 S.W.2d at 581; *Malone*, 939 S.W.2d at 784.

Concerns about child care could distract the juror. *Lamons*, 938 S.W.2d at 776-777; *Broden*, 923 S.W.2d at 186-187.

Single. Marital status. *U.S. v. Martinez*, 168 F.3d at 1047; *U.S. v. Thomas*, 943 F.Supp. at 697. Extended further, single mother of four is assumed to be on welfare and therefore also assumed to be a more plaintiff-minded juror. *Goode*, 943 SW.2d at 447.

J. Bias Based on Case-Specific Factors

Reasons for strike need not relate to the subject matter of the case. *Ealoms*, 983 S.W.2d at 857 (citing *Purkett*, 514 U.S. at 768-769); *Lee*, 949 S.W.2d at 851.

Juror only believed in assessing the death penalty in cases where the defendant requested it. *Mathis*, 67 S.W.3d at 924.

Unable to convict on the testimony of only one witness; "wishy-washy" on the one witness rule. *Tate*, 939 S.W.2d at 745-746; *Garrett*, 815 S.W.2d at 335-36.

Spanish-speaking jurors might interpret audio tapes differently than the transcripts introduced into evidence. *U.S. v. Munoz*, 15 F.3d at 398.

Did not think that eyewitness testimony was reliable. *Hughes*, 962 S.W.2d at 91.

Juror had a child about the same age as defendant. *Mathis*, 67 S.W.3d at 924.

Believed DNA new and unreliable; needs more than DNA to convict. *Harris*, 996 S.W.2d at 235-36.

Juror had been misidentified before and identity an issue in this case. *Kennerson*, 984 S.W.2d at 708.

Thought cops should not be able to pull a gun during a traffic stop. *Ealoms*, 983 S.W.2d at 856-857.

Defense counsel extensively questioned jurors on unreliability of confessions, in an attempt to get them to commit themselves not to consider defendant's statement. *Ramirez*, 976 S.W.2d at 226.

Vacillated on the kind of evidence needed to find defendant posed a future danger. *Rhoades*, 934 S.W.2d at 124-125.

Nodded in agreement when another panel member said they would need scientific evidence of intoxication in order to convict. *Davis*, 964 S.W.2d at 355.

Had a problem believing witnesses (co-defendants) who had made a deal with the State for their testimony. *Lopez*, 960 S.W.2d at 952.

Would have trouble believing the testimony of a prostitute, and had a poor opinion of people who are involved in narcotics. These were the State's witnesses. *Solomon*, 830 S.W.2d at 637.

Confused about the issue of a deadly weapon finding where no one was actually injured. *Tate*, 939 S.W.2d at 744.

K. Case-Specific Explanations with Disproportionate Impact

Even though a reason may disproportionately apply to one certain minority, the reason may still be valid if it is relevant enough to the facts of the case.

Juror's brother had been murdered and the case against the murderer had been dismissed. Prosecutor thought that juror would blame District Attorney for selectively prosecuting crimes based on race. *Holder*, 60 F.3d at 389.

Juror was an active member of NAACP. So was the defense attorney, who wore a NAACP lapel pin on his suit during trial. *Rice*, 746 S.W.2d at 358.

Juror had three bumper stickers on his vehicle which referred to the Confederate heritage and/or the Confederate flag. *U.S. v. Blanding,* 250 F.3d at 861.

L. Incomplete or Inaccurate Information

General rule: Incomplete juror information cards or juror questionnaires are race-neutral reasons. *See Magee*, 994 S.W.2d at 889; *Yarborough*, 983 S.W.2d at 355-356; *Roberts,* 963 S.W.2d at 899-900.

Likewise, failure to disclose a prior arrest on a juror questionnaire is a permissible reason for a strike. *Johnson*, 68 S.W.3d at 648.

M. Prior Jury Service

Previously served on hung jury. *Malone*, 939 S.W.2d at 784; *Webb*, 840 S.W.2d at 546; *Frierson*, 839 S.W.2d at 854; *Irvine*, 857 S.W.2d at 926.

Person had been on another jury recently. *U.S. v. Contreras-Contreras,* 83 F.3d at, 1104.

A low score on juror information cards, where race was unknown to person evaluating the cards, is race-neutral. *U.S. v. Gibbs,* 182 F.3d at 438; *Matthews*, 979 S.W.2d at 721.

Beware, however, of using information about prior jury service. Where defendant is denied the opportunity to question the person who actually ranked the juror (i.e. the prosecutor from the prior trial) to determine whether the rating was based on race, it may be reversible error. It is the *original* prosecutor's credibility that is at issue. *Bausley*, 997 S.W.2d at 317-318; *Lopez*, 940 S.W.2d at 390-91. But see *Reddicks*, 10 S.W.3d at 363-65 (holding that although a prior jury rating is a facially valid reason, the court of appeals expressly dislikes the practice because of its possibility for misuse).

N. Community Ties or Lack Thereof

General rule: Juror acquainted with defendant or defendant's family a race-neutral reason. *See Yarborough*, 983 S.W.2d at 354; *Matthews*, 979 S.W.2d at 721; *Burns*, 958 S.W.2d at 485-86; *Roberts*, 963 S.W.2d at 899 (where juror was familiar with the defendant from the music business); *Buhl*, 960 S.W.2d at 935 (juror went to church with defendant's mother).

Lack of community ties or isolation is a permissible reason for a strike. *U.S. v. Jones*, 224 F.3d at 624 (juror unemployed and had no community activity outside the home); *U.S. v. Feemster*, 98 F.3d at 1091; *U.S. v. Atkins*, 25 F.3d at 1406; *Lee*, 949 S.W.2d at 850 (finding juror's self-employment removed him too far from society); *Hernandez*, 808 S.W.2d at 542.

Juror knew a witness in the case. *Ramirez*, 976 S.W.2d at 226.

Juror lived in defendant's voting district. *U.S. v. Williams*, 264 F.3d at 571.

Juror lived and worked in same suburb, which was known for drug activity, he might know some of the witnesses by sight if not by name, a police officer said a family with the same name in that suburb was notorious for drug dealing, and the prosecutor had no time to verify this information. *U.S. v. Williams*, 272 F.3d at 861.

Offense occurred in juror's neighborhood and juror might know some of the witnesses. *Williams*, 937 S.W.2d at 485. Juror familiar with the vicinity of the crime. *U.S. v. Jones*, 245 F.3d at 992.

Juror patrionized the defendant's car wash and knew some of the potential witnesses. *U.S. v. Mathis*, 96 F.3d at 1582.

O. Philosophical Concerns

General rule: Juror in favor of rehabilitation as primary goal of criminal justice system a race-neutral reason. *See Harris*, 996 S.W.2d at 235; *Victor*, 995 S.W.2d at 222; *Roberts*, 963 S.W.2d at 899-900; *Umoja*, 965 S.W.2d at 9 (holding general rule applies even when the judge will set punishment).

General rule: Juror with reservations about imposing the death penalty is a race-neutral reason. *Fuentes*, 991 S.W.2d at 278; *Pondexter*, 942 S.W.2d at 581; *Williams*, 937 S.W.2d at 485; *Lee*, 949 S.W.2d at 851; *Rhoades*, 934 S.W.2d at 124-125; *see also Morris*, 940 S.W.2d at 612 (could not assess the death penalty against a young defendant).

Juror harbored a resentment against police officers. *Johnson*, 68 S.W.3d at 648-49.

Juror concerned about innocent people being wrongly convicted. *Chamberlain*, 998 S.W.2d at 236.

Juror felt he could not play the role of God. *Jasper*, 61 S.W.3d at 422.

Equivocation on imposing life sentence. *Kennerson*, 984 S.W.2d at 707-08.

In favor of the O. J. Simpson verdict. *Harris*, 996 S.W.2d at 236. Negative feelings about the government stemming from the O. J. case. *Williams*, 939 S.W.2d at 707.

Responded affirmatively to question, "Has anyone ever been falsely accused?" *Whitaker*, 977 S.W.2d at 876; *Spears*, 902 S.W.2d at 519-22.

Would hold defendants from a certain socioeconomic background to a different standard of behavior. *Johnson*, 959 S.W.2d at 291.

Juror is "liberal," and this is supported by the record. *Cuestas*, 933 S.W.2d at 733.

Juror a consumer advocate, like Ralph Nader, and believes one should be allowed to carry a firearm in order to solve problems peacefully. *Ceasar*, 939 S.W.2d at 781.

Thought the government filed charges against defendant because of the defendant's race. *U.S. v. Perkins*, 105 F.3d at 978.

Juror uncomfortable about sitting on a panel. Court held this was not a good reason, but it was race-neutral. *U.S. v. Ladell*, 127 F.3d at 625.

XII. How Do I Give a Good Response to a Batson Challenge?

You should aspire to put as much information into the record as possible. See Exhibit A for an example of a very complete response. It includes these helpful features:

(1) Systematically addresses each challenged juror in order so that there are no overlooked jurors;

(2) Takes every reason applied to each challenged juror and identifies the other panel members who had that same problem. The reasons applied to jurors of all races. Thus, the reasons were patently race-neutral;

(3) Notes that all of those other panel members with the same problem were also removed and accounts for the method of removal of each juror. Thus, there was no disparate treatment;

(4) Gives multiple reasons for the same juror where appropriate. This is helpful because all reasons must be tendered at this hearing or they are waived. Furthermore, a multiple reason may save a case under a dual motivation theory; and

(5) Dictates into the record all of the appropriate statistical data:
How many veniremen in the panel,
How many were African American,
How many African Americans were within strike range,
How many strikes were used by the prosecutor,
How many strikes were used upon African Americans, and
How many African Americans were struck by agreement.

WHEN

XIII. WHEN MUST AN OPPONENT RAISE A BATSON CHALLENGE?

General rule: A Batson claim must be raised before the jury is seated and sworn. Otherwise, it is waived. *Saldivar*, 980 S.W.2d at 483; *see also Chambers*, 197 F.3d at 735 (defendant waited until after the venire was dismissed to raise a challenge).

Even if the jury is not yet sworn, a Batson objection may be forfeited as untimely. *See Weeks*, 273 F.3d at 90 (claim waived where attorney waited until the venire was dismissed, court heard pretrial motions, parties took a lunch break, and court reconvened).

Additionally, the respondent must tender any explanations at the Batson hearing. Race or gender-neutral reasons for a strike cannot be raised for the first time on appeal. *See, e.g., Brown*, 856 S.W.2d at 176.

For post-conviction purposes, the defense of laches may apply. A defendant waited until thirteen years after trial to reassert a Batson claim in a writ. By this time, the prosecutor could not remember his reasons for the strike and all notes had been destroyed. The court found that the State's ability to defend itself was compromised by the defendant's delay and overruled the Batson challenge on the basis of laches. *Chambers*, 197 at 735-36.

XIV. WHEN DOES A PRIMA FACIE CASE FINDING BECOME MOOT?

General rule: Once the prosecutor begins offering explanations, the issue of whether the defendant established a prima facie case becomes moot. The State has waived any opposition to the prima facie Batson challenge. *See Chamberlain*, 998 S.W.2d at 236; *Mandujano*, 966 S.W.2d at 819, *Roberts*, 963 S.W.2d at 899.

Even if the prosecutor waits until after the case and tenders his explanations in a bill of exceptions, the question of a prima facie case is rendered moot. *See Malone*, 919 S.W.2d at 412; *see also Coggeshall*, 961 S.W.2d at 645 (where prosecutor stuck with his position that no prima facie case had been established, did not offer any further explanation, and the court of appeals agreed).

WHO

XV. WHO BENEFITS?

A Batson challenge is an Equal Protection claim *intended to benefit venire panel members* from discrimination due to race, ethnicity, or sex. *Powers v. Ohio*, 499 U.S. at 406-08 (stating that jury service "affords ordinary citizens a valuable opportunity to participate in a process of government" and holding an individual has the right not to be excluded from a jury panel on account of race); *see also* U.S. CONST., amend. XIV.

XVI. WHO HAS STANDING TO RAISE A BATSON CLAIM?

A. Either Party

One need not be a member of the same race or gender to assert a Batson claim. *Powers*, 499 U.S. 415; *Tankleff*, 135 F.3d 248; *Held*, 948 S.W.2d at 50.

B. Prosecutors

Batson can be an important weapon for the prosecutor. The U.S. Supreme Court has ruled that defendants are also bound by Batson. *Georgia v. McCollum*, 505 U.S. at 59. Some examples of State Batson challenges follow:

Prosecutor successfully used Batson against defendant in sexual assault cases who struck all of the women from the panel. *Garza*, 10 S.W.3d at 768.

Government successfully challenged a defendant in a sexual harassment case who struck women from the jury panel. *Montanez*, 33 F.Supp.2d at 107.

Prosecutors have successfully challenged African American defendants for striking Anglos from the jury. *U.S. v. Blotcher*, 142 F.3d at 729; *U.S. v. Wynn*, 20 F.Supp.2d at 12; *U.S. v. Taylor*, 92 F.3d at 1320-21.

Government successfully challenged a white defendant, who was charged with a racial hate crime, for striking the only African American on the panel. *U.S. v. Mahan*, 190 F.3d at 424-25.

Prosecutor challenged African American defendant who struck six Anglo jurors. Defense counsel said, "Judge, we have predominantly Caucasian and we have no chance." Although counsel's desire for racial diversity was admirable, the case was reversed. *U.S. v. Allen-Brown*, 243 F.3d at 1295-98; *see also Eagle*, 279 F.3d at 941 (case reversed because both parties were "doing what they could to get the different races off the jury").

XVII. WHO DECIDES?

The trial judge, a human being. A Batson ruling can be very subjective; it is largely based on the judge's assessment of each attorney's overall credibility. Because the trial court's decision turns largely on an evaluation of credibility, it is given great deference by appellate courts. *Ladd*, 3 S.W3d at 563.

General rule: A Batson ruling is essentially a determination of the prosecutor's credibility. *Yarborough,* 983 S.W.2d 358. The trial court may consider its past experience with the prosecutor in determining credibility. *Morris*, 940 S.W.2d at 612.

"The ultimate inquiry for the judge is not whether counsel's reason is suspect, or weak, or irrational, but whether counsel is telling the truth in asserting that the challenge is not race-based." *U.S. v. Montgomery*, 210 F.3d at 453.

XVIII. WHO ELSE IS AFFECTED? EXTENSION OF BATSON BEYOND RACIAL GROUPS AND GENDER.

Litigants have attempted to obtain protected class status for a number of other types of individuals. The following attempts have been unsuccessful:

A. Religion

Batson does not apply to religious beliefs in Texas case law. *Ramos*, 934 S.W.2d at 368; *Goff*, 931 S.W.2d at 552.

Additionally, the Fifth Circuit has refused to acknowledge the application of Batson to religion as controlling law or to extend Batson to religious classifications. *Fisher*, 169 F.3d at 305-06; *see also U.S. v. Friesel*, 224 F.3d at 120 (refusing to rule on the question of religion as a protected class).

But note that a court in New York held that Batson protects Jewish persons, both on the basis of race and of religion. Demonstrating that the jurors were, in fact, Jewish proved to be tricky in some instances. *U.S. v. Somerstein*, 959 F.Supp. at 598. There is also some dicta in a recent Court of Criminal Appeals opinion that refers to the possible categorization of "Jewish" as a race or ethnicity. *Wamget*, 67 S.W.3d at 855-56.

B. Age

Age is not a protected class. *See Carson* 986 S.W.2d at 26; *Ealoms*, 983 S.W.2d at 856.

C. Other Attempted Classifications

Physically disabled persons do not comprise a protected class under Batson. *U.S. v. Harris*, 197 F.3d at 875-76.

Homosexuality is not a protected class. *Johnson*, 92 F.3d at 953-54.

Recent attempts to make a prima facie case of discrimination against Italian Americans have failed. *U.S. v. Marino*, 277 F.3d at 23; *Collado,* 157 F.Supp.2d at 233.

WHY

XIX. WHY BOTHER? REMEDIES.

The type of remedy resulting from a successful Batson challenge may have dramatic impact on the case. The first issue to determine is whether the opponent challenged the strikes under a Constitutional theory or under article 35.261.

A. Constitutional Claims.

If Batson complaint is a Fourteenth Amendment claim, the trial court may fashion an appropriate remedy. *Roberts*, 978 S.W.2d at 583. This is quite a broad statement and it lends itself to judicial creativity.

One court placed two jurors back into the venire panel and gave the striking party two additional peremptory challenges. *U.S. v. Ramirez-Martinez*, 273 F.3d at 910. For Constitutional purposes, reinstatement of the improperly-excluded individuals to the jury panel, rather than replacing the entire array, is an acceptable remedy. *Garza*, 10 S.W.3d at 770 (citing *Curry*, 885 S.W.2d at 424-25); *Roberts*, 978 S.W.2d at 583.

Another court, however, exceeded the bounds of good sense. When one Anglo was dismissed from the empaneled jury due to illness, the judge *sua sponte* removed a second Anglo from the jury. Then he took two alternate jurors out of order, one African American and one Jewish, and placed them onto the jury. The appellate court found that this remedy was "unquestionably highly improper" and reversed. *U.S. v. Nelson*, 277 F.3d at 207-13.

B. Statutory Claims.

If it is a claim under article 35.261 in a non-capital case, there is one sole remedy. The trial court can only call a new jury panel. *Roberts*, 978 S.W.2d at 583.

A party must specifically invoke the provisions of article 35.261 at trial. Otherwise, the claim is waived and the court will only review the Batson challenge for a Constitutional violation. *Lamons*, 938 S.W.2d at 779 (citing *Camacho*, 864 S.W.2d at 527-28).

C. Capital Cases.

In capital cases, the trial court can simply dismiss the mini-panel involved, rather than the entire venire. *Roberts*, 978 S.W.2d at 583.

XX. WHY IS IT IMPORTANT? APPELLATE REVIEW OF BATSON CLAIMS.

Appellate courts look to three major issues in reviewing Batson claims: (1) whether the parties preserved the claim or waived it, (2) whether the trial court's ruling was clearly erroneous based on the information provided by the attorneys, and (3) whether the opponent was harmed by any Batson error.

A. Procedural Default

The prosecutor must state the race-neutral explanations at the Batson hearing. The appellate court will not consider explanations offered for the first time on appeal. *See Greer*, 264 F.3d at 681; *Kennerson*, 984 S.W.2d at 708.

Likewise, the appellate court will not consider additional defense arguments which were not raised at trial. *Roberts*, 963 S.W.2d at 904; *see also Flores*, 33 S.W.3d at 926 (holding that the defendant waived appellate review of his entire claim by failing to cross examine the prosecutor during the rebuttal stage).

An appellate court cannot analyze the claim if the opponent does not place statistics into the record, such as the racial composition of entire panel, racial composition of jury, races of those challenged for cause, and races of those peremptorily stricken. *Hatchett*, 930 S.W.2d at 847.

B. Standards of Review

The trial court's decision will not be reversed unless it was clearly erroneous. *See Ladd*, 3 S.W.3d at 563; *Chamberlain*, 998 S.W.2d at 236; *Fuentes*, 991 S.W.2d at 278.

The trial court's decision is reviewed in the light most favorable to its ruling. An appellate court must be left with a "definite and firm conviction that a mistake has been committed." *Mandujano*, 966 S.W.2d at 817.

Appellate courts give great deference to any ruling by a trial court which is based on credibility and demeanor of the witnesses. *Johnson*, 68 S.W.3d at 649; *Mathis*, 67 S.W.3d at 924; *Jasper*, 61 S.W.3d at 422.

If a Federal trial court rules that the opponent failed to establish a prima facie case of discrimination, its finding has a "presumption of correctness." The appellant can only rebut the trial court's decision by clear and convincing evidence. *Brown*, 237 F.3d at 561-62; *Soria*, 207 F.3d at 238.

If Batson arises in a postconviction writ, the standard of review is *de novo*. *Riley*, 277 F.3d at 277-87; *see also Rankins,* 141 F.Supp.2d at 1240 (reviewing transcript and determining that the prosecutor lied about the reasons for his strikes, despite the trial court's ruling to the contrary).

Prosecutor tip: Batson hearings are all about the credibility and demeanor of the parties. The more facts you can get the trial judge to dictate into the record supporting the ruling, the more solid your case will be on appeal. Ideally, the judge would sign findings of fact and conclusions of law.

Remedial tip: Of course, your success in a Batson hearing depends upon your history of ethical practice and honest dealings with the judge. Smarmy trial tactics may gain an advantage in one case, but the repercussions will haunt you in future dealings with the judge. You should familiarize yourself with the special ethical rules applicable to prosecutors.

C. Harm Analysis

A harm analysis finds or assumes that error was committed and determines whether the error harmed the opposing party. Most trial error does not result in a reversal of the case. *See* TEX. R. APP. P. 44.2(b). A Batson claim, however, is likely to be Constitutional in nature. Thus, error causes a case to be reversed "unless the court [of appeals] determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." TEX. R. APP. P. 44.2(a).

When Batson error occurs, there is no harm if the venire member was outside the strike zone. *Johnson*, 959 S.W.2d at 294; *Munson*, 774 S.W.2d at 779. Another court held that although the trial court erred by refusing to require the prosecutor to tender his notes to the opponent, there was no harm where the notes eventually revealed that he had no discriminatory purpose. *Franklin*, 986 S.W.2d at 356.

WHAT'S NEW

XXI. WHAT NEW TRENDS ARE FORMING WITHIN TEXAS JURISPRUDENCE?

The broad shifts in Batson case law are likely to occur in the following areas:

A. Dual Motivation Jurisprudence

Pursuant to the new *Guzman* case, a litigant who struck a juror for several reasons - one of which was improper - might still pass scrutiny under Batson. To do so, the party must show by a preponderance of the evidence that he would have stricken the juror regardless of the impermissible, non-neutral purpose. *Guzman*, slip op. at 18 n. 47.

This test is quite broad. Therefore, expect a flurry of cases trying to interpret the test and how it applies to specific fact situations.

B. Findings of Fact and Conclusions of Law

The appellate courts prefer that trial courts file Findings of Fact and Conclusions of Law after conducting Batson hearings. They prefer it a lot.

Federal opinions for the past several years have consistently included dicta criticizing the trial courts' perfunctory rulings and lack of explicit factual findings. *See, e.g., U.S. v. Humphrey*, 287 F.3d at 438; *U.S. v. Castorena Jaime,* 285 F.3d at 929; *McCurdy v. Montgomery,* 240 F.3d at 521-22.

The Court of Criminal Appeals has held that appellate courts are not required to defer to a trial court's rulings where the trial court did not place any specific fact findings in the record. *Yarborough,* 947 S.W.2d at 896 (also see in concurring opinion that "the better practice would be for the trial court to enter, on the record, its finding"). In *Hutchinson*, the Texarkana court of appeals relied upon *Yarborough* and refused to be bound by the trial court's rulings because the trial court did not file specific fact findings. *Hutchinson*, 42 S.W.3d at 339.

Furthermore, the Texarkana court of appeals abated the appeal and instructed the trial court to conduct a Batson hearing, gather the additional facts, and file findings of fact and conclusions of law with the appellate court. When the additional facts were filed with the appellate clerk, the court of appeals decided the case. *Hutchinson*, 42 S.W.3d at 342.

This case is being reviewed by the Court of Criminal Appeals, which will address three issues:

(1) Did the court of appeals err in ordering the trial court to supplement the trial record with written findings of fact and conclusions of law that were not required by law to be made by the trial court?

(2) Did the court of appeals err in ordering the record to be supplemented?

(3) Did the court of appeals err by allowing the State to supplement the record with regard to appellant's Batson challenge, which unfairly gave the State two bites at the apple?

See Hutchinson v. State, No. 01-0827 (Tex. Crim. App.). Stay tuned.

C. Application of Batson to Other Procedures

Parties have long tried to apply Batson to other classifications of people. There are also numerous attempts to extend Batson to other types of procedures.

Batson has been extended to civil litigation. *Edmonson v. Leesville Concrete Co.*, 500 U.S. at 618-28; *Brown*, 237 F.3d at 561; *Goode*, 943 S.W.2d at 444.

Batson applies to slow pleas. *See Coggeshall*, 961 S.W.2d at 641, 644 (holding parties still bound by Batson where defendant pled guilty to the court but went to a jury for punishment).

Batson applies to alternate jurors. *Carter*, 255 F.3d at 591-93; *U.S. v. Harris*, 192 F.3d at 588.

Does Batson apply to jury shuffle requests? *Ladd*, 3 S.W.3d at 564, fn. 9. The Court of Criminal Appeals clearly states that it does not endorse such a view. But the court assumed Batson does apply and went on to analyze the shuffle in the same way as peremptory strikes. *See also Wearren*, 877 S.W.2d at 547 (holding Batson does not apply to random jury shuffles).

Batson applies to the Grand Jury. *Campbell v. Louisiana*, 523 U.S. at 400. But in Texas, Batson only applies to the entire panel, not to any particular individual on the Grand Jury. Batson does not apply to the specific position of foreperson because Texas grand jury foremen have only ministerial duties. *Mosley*, 983 S.W.2d at 256.

Does Batson apply to selective prosecution claims? *Galvan*, 988 S.W.2d at 293. This case fails because the defendant forfeited his selective prosecution claim by procedural default. But the question remains open to judicial interpretation.

Can Batson be applied to the Cumulative Error Doctrine? In *Williams*, the defendant acknowledged that the Batson error, if any, might be harmless. But he claimed that when the error is combined with all of the other trial errors, the cumulative effect was to deprive him of a fair trial. The Fifth Circuit disagreed. *U.S. v. Williams*, 264 F.3d at 572.

D. Using Third-Hand Information

Because the opponent of a strike has the burden of proving discriminatory intent, he has the right to cross examine the respondent and introduce evidence on rebuttal. If the respondent has used a strike based upon information gathered from a third party, the opponent should be able to cross examine the person who gave that information.

A Federal court just disallowed the second-chair prosecutor to testify about the lead prosecutor's reasons for exercising peremptory strikes, even though she helped conduct the voir dire. Because the lead prosecutor did not appear to provide his reasons for the strikes, the defendant won his Batson claim. *Bui*, 270 F.3d at 1336-38.

In *Lopez*, the prosecutor relied on the suggestion of a law enforcement officer that a certain person would not make a good juror. The court of appeals reversed because the prosecutor failed to establish that the officer's reasons for the statement were race-neutral. *See Lopez*, 940 S.W.2d at 390-391. In *Bausley*, the prosecutor relied on a "bad" rating from the person's prior jury service. The court of appeals reversed because the defendant was denied an opportunity to cross-examine the trial prosecutor who originally rated the juror "bad." *Bausley*, 997 S.W.2d at 317-318.

Conversely, in *Reddicks*, the court of appeals acknowledged that a prior jury rating is a facially race-neutral reason for striking a juror and affirmed the conviction. The court went on to say, however, that it expressly dislikes the practice of rating jurors because of the great potential for misuse by "an unscrupulous prosecutor wishing to circumvent the Batson issue." *See Reddicks*, 10 S.W.3d at 363, 365.

Practical tip: Until this issue is more fully developed in case law, the safer practice is to avoid using third-hand information as the reason for a strike unless the person who provided that data is available for cross-examination.

EXHIBIT A

1 (The following proceedings continued on
2 June 28, 1999:)
3 THE COURT: Let the record reflect this is
4 outside the presence and hearing of the jury panel but after the
5 composition of the jury is known.
6 Go ahead, either Ms. Gill or Mrs. Roden.
7 MS. GILL: Your Honor, the State has struck nine
8 jurors. Seven out of those nine jurors are African American.
9 The sheer number percentage of those strikes, seven out of nine
10 being African American, raises the possibility, we believe, that
11 the strikes were racially motivated or that they were not race
12 neutral.
13 THE COURT: What numbers precisely, please?
14 MS. GILL: That would be juror number two, number
15 seven, number nine, number 16, number 24, number 25 and number
16 31.
17 THE COURT: What were your reasons for
18 striking -- take your seat, Mr. Keeton.
19 (Defendant complies.)
20 THE COURT: What was your reason for striking
21 those jurors, Mr. Wirskye?
22 MR. WIRSKYE: Juror number two, Your Honor, Mr.
23 Hall, did not respond to my question about prior criminal record
24 and the records that I have in front of me indicate that Mr. Lee
25 V. Hall with the same birthdate as indicated on the juror

1 questionnaire has been charged with DWI three times and
2 convicted twice. That is the reason I struck juror number two.
3 Juror number seven, Mr. Simms, initially early on
4 into my portion of the voir dire expressed concerns about
5 finding anybody guilty of aggravated assault where the weapon
6 was not produced in court.
7 Juror number nine, Ms. Brumsey, was struck
8 because she had a positive response to my question about a bad
9 experience with law enforcement. Additionally, she also
10 expressed some concern over her prior jury service and how that
11 would affect her in this case. And also she indicated she was a
12 diabetic.
13 Juror number 16, Mrs. Williams, also was struck
14 because she expressed she had had -- excuse me. He expressed he
15 had had a bad experience with law enforcement.
16 Juror number 24, Mrs. Sowels, was the first juror
17 to respond to my question about concerns of sitting in judgment
18 of another person in a criminal trial. She continued to express
19 those concerns to me, I think, when I came back to her a second
20 time.
21 Such was the case with juror number 25, Mrs.
22 Jackson, who expressed to me similar concerns about being able
23 to sit in judgment of a person in a criminal trial and also --
24 THE COURT: Were there any other jurors that you
25 struck that expressed some reluctance to sit in judgment?

1 MR. WIRSKYE: Yes, ma'am, there were. Just to
2 give the Court a glimpse of my reasoning, I struck everybody
3 within strike range that expressed concerns about sitting in
4 judgment or had a bad experience or expressed concerns about
5 deadly weapon.
6 With respect to the specific question about being
7 able to sit in judgment, juror number 20 had a positive
8 response. She was struck by agreement. Juror number 24, of
9 course, I struck as I did number 25. Juror number 28 also had a
10 positive response. They were struck by agreement.
11 Juror number 31 was also struck because she
12 cannot sit in judgment. I believe that is juror Ms. Bateman.
13 Also number 32 expressed a positive response about concerns of
14 sitting in judgment, was struck by agreement.
15 Also juror number 35, the last of the jurors in
16 the strike range who expressed a concern about judgment, was
17 struck by agreement. I believe that is also addressed -- juror
18 number 31, Your Honor.
19 THE COURT: And -- I'm sorry. Go ahead.
20 MR. WIRSKYE: Also for purposes of the record I
21 express to the Court I struck everybody with a bad experience
22 within strike range. Number nine --
23 THE COURT: Bad experience with law enforcement?
24 MR. WIRSKYE: Bad experience with law
25 enforcement, Yes, Your Honor. Juror number nine, number 16, I

1 struck. The final juror within strike range, juror number 33,
2 was struck by agreement.
3 Also with respect to concerns about actually
4 having a weapon produced in court, there were two positive
5 responses, juror number seven which, of course, I struck and
6 juror number five who was struck by agreement.
7 Those are the reasons for my strikes of the
8 African American juror members.
9 THE COURT: Were there any other jurors who did
10 not say if they had been convicted, as juror number two?
11 MR. WIRSKYE: There was one other juror that did
12 not admit to a criminal record. That was juror number 46, Mr.
13 Sandven, who my records show had a deferred adjudication for
14 public lewdness. That juror was struck by agreement.
15 Other than those two jurors -- the only two that
16 had a criminal record that did not tell us about it during voir
17 dire.
18 THE COURT: Is there anything further, Mr.
19 Wirskye?
20 MR. WIRSKYE: Just for record purposes, 60
21 veniremen on the panel, ten African American jurors on the
22 panel, eight within strike range. I used nine strikes. Seven
23 of those strikes were for African Americans. Two African
24 Americans were struck by agreement. That is it.
25 THE COURT: Anything further, Ms. Gill?

1 MS. GILL: Only, Judge, that I believe only one
2 African American was struck by agreement, number two and the
3 other -- I'm sorry. Number three was struck by agreement and
4 number 35, I believe, was excused and that would be Breashears.
5 MR. WIRSKYE: That is correct, Your Honor. I
6 misspoke. Number 35 was excused by the Court.
7 THE COURT: Anything further, Ms. Gill?
8 MS. GILL: Nothing further, Your Honor.
9 THE COURT: The Court finds that the State has
10 not exercised their strikes in a racially discriminatory
11 manner.
12 (The jury panel returned to the courtroom.)
13 THE COURT: Ladies and gentlemen, we're a little
14 early but hopefully we'll have everyone here. As I call your
15 names please bring all of your personal belongings and have a
16 seat in the jury box. You may sit anywhere you wish. However,
17 it will be easier if you will move down to the end.
18 (The jury was seated in the jury box.)
19 THE COURT: Those of you in the audience, your
20 responsibility for the jury summons you received has come to an
21 end. You need not report back to the Central Jury Room unless
22 you need something to take to your employment showing you were
23 on jury duty today. If so, you can get that in the Central Jury
24 Room.
25 Tell them that Judge Meier excused you and they

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

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