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Peremptory Jury Strike in Texas after Batson and Edmondson.

Alan B. Rich

PEREMPTORY JURY STRIKES IN TEXAS AFTER *BATSON* AND *EDMONDSON*

ALAN B. RICH*

* Junior Shareholder, Johnson & Gibbs, P.C., Dallas, Texas. A.B., Magna Cum Laude (1981), J.D., Magna Cum Laude, University of Illinois (1984).

I. INTRODUCTION

In *Swain v. Alabama*,[1] the Supreme Court declared that a state's racially motivated peremptory jury strikes in a criminal trial violated the defendant's equal protection rights under the Fourteenth Amendment. In *Batson v. Kentucky*,[2] the United States Supreme Court overruled that portion of *Swain v. Alabama* which had imposed a "crippling burden of proof"[3] upon a person who wished to vindicate his right of equal protection under the Fourteenth Amendment in the face of a racially motivated peremptory challenge. In *Swain*, the Supreme Court required proof that:

> the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that *no Negroes ever serve on petit juries*.[4]

The revolutionary change wrought by *Batson* was, in reality, a change in the evidentiary burden applicable to challenging the state's use of peremptory jury strikes. Under *Batson*, a defendant would be permit-

1. 380 U.S. 202 (1965).
2. 476 U.S. 79 (1986).
3. *Id.* at 92.
4. *Swain*, 380 U.S. at 223 (emphasis added).

ted to raise an inference of discrimination, and prove it, using only evidence adduced at his own trial. The case law under *Batson* and its progeny continues to map out the contours of this revolutionary case.

II. WHO CAN BRING THE CHALLENGE AND WHAT STRIKES TRIGGER THE *BATSON* PROCEDURE

Two fundamental questions which must be resolved prior to involving the *Batson* procedures are: (A) who has standing to bring a *Batson* challenge; and (B) who must be challenged before the *Batson* procedures come into play.

A. *Who Has Standing*

The answer to the standing question was made considerably easier in the Supreme Court's last term. While *Batson* itself gives standing only to a criminal defendant who is a member of a racial minority group, and then only when challenging the strike of another member of his or her racial minority group, most of these limitations fell by the wayside in the Supreme Court's October, 1990 term.

In *Powers v. Ohio*,[5] the Supreme Court held that a white criminal defendant had standing to challenge a peremptory strike of a venireman who was a member of a racial minority. Thus, racial identity between the party-litigant and the stricken venireman is no longer required. Later in the 1990 term, the Court decided *Edmonson v. Leesville Concrete Company*,[6] which "closed the circle" by making *Batson* applicable to civil proceedings. Following *Edmonson*, a civil litigant has standing to assert the equal protection rights of wrongfully excluded petit veniremen.[7]

B. *Who Must Be Peremptorily Stricken to Trigger* Batson

As seen above, *Batson* and *Powers* addressed who has standing to attack a racially motivated peremptory strike. In *Hernandez v. New York*,[8] the Court held that *Batson* protections extended to "Latinos."[9] *Hernandez* certainly stands for the proposition that *Batson* is no longer limited to racial minorities. This development is not surpris-

5. 499 U.S. __, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).
6. 500 U.S. __, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991).
7. *Id.* at __, 111 S. Ct. at 2087, 114 L. Ed. 2d at 679.
8. 500 U.S. __, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991).
9. *Id.* at __, 111 S. Ct. at 1873, 114 L. Ed. 2d at 414.

ing, however. Under equal protection jurisprudence, race and national origin have long been treated equivalently as *suspect classifications*.[10]

Many other questions remain, some difficult, and some simple. Does *Batson* extend to any other "discrete and insular minority"?[11] The simple answer is yes. Clearly *Batson* should apply to any minority group the legislative classification of which constitutes a suspect classification under equal protection jurisprudence. Therefore, *Batson* is surely applicable to peremptory strikes based upon a venireman's particular religious affiliation.[12] The courts of appeals and state courts throughout the country are, however, in disarray over whether the principal of *Batson*, expanded by *Hernandez v. New York*, extends to strikes based upon other national origins, such as Italian-Americans.[13] Whether gender-based strikes fall under *Batson* scrutiny is also a hotly debated subject.[14] Unfortunately, questions regarding extending *Hernandez v. New York* to other nationalities and the question of gender discrimination are beyond the scope of this article.

III. PROCEDURES FOLLOWED IN A *BATSON* HEARING

While the following section of this article will examine the substantive elements of the *Batson* claim, this section examines the procedures which must be followed to assert and preserve *Batson* error.

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10. *See* Hernandez v. Texas, 347 U.S. 475, 477-78 (1954).

11. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (using term in reference to legislation impact on constitutional rights) (1938).

12. *Cf.* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987) (denial of welfare benefits on religious basis subject to strict scrutiny); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 717-18 (1981) (denial because of religious conduct burdens religion; McDaniel v. Paty, 435 U.S. 618, 628-29 (1978) (constitutional delegate barred by religion); United States v. Greer, 939 F.2d 1076, 1085-86 (5th Cir. 1991); *see also* Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617-18 (1987) (Judaism is equivalent to "race" under the civil rights laws enacted at the time of the adoption of the Fourteenth Amendment); Juarez v. State, 277 S.W. 1091, 1094 (Tex. Crim. App. 1925) (a law prohibiting Roman Catholics from serving on grand juries would violate the Fourteenth Amendment).

13. *See* United States v. Bucci, 839 F.2d 825, 833 (1st Cir.), *cert. denied*, 488 U.S. 844 (1988).

14. *Compare* United States v. De Gross, 913 F.2d 1417, 1423 (9th Cir. 1990) (gender-based strike prohibited), *reh'g en banc granted*, 930 F.2d 695 (9th Cir. 1991) *with* United States v. Hamilton, 850 F.2d 1038, 1043 (4th Cir. 1988) (*Batson* applies to race only), *cert. denied*, 489 U.S. 1094 (1989). *See* United States v. Nichols, 937 F.2d 1257 1262-64 (7th Cir. 1991) (strike of three black women reviewed on racial basis only), *cert. denied*, 60 U.S.L.W. 3521 (U.S., Jan. 27, 1992). Note that gender is not a suspect classification. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440-41 (1985).

This area of the law, like many other aspects of the interrelationship between the Fourteenth Amendment and peremptory jury strikes, is in great flux. This is to be expected as courts create law out of whole cloth, a process contemplated by the Supreme Court in *Batson* and its progeny.[15]

A. *Timing of the Objection*

The first order of business is always the question of when to object. According to the Fifth Circuit, the Supreme Court's *Batson* analysis "presumed that an objection would be made promptly, probably before the venire was dismissed."[16] Therefore, in the Fifth Circuit, a *Batson* or *Edmonson* objection must be made prior to dismissal of the venire.[17] In Texas state criminal cases, an objection must be made prior to *both* the swearing-in of the jury *and* the dismissal of the venire.[18] In Texas state civil cases, the timing question has not been definitively addressed. The Texas Supreme Court, in a recent post-*Edmonson* opinion holding that the *Batson* rule was applicable to civil actions, gave no guidance to lower courts on any aspect of *Batson's* application to civil cases, including the timing question.[19] Prior to the United States Supreme Court's decisions in *Powers* and *Edmonson*, the Dallas Court of Appeals held that in a juvenile delinquency proceeding, a civil case albeit "quasi-criminal" in nature, the court would judicially adopt the timing provisions of article 35.261 of the Texas

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15. *See* Edmonson v. Leesville Concrete Co., 500 U.S. __, 111 S. Ct. 2077, 2088-89, 114 L. Ed. 2d 660, 680 (1991); Powers v. Ohio, 499 U.S. __, 111 S. Ct. 1364, 1374, 113 L. Ed. 2d 411, 429 (1991); Batson v. Kentucky, 476 U.S. 79, 99 n.24 (1986).

16. Jones v. Butler, 864 F.2d 348, 370 (5th Cir. 1988), *cert. denied*, 490 U.S. 1095 (1989). The reason for objecting prior to dismissal of the venire is clear given that one available remedy for *Batson* abuse (at least in federal courts, and perhaps in Texas *civil* cases) is replacement of the improperly stricken member of the venire. *See* Batson v. Kentucky, 476 U.S. 99, 99 n.24 (1986).

17. *Jones*, 864 F.2d at 370; United States v. Romero-Reyna, 867 F.2d 834, 836-37 (5th Cir. 1989), *cert. denied*, 494 U.S. 1084 (1990).

18. *See* Cooper v. State, 791 S.W.2d 80, 81-82 (Tex. Crim. App. 1990) (objection not timely when made before venire dismissed, but after swearing-in the jury); Brown v. State, 769 S.W.2d 565, 567-68 (Tex. Crim. App. 1989) (objection not timely when made after venire dismissed, but before swearing-in the jury). In Texas criminal cases tried prior to *Batson*, but still pending on direct appeal when *Batson* was decided, an objection was timely if made any time at trial. *See* Henry v. State, 729 S.W.2d 732, 736 (Tex. Crim. App. 1987).

19. *See* Powers v. Palacios, 813 S.W.2d 489, 490-91 (Tex. 1991). In *Palacios*, the challenge came during voir dire; certainly timely under the Court of Criminal Appeals formulation.

Code of Criminal Procedure,[20] which requires that a *Batson* challenge be made prior to the dismissal of the venire and the swearing-in of the jury.[21] This was a logical decision given that in a delinquency proceeding a defendant is entitled to all of the constitutional rights of an adult in a criminal trial.[22] More importantly, article 35.261 is the Texas Legislature's implementation of *Batson*;[23] therefore, it can be strongly argued that the article represents the general will of the legislature, and *Batson* should be implemented the same way in non-criminal contexts.

A recent court of appeals decision, after *Powers v. Palacios*,[24] holds that, as in a criminal case, a *Batson/Edmonson* challenge must be made prior to dismissal of the venire and the swearing-in of the jury.[25] This decision is, however, not necessarily correct given the remedies available for a *Batson/Edmonson* violation in a civil case. In the civil context, there is no reason to insist upon the objection being made prior to swearing-in and prior to dismissal of the venire. The rule should be that an objection is timely in a civil case if made prior to *either*, not both. The timing of the objection would, of course, dictate the available remedy. If the objection is made prior to dismissal of the venire, then the moving party should have the option of either a new venire, or reinstatement of the improperly struck venireman. If the objection is made after the dismissal of the venire, but before the jury has been sworn, then the remedy would be limited to a new venire.

There is no unfairness in giving the moving party the option of either reinstatement or a new venire. The party who committed the purposeful violation of the venireman's constitutional rights is hardly in a position to complain. Furthermore, a rule, like article 35.261, which requires an entirely new venire has a potential for great abuse. For instance, if a litigant did not like the venire, even after a shuffle,[26] a deliberately discriminatory strike could be made, prompting an ob-

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20. C— E— J— v. State, 788 S.W.2d 849, 852-53 (Tex. App.—Dallas 1990, writ denied).

21. TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon 1989). Because the only available remedy for a *Batson* violation under the Texas Code of Criminal Procedure is dismissal of the current array as opposed to reinstatement of the struck juror, this cutoff is logically defensible.

22. *C— E— J—*, 788 S.W.2d at 852.

23. *Id.* at 853.

24. 813 S.W.2d 489 (Tex. 1991).

25. Pierson v. Noon, 814 S.W.2d 506, 508 (Tex. App.—Houston [14th Dist.] 1991, no writ).

26. *See* TEX. R. CIV. P. 223.

jection and a new venire.[27] Thus, a civil litigant who prevails on a *Batson* challenge should be given the option to reinstate the improperly struck juror, so long as the objection is made before the venire (including the struck venireman) has been dismissed.

B. *The Evidentiary Hearing*

A *Batson* hearing should be an adversary, evidentiary hearing.[28] Because it is an evidentiary hearing, the normal rules of evidence apply throughout.[29] Furthermore, the *Batson* hearing should be held on the record[30] and in open court, with the moving party being able to cross-examine the opposing counsel who made the suspect strikes.[31]

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27. The potential for such abuse in a criminal action does not render article 35.261 unconstitutional. Chambers v. State, 750 S.W.2d 264, 267 (Tex. App.—Houston [14th Dist.] 1988, no pet.). Such abuse is unfair and should neither be condoned nor rewarded in either civil or criminal trials. *Id.*

28. *E.g.*, Tompkins v. State, 774 S.W.2d 195, 201-02 (Tex. Crim. App. 1987), *aff'd by an equally divided court*, 490 U.S. 754 (1989); Keeton v. State, 749 S.W.2d 861, 871 n.1 (Tex. Crim. App. 1988) (*Keeton II*); Shields v. State, 820 S.W.2d 831, 831 (Tex. App.—Waco 1991, no pet. h.).

29. *E.g.*, Shields v. State, 820 S.W.2d 831, 832 (Tex. App.—Waco 1991, no pet. h.); Cuesta v. State, 763 S.W.2d 547, 553 (Tex. App.—Amarillo 1988, no pet.). Of course, if "non-evidence" is "introduced" and considered by the court without objection, it then becomes "evidence." *See* Jones v. State, 795 S.W.2d 32, 33-34 (Tex. App.—Houston [1st Dist.] 1990, no pet.). The *Shields* court held, however, that the non-movant's proffer of facially neutral explanations for its peremptory strikes after the movant's prima facie case need not be done under oath. *Shields*, 820 S.W.2d at 832. *Shields* is the first case to squarely examine that issue. This decision seems contrary to the spirit of *Salazar v. State*, which stresses that the entire *Batson* hearing must be done in open court. *Salazar v. State*, 795 S.W.2d 187, 192-93 (Tx. Crim. App. 1990). The *Shields* ruling also seems to violate the words of the Texas Court of Criminal Appeals in *Keeton II* wherein elaborate procedures concerning the non-movant's burden of production are set forth, "the following are *illustrative* of the types of *evidence* that can be used to *overcome the presumption of discrimination and show neutrality*." Keeton v. State, 749 S.W.2d 861, 867-68 (Tex. Crim. App. 1988) (*Keeton II*). Furthermore, *Batson* analogizes the process to title VII proceedings. Batson v. Kentucky, 476 U.S. 79, 93-94 & n.18 (1986). Obviously, a title VII defendant cannot rebut a prima facie case without admissible evidence. *Batson* also clearly contemplates that the non-movant must produce a legitimate explanation of the strikes at issue. *Id.* It is simply nonsensical to allow this important step in the process to be decided based upon inadmissible evidence. Again, it makes little sense to allow the non-movant's credibility to be assessed in the absence of an oath and the rules of evidence. *See* Williams v. State, 767 S.W.2d 872, 873-75 (Tex. App.—Dallas 1989, pet. ref'd) (reviewing procedures for *Batson* hearing).

30. Failure to have the *Batson* proceedings transcribed in full will result in any error being waived on appeal. *See, e.g.*, Allen v. State, 753 S.W.2d 792, 794-95 (Tex. App.—Beaumont 1988, no pet.); Reed v. State, 751 S.W.2d 607, 610 (Tex. App.—Dallas 1988, no pet.).

31. *See Salazar*, 795 S.W.2d at 192-93. The right to cross-examination arises only after the movant has made out a prima facie case. *See Williams*, 767 S.W.2d at 873-75.

In addition, it is permissible to call a struck juror to the stand in an attempt to prove that the non-movant's reasons for the strike were pretextual.[32]

As part of the *Batson* evidentiary hearing, the movant is entitled to inspect the opposition's voir dire notes, *if* they have been used to refresh recollection for *Batson* testimony.[33] However, if those notes have not been reviewed for testimonial purposes, they remain work product, and cannot be inspected by the opposition—"*Batson* does not create an exception to the work product privilege."[34] Furthermore, one should introduce into evidence such documentary evidence as juror lists, strike lists and voir dire notes, as merely including them in the transcript (absent a stipulation or judicial notice) does not transmute these papers into evidence.[35] Remember, the record will not reflect anything unless it has been made into admissible evidence, whether by proper introduction, stipulation, sworn testimony, admissions, or judicial notice.[36] After a *Batson* hearing, the court should enter findings of fact and conclusions of law.[37]

C. *The Remedy*

If a *Batson* violation is found by the trial court, the remedy in a criminal case is statutory; a new array is summoned and jury selection begins anew.[38] In civil cases one of two remedies is possible, either a new array (as in criminal cases), or the reinstatement of the struck venireman.[39] In civil cases, the same concerns expressed *supra* concerning the timing of the objection are present. It simply does not make sense to restrict the remedy in civil cases to a new array.[40]

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32. *See* Jones v. State, 756 S.W.2d 376, 379 (Tex. App.—Houston [14th Dist.] 1988, no pet.).

33. *See Salazar*, 795 S.W.2d at 193.

34. *See* Guilder v. State, 794 S.W.2d 765, 767 (Tex. App.—Dallas 1990, no pet.).

35. *See Shields*, 820 S.W.2d at 833.

36. *Id.*

37. *Salazar*, 795 S.W.2d at 194. After a civil *Batson/Edmonson* hearing, the moving party should request findings of fact and conclusions of law under rules 296-299a of the Texas Rules of Civil Procedure.

38. *See* TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon 1989); State v. Tunnell, 768 S.W.2d 765, 767 (Tex. App.—Tyler 1989, orig. proceeding); Chambers v. State, 750 S.W.2d 264, 266-67 (Tex. App.—Houston [14th Dist.] 1988, no pet.).

39. Batson v. Kentucky, 476 U.S. 79, 99 n.24 (1986).

40. *See* discussion *supra* part III.A.

IV. THE LEGAL STANDARDS IN THE TRIAL COURT FOR DECIDING *BATSON/EDMONSON* CHALLENGES

In this section, the substantive legal standards for proving a *Batson* claim will be explored. As seen below, a prima facie case must first be made out by the movant. Then, the non-movant must rebut that prima facie case by coming forward with a neutral explanation for the strike. Finally, after the neutral explanation has been proferred, the movant must prove that the strike was in fact discriminatory and that the neutral explanation was pretextual.

A. *The Prima Facie Case*

A party must initially make out a prima facie case of purposeful discrimination.[41] In order to make out a prima facie case, the party must first show that a member of a cognizable minority group has been struck from the venire.[42] Second, a movant may rely upon a presumption that if opposing counsel "is of a mind to discriminate," that such a mind-set will manifest itself in the exercise of a peremptory challenge.[43] Finally, the moving party must show that the foregoing and all other relevant circumstances raise an inference that the peremptory challenges were exercised to purposefully exclude a member of a cognizable minority group.[44]

A prima facie case "represents the minimum quantity of evidence

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41. Batson v. Kentucky, 476 U.S. 79, 96 (1986); Tennard v. State, 802 S.W.2d 678, 680 (Tex. Crim. App. 1990); Miller-El v. State, 748 S.W.2d 459, 460 (Tex. Crim. App. 1988); Henry v. State, 729 S.W.2d 732, 734 (Tex. Crim. App. 1987); Keeton v. State, 724 S.W.2d 58, 65 (Tex. Crim. App. 1987) (*Keeton I*), *aff'd on rehearing*, 749 S.W.2d 861 (Tex. Crim. App. 1991).

42. *Batson*, 476 U.S. at 96; State v. Oliver, 808 S.W.2d 492, 494 (Tex. Crim. App. 1991); *Keeton I*, 724 S.W.2d at 65; *see also* discussion *supra* part III.B.

43. *Batson*, 476 U.S. at 96; *Henry*, 729 S.W.2d at 734; *Keeton I*, 724 S.W.2d at 65.

44. The Texas Court of Criminal Appeals, in its reading of *Batson*, uses the phrase "the facts and any other relevant circumstances raise an inference." *Henry*, 729 S.W.2d at 735; *Keeton I*, 724 S.W.2d at 65. The United States Supreme Court formulates this final step in a subtly different way, "these facts and any other relevant circumstances raise an inference." *Batson*, 476 U.S. at 96. While this is most likely a distinction without a difference, more may be at work here. The Supreme Court's formulation, "these facts," encourages a greater focus on the legal presumption that one with a predisposition to discriminate is acting accordingly. Interestingly, the Texas Court of Criminal Appeals has failed to even allude to this presumption in its latest incantation of the *Batson* rule. *See Tennard*, 802 S.W.2d at 680. If the predisposition presumption is taken seriously, one should then be able to explore opposing counsel's own racial and religious predilections in order to establish that he or she is of a mind to discriminate. Given, however, the ease of establishing a prima facie case, it should seldom be necessary to utilize this presumption, and thus such examination would be pretermitted.

necessary to support a rational inference that the allegation [of discrimination] is true."[45] In *Batson*, the Supreme Court advised lower courts to "consider all relevant circumstances" in deciding whether a prima facie case has been made out.[46] As examples, the Supreme Court cited the following: whether there was a pattern of strikes against minorities on the venire, or whether a party's voir dire questions or statements made during that process support or refute discrimination.[47]

A prima facie case is most easily established by a suspect pattern of strikes. The Texas Court of Criminal Appeals has held that a suspect pattern is established where "the State has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of peremptories against the group."[48] To put the foregoing analysis into perspective, the Texas Court of Criminal Appeals has also cautioned lower courts "that the initial burden in establishing a prima facie case is not onerous."[49] In *Dewberry v. State*,[50] the court found that striking five out of the six minority persons in the venire established a prima facie case.[51] The Texas Court of Criminal Appeals admonished the appeals court for focusing only on the precentage of peremptories exercised against minorities, five of ten, but ignoring the percentage of minorities actually struck. In other words, "or" in the above formulation means "or."[52] The Texas Court of Criminal Appeals has itself held, in *Miller-El v. State*,[53] that a prima facie case is established where a prosecutor used ten of fourteen, or seventy percent, of his strikes against minorities, resulting in the exclusion of ten of eleven, or ninety-one percent, of the minorities from the jury.[54]

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45. Tompkins v. State, 774 S.W.2d 195, 201 (Tex. Crim. App. 1987), *aff'd by an equally divided court*, 490 U.S. 754 (1989).

46. *Batson*, 476 U.S. at 96-97.

47. *Id.* at 97.

48. Dewberry v. State, 776 S.W.2d 589, 591 (Tex. Crim. App. 1989).

49. *Id.* at 590-91, (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981)).

50. 776 S.W.2d 589 (Tex. Crim. App. 1989).

51. *Id.* at 591. This means that eighty-three percent of the minorities were struck.

52. "In this case the Court of Appeals focused on the total number of strikes used against black veniremen and not the number of blacks actually excluded from the jury. While this mode of analysis may be valid in some circumstances it failed to take into account the result of strikes against jurors of the same race as appellant." *Id.*

53. 748 S.W.2d 459 (Tex. Crim. App. 1988).

54. *Id.* at 460.

Since the decisions in *Dewberry* and *Miller-El*, the courts of appeals have been relatively predictable in their prima facie case determinations, appearing, albeit *sub rosa*, to utilize a mechanistic formula in deciding the question of whether most or all minorities have been struck, the first half of the *Dewberry* test. It should be noted that in no case has the appeals court reversed a trial court's finding that a prima facie case has been shown.[55] Thus, in *Lewis v. State*,[56] the court held that the state's use of six of ten, or sixty percent, of its peremptories against black veniremen established a prima facie case.[57] The opinion does not, however, cite to *Dewberry* or *Miller-El*, nor does it state how many black veniremen were eligible to serve (more than six?), nor does it state if any blacks served on the jury.[58] This case is, therefore, dubious precedent. Then, in *Campbell v. State*,[59] the court found that no prima facie case was made out where four of seven, or fifty-seven percent, of the peremptories were used to eliminate minorities, resulting in three of six, or fifty percent, of the minorities being stricken, and where three of the jury members were black.[60]

Next, in *Hawkins v. State*,[61] the Dallas Court of Appeals held that the defendant proved a prima facie case where five of ten, or fifty percent, of the strikes were directed at minorities, resulting in the striking of five of eight, or sixty-three percent, of the black veniremen.[62] Given the strike statistics, the seating of two minorities on the jury was looked upon as a negative factor, not a favorable one. Where all, four of four, of the minority jurors remaining after challenges for cause were struck, the court in *Jones v. State*[63] had no trouble in finding that a pattern had been shown, and, thus, a prima facie case made out.[64] Most recently, in *Bean v. State*,[65] the court held that no prima facie case had been proven because only four of ten, or forty percent,

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55. Obviously, if the question were whether to reverse the finding of a prima facie case, application of any formalistic, mathematical method would be foolish. The trial court must take into account any other circumstances in determining whether a prima facie case has been established.

56. 779 S.W.2d 449 (Tex. App.—Tyler 1989, pet. ref'd).

57. *Id.* at 454.

58. *See id.* at 451-54.

59. 775 S.W.2d 419 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd).

60. *Id.* at 422. This court also failed to cite either *Dewberry* or *Miller-El*.

61. 783 S.W.2d 288 (Tex. App.—Dallas 1989, no pet.).

62. *Id.* at 291-92. "[O]nly two black jurors [were] seated on the panel." *Id.* at 292.

63. 795 S.W.2d 32 (Tex. App.—Houston [1st Dist.] 1990, no pet.).

64. *Id.* at 33-34.

65. 816 S.W.2d 115, (Tex. App.—Houston [14th Dist.] 1991, no pet. h.).

of the State's peremptories were used against minorities, resulting in only five of eight, or sixty-three percent, of the minority veniremen being struck.[66] This is true even though the entire panel was twenty percent minority.

From an analysis of cases decided after *Dewberry* and *Miller-El*, wherein the question of whether a prima facie case has been shown was squarely presented, it appears that the courts of appeals take the "most or all" language of *Dewberry* seriously, applying it when as few as sixty percent of the minorities on the panel were struck.[67]

However, for reasons which are unstated and unclear, the courts of appeals have completely ignored the second, disproportionate number of peremptories, aspect of *Dewberry*. While most cases report the number of strikes used and the number of those strikes used against minorities, that figure, without more information, is irrelevant in assessing disproportionality. There is simply no way of gauging disproportionality unless one knows the size of the panel, the total number of minorities on the panel, and the number of minorities remaining on the panel after challenges for cause, aside from the raw number of stricken minorities. Certainly, in the post-*Dewberry* cases which have found that a prima facie case was made out based upon the striking of most or all minorities, a disproportionality analysis would not have added anything to the opinion or the result. However, in *Campbell v. State*[68] the court ignored the disproportionality prong of *Dewberry*, which may have led to an incorrect result.[69] There is, however, simply not enough information to tell, for in *Campbell*, there is no indication of either the size of the panel or the number of minorities on that

66. *Id.* at 119.

67. One suspects that "most" does mean most. Therefore, striking fifty-one percent or more of the minority venireman should establish a prima facie case. The courts of appeals have not had an opportunity to address a case falling in the fifty-one percent to fifty-nine percent range. When such a case is presented, the court should find that a prima facie case has been made out. Given the Texas Court of Criminal Appeals' decisions in *Dewberry* and *Miller-El*, it is apparent that the following pre-*Dewberry* cases incorrectly decided the prima facie question, and have implicitly been overruled on that point. Chandler v. State, 744 S.W.2d 341, 344 (Tex. App.—Austin 1988, no pet.) (one hundred percent struck); Smith v. State, 734 S.W.2d 694, 697 (Tex. App.—Houston [1st Dist.] 1987, no pet.) (sixty-seven percent struck); Townsend v. State, 730 S.W.2d 24, 26 (Tex. App.—Texarkana 1987, no pet.) (one hundred percent struck); Allen v. State, 726 S.W.2d 636 (Tex. App.—Eastland 1987, no pet.) (one hundred percent struck); Williams v. State, 712 S.W.2d 835, 841 (Tex. App.—Corpus Christi 1986, no pet.) (sixty-seven percent struck).

68. 775 S.W.2d 419 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd).

69. *Id.* at 422.

panel. In *Bean v. State*,[70] however, ignoring the disproportionality component of *Dewberry* clearly did lead to a mistaken ruling. While the state only struck fifty percent of the minority veniremen, thus not running afoul of the most-or-all prong of *Dewberry*, the state did exercise forty percent of its peremptory strikes against twenty percent of the panel. Because peremptory strikes against minorities were utilized at a rate twice that of the minority panel population, the strikes were clearly disproportionate.

B. *Explanations Offered in Rebuttal*

Once the movant has proven a prima facie case, the burden of production shifts to the other party to come forward with a non-discriminatory explanation for the strike.[71] The Supreme Court has specifically held that the explanation required need not "rise to the level justifying exercise of a challenge for cause."[72] However, the movant's prima facie case cannot be rebutted merely by denying discriminatory intent and professing good faith.[73] The burden is to come forward with a " 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges."[74]

The Supreme Court, in *Hernandez v. New York*,[75] recently de-emphasized the non-movant's burden after the prima facie case is made out. "At this step of the inquiry, the issue is the facial validity of the [non-movant's] explanation. Unless a discriminatory intent is inherent in the . . . explanation, the reason offered will be deemed race neutral."[76] The *Hernandez* formulation stands in stark contrast to the

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70. 816 S.W.2d 115, (Tex. App.—Houston [14th Dist.] 1991, no pet. h.); *see supra* note 65 and accompanying text.

71. Hernandez v. New York, 499 U.S. __, __, 111 S. Ct. 1859, 1866, 114 L. Ed. 2d 395, 405 (1991); Batson v. Kentucky, 476 U.S. 79, 97 (1986); Williams v. State, 804 S.W.2d 95, 97 (Tex. Crim. App. 1991); Tennard v. State, 802 S.W.2d 678, 680 (Tex. Crim. App. 1990); Tompkins v. State, 774 S.W.2d 195, 201 (Tex. Crim. App. 1987), *aff'd by an equally divided court*, 490 U.S. 754 (1989); Henry v. State, 729 S.W.2d 732, 734 (Tex. Crim. App. 1987); Keeton v. State, 724 S.W.2d 58, 65 (Tex. Crim. App. 1987) (*Keeton I*), *aff'd on reh'g*, 749 S.W.2d 861 (Tex. Crim. App. 1988).

72. *Batson*, 476 U.S. at 97.

73. *Id.* at 98.

74. *Id.* at 98 n.20 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)).

75. 499 U.S. __, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991).

76. *Id.* at __, 111 S. Ct. at 1866, 114 L. Ed. 2d at 405. This portion of the plurality opinion (Kennedy, White, & Souter, JJ., & Rehnquist, C.J.) was concurred in by Justices O'Connor and Scalia. *Id.* at __, 111 S. Ct. at 1873, 114 L. Ed. 2d at 415.

burden contemplated by the Texas Court of Criminal Appeals. In its seminal *Keeton II*[77] opinion, the court of criminal appeals frames the non-movant's burden after the movant's prima facie case as follows:

> The state then has the burden of articulating a clear, specific, and legitimate reason for the challenge which relates to the particular case to be tried and which is nondiscriminatory. . . . In addition to a clear, specific and plausible nondiscriminatory explanation of a specific characteristic that affected the decision to challenge, the following are *illustrative* of the types of *evidence* that can be used to *overcome the presumption of discrimination and show neutrality*:
>
> 1. The state challenged non-black jurors with the same or similar characteristics as the black jurors who were struck.
> 2. There is no evidence of a pattern of strikes used to challenge black jurors, e.g., having a total of 6 peremptory challenges, the state used 2 to strike black jurors and 4 to strike white jurors, and there were blacks remaining on the venire.[78]

Given the United States Supreme Court's retrenchment on the non-movant's burden, and given that the opinions of the Texas Court of Criminal Appeals on this point are based upon the Fourteenth Amendment rather than upon the Texas Constitution, it is likely that Texas courts will embrace the same de-emphasis of the non-movant's rebuttal burden. Regardless, however, of the scrutiny applied to the neutral explanation offered, case law in Texas has identified a number of explanations which are not *facially* neutral. Of course, many, many explanations have been found to be facially neutral under *Batson*. Note that under certain circumstances, facially neutral explanations may later be found to be discriminatory under the final part of the *Batson* analysis discussed below.[79]

1. Extent to Which Race Can Be a Factor

Obviously, a strike exercised because a juror is a racial minority is facially discriminatory.[80] A critical question has arisen, however, as to what extent race may be a factor in the decision to strike. The

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77. Keeton v. State, 749 S.W.2d 861 (Tex. Crim. App. 1988) (*Keeton II*).

78. *Id.* at 867-68.

79. *See infra* notes 252-63 and accompanying text (facially neutral explanations fail when found to be pretext for discrimination).

80. McKinney v. State, 761 S.W.2d 549, 550-51 (Tex. App.—Corpus Christi 1988, no pet.); Robinson v. State, 756 S.W.2d 62, 62-63 (Tex. App.—Texarkana 1988, no pet.); Speaker v. State, 740 S.W.2d 486, 489 (Tex. App.—Houston [1st Dist.] 1987, no pet.).

Texas cases addressing this question have held that race may not be a factor *at all*.[81] Federal law may, however, be to the contrary. This issue was neatly side-stepped by the Supreme Court in *Batson*, by defining the prohibited act as striking a venireman "*on account of* their race."[82] Further confusion exists on this question because, in discussing the general equal protection principles at issue, the *Batson* court stated that "the equal protection clause forbids the prosecutor to challenge potential jurors *solely* on account of their race."[83] Although *Batson* was itself ambiguous on this question, the Supreme Court has recently "clarified" this point. In *Powers v. Ohio*,[84] the Supreme Court specifically held that:

> the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race. . . . An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one *on account of race*.[85]

Significantly, not only did the Supreme Court pointedly use the term "solely" in its most recent *Batson* holding, but also used the phrase "on account of race," the *Batson* language, in the same paragraph and in a context that makes it unmistakable that "on account of" and "solely" are synonymous. As with the Supreme Court's relaxation of the non-movant's burden to rebut the prima facie case, it remains to be seen whether Texas courts will retrench on this point, or whether they will create their own standard. If "solely" *really* means having no other valid reason for the strike, then the *Batson/Edmonson* challenge seems doomed to the same desuetude as *Swain v. Alabama*.[86] Certainly, if race is more than a coincidental motivation for a strike, Equal Protection Clause jurisprudence demands redress.

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81. *Speaker*, 740 S.W.2d at 489. One court of appeals has specifically held that after a prima facie case is made out, it is incorrect to judge the explanation offered using the standard "solely [based] on race." Vann v. State, 788 S.W.2d 899, 905 (Tex. App.—Dallas 1990, pet. ref'd).

82. *Batson*, 476 U.S. at 96 (emphasis added).

83. *Id.* at 89; *see also Hernandez*, 499 U.S. at __, 111 S. Ct. at 1874, 114 L. Ed. 2d at 395 (1991) (O'Connor, J. & Scalia, J., concurring).

84. 499 U.S. __, 111 S. Ct. 1364, 113 L. Ed. 2d 411.

85. Powers v. Ohio, 499 U.S. __, __, 111 S. Ct. 1364, 1370, 113 L. Ed. 2d 411, 424 (1991) (emphasis added).

86. 380 U.S. 202 (1965).

2. Facially Discriminatory Reasons

In *Batson*, the Supreme Court specifically held that, as a matter of law, a neutral explanation cannot be that the shared race of the defendant and the venireman would result in partiality to the defendant.[87] Most facially invalid explanations are variations on this theme. There are, however, certain inconsistencies between the law of the Fifth Circuit and Texas law on the substantive question[88] of whether certain reasons are facially invalid. These differences are based upon the different definitions of the term, "cognizable minority group," currently utilized in the two court systems.[89]

In addition to an admission of racial animus, a few other explanations have been condemned as facially invalid. A strike made because a juror was a member of a "minority club" and therefore might be biased in favor of a minority defendant is facially invalid.[90] Similarly, a peremptory challenge based upon National Association for the Advancement of Colored People membership is discriminatory.[91] It has also been held that "sight strikes" are invalid strikes based only upon the looks of a prospective minority juror.[92] The following explanation, close relative of the sight strike, albeit more blatant, has also been found to be facially discriminatory: "He's Black, he's male, and I didn't like the way he responded to my questions."[93]

Failure to give any explanation for the strike is facially invalid.[94]

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87. *Batson*, 476 U.S. at 97; *see also McKinney*, 761 S.W.2d at 550-51; *Robinson*, 756 S.W.2d at 62-63; *Speaker*, 740 S.W.2d at 489.

88. As set out *supra* notes 76-77 and accompanying text, there are also currently significant differences between federal and Texas state courts regarding the methodology for determining whether an explanation is facially neutral.

89. *See supra* notes 8-13 and accompanying text (discussing standing to challenge possibly discriminatory jury strikes).

90. *See* Moore v. State, 811 S.W.2d 197, 200 (Tex. App.—Houston [1st Dist.] 1991, no pet.).

91. Somerville v. State, 792 S.W.2d 265, 267-68 (Tex. App.—Dallas 1990, pet. ref'd). There obviously is a fine line here between the previous two excuses and a similar one, upheld as neutral under the circumstances, of NAACP membership shared by the venireman and the defendant's counsel. *See* Rice v. State, 746 S.W.2d 356, 357-58 (Tex. App.-Fort Worth 1988, pet. ref'd).

92. Davis v. State, 796 S.W.2d 813, 819 (Tex. App.—Dallas 1990, pet. ref'd)

93. Hill v. State, 787 S.W.2d 74, 78 & n.3 (Tex. App.—Dallas 1990, pet. granted). In this case the prosecutor could not remember his voir dire questions or the stricken venireman's responses, but he did recall attitude and demeanor.

94. Allen v. State, 753 S.W.2d 792, 794-95 (Tex. App.—Beaumont 1988, no pet.); Seubert v. State, 749 S.W.2d 585, 588 (Tex. App.—Houston [1st Dist.] 1988), *rev'd on other grounds*, 787 S.W.2d 68 (Tex. Crim. App. 1990). However, in *Lee v. State*, 747 S.W.2d 57, 59 (Tex.

However, the Fifth Circuit has taken an opposite position where no explanation is given. In *United States v. Forbes*,[95] the court brushed aside the apparent failure to rebut by observing that the prosecution had adequately explained two of the three strikes, that the defendant did not object to the failure the explain the final strike, that blacks actually served on the jury, and that the jury had a black/white ratio which mirrored the venire.[96]

Although it appears on all counts that Texas courts are more hospitable to *Batson/Edmonson* claims, in some areas the Supreme Court and the Fifth Circuit are still out ahead. Thus, while Texas courts treat strikes based upon a juror's particular religious affiliation as facially neutral,[97] the Fifth Circuit has specifically held that a peremptory challenge based on religious affiliation would be facially invalid.[98]

C. *Facially Neutral Explanations*

A survey of Texas state and federal cases reveals a bewildering variety of facially neutral explanations. These are, of course, explanations which, if not proven pretextual,[99]suffice to defuse any constitutional *Batson* challenge. These explanations are both objective and subjective in nature and fall into several categories. As seen below, however, there is a far greater chance that a subjective explanation will not survive the final *Batson* evaluation of pretext. The facially valid reasons divide into nineteen categories, including a miscellaneous cat-

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App.—Houston [1st Dist.] 1988, pet. ref'd), the court of appeals, in a fit of generosity, found that the failure to explain the strike was inadvertent, and remanded for an explanation, rather than granting a new trial. This was improper, for if the non-movant fails to meet its burden of production to show a neutral reason for the strike after a prima facie case, the *Batson* challenge should be upheld.

95. 816 F.2d 1006 (5th Cir. 1987).

96. *Id.* at 1011. Requiring an objection to the non-movant's failure to offer an explanation is certainly an unusual requirement. Once the movant objects, and makes a prima facie case, the Supreme Court clearly places the burden on the non-movant to come forward with particularized neutral explanations. It does not make sense to require this type of additional objection by the movant. In addition, the Fifth Circuit implied that the non-movant even can prevail on the merits, the final Batson "pretext" analysis, without explaining every peremptory strike. *See id.* at 1011 & n.7.

97. *See, e.g.*, Chambers v. State, 724 S.W.2d 440, 442 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd); Salazar v. State, 745 S.W.2d 385, 389 (Tex. App.—Fort Worth 1987), *rev'd on other grounds*, 795 S.W.2d 187 (Tex. Crim. App. 1990).

98. United States v. Greer, 939 F.2d 1076, 1086 & n.9 (5th Cir. 1991) (*Batson* and its progeny limit "race, religion, and national-origin-based peremptory challenges.")

99. *See* discussion *infra* part IV.D.

egory. These categories are: (1) prior involvement with the criminal justice system; (2) problems relating to the juror information card; (3) objectively determinable voir dire problems; (4) subjective impressions from voir dire; (5) relationships between a venireman or a venireman's family and others involved in the case, such as a party, witness, judge, or lawyer; (6) a venireman's similar characteristics to those of the opposing party or counsel; (7) a venireman's age; (8) a venireman's marital and parental status; (9) a venireman's prior jury, witness or litigation experience; (10) a venireman's health; (11) a venireman's willingness to serve on the jury; (12) a venireman's dress or appearance; (13) a venireman's employment; (14) a venireman's religion or religious involvement; (15) a venireman's exposure to pretrial publicity or possible familiarity with subject matter; (16) a venireman's ties to the community; (17) a venireman's geographic origin; (18) a venireman's place on the panel; and (19) miscellaneous explanations.

1. Involvement with the Criminal Justice System

The cases hold that just about any involvement of the venireman, or the venireman's friends or extended family with the criminal justice system is enough to establish the facial validity of a peremptory strike. Strikes have been found to be facially neutral when the venireman has been convicted of a crime.[100] In fact, a strike is facially neutral where the venireman has been arrested, charged,[101] or indicted;[102] a conviction is unnecessary. Appellate courts have also upheld the facial validity of a strike where there have been convictions of friends and extended family members. Strikes have been deemed neutral when a

100. *See, e.g.*, Keeton v. State, 749 S.W.2d 861, 863-64, 870 (Tex. Crim. App. 1988) (*Keeton II*); Grimes v. State, 779 S.W.2d 124, 126 (Tex. App.—Houston [1st Dist.] 1989, pet. ref'd); Munson v. State, 774 S.W.2d 778, 779-80 (Tex. App.—El Paso 1989, no pet.); Johnson v. State, 740 S.W.2d 868, 870-71 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd); Adams v. State, 740 S.W.2d 60, 62 (Tex. App.—Dallas 1987, no pet.).

101. *See, e.g.*, Barnett v. State, 771 S.W.2d 654, 657-58 (Tex. App.—Corpus Christi 1989, no pet.); Perry v. State, 770 S.W.2d 950, 952-53 (Tex. App.—Fort Worth 1989, no pet.); Anderson v. State, 758 S.W.2d 676, 680-81 (Tex. App.—Fort Worth 1988, pet. ref'd); Chandler v. State, 744 S.W.2d 341, 344 (Tex. App.—Austin 1988, no pet.); Yarbough v. State, 732 S.W.2d 86, 90 (Tex. App.—Dallas 1987), *vacated on other grounds*, 761 S.W.2d 17, 18 (Tex. Crim. App. 1988); Grady v. State, 730 S.W.2d 191, 194-95 (Tex. App.—Dallas 1987), *vacated on other grounds*, 761 S.W.2d 19 (Tex. Crim. App. 1988).

102. *See* Ivatury v. State, 792 S.W.2d 845, 847-48 (Tex. App.—Dallas 1990, pet. ref'd).

relative was involved in a criminal proceeding;[103] where cousins had criminal problems;[104] where a venireman's son or son-in-law had been convicted of a crime;[105] where a venireman's spouse or former spouse had been convicted of a crime;[106] where a venireman's brother or sister had been convicted;[107] and when a good friend of the venireman had a prior conviction.[108]

Not only will a prior conviction of a venireman's relative or friend be sufficient to uphold the facial neutrality of the strike, but so will prior arrests. Thus, the arrest of a family member,[109] including a brother,[110] brother-in-law,[111] son,[112] or father[113] will suffice as a facially non-discriminatory explanation for a peremptory strike. Similarly, a neutral explanation was also found where the venireman was less than completely candid on voir dire regarding the person's own criminal record and the criminal record of the venireman's relatives.[114]

2. Problems Relating to the Juror Information Card

A perennial favorite reason offered for peremptorily striking a venireman is some *problem* with the juror information card which the veniremen must fill out. Peremptory strikes based on the following

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103. *See* Straughter v. State, 801 S.W.2d 607, 611-13 (Tex. App.— Houston [1st Dist.] 1990, no pet.); Catley v. State, 763 S.W.2d 465, 466-67 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd); Rijo v. State, 721 S.W.2d 562, 564-65 (Tex. App.—Amarillo 1986, no pet.).

104. *See Grimes*, 779 S.W.2d at 126; *Rijo*, 721 S.W.2d at 564-65.

105. *See* United States v. Terrazas-Carrasco, 861 F.2d 93, 95 n.1 (5th Cir. 1988) (son); *Catley*, 763 S.W.2d at 466-67 (son); *Chandler*, 744 S.W.2d at 344 (son); *Garza*, 739 S.W.2d at 375 (son-in-law).

106. *See* Daniels v. State, 768 S.W.2d 314, 317 (Tex. App.—Tyler 1988, pet. ref'd) (husband); Williams v. State, 752 S.W.2d 729, 729-30 (Tex. App.—Corpus Christi 1988, no pet.) (ex-husband).

107. *See, e.g.*, United States v. Guerra-Marez, 928 F.2d 665, 673 (5th Cir.), *cert. denied*, __ U.S. __, 112 S. Ct. 322, 116 L. Ed. 2d 363 (1991); United States v. Cartlidge, 808 F.2d 1064, 1070-71 (5th Cir. 1987); *Munson*, 774 S.W.2d at 779-80.

108. *See Munson*, 774 S.W.2d at 779-80.

109. *See, e.g.*, *Catley*, 763 S.W.2d at 466-67; *Yarbough*, 732 S.W.2d at 90; *Grady*, 730 S.W.2d at 194-95.

110. *See, e.g.*, *Guerra-Marez*, 928 F.2d at 673; *Adams*, 740 S.W.2d at 62; *Rasco*, 739 S.W.2d at 439.

111. *See Garza*, 739 S.W.2d at 375.

112. *See Grimes*, 779 S.W.2d at 126.

113. *See* Roy v. State, 813 S.W.2d 532, 538 (Tex. App.—Dallas 1991, no pet. h.); Allen v. State, 811 S.W.2d 673, 675-77 (Tex. App.—Dallas 1991, pet. ref'd).

114. *See* Holman v. State, 772 S.W.2d 530, 533 (Tex. App.—Beaumont 1989, no pet.).

problems with the juror information card were found to have been facially neutral: failure to complete the card,[115] improperly filling out the card, failure to follow the instructions,[116] filling out the card illegibly or with poor handwriting,[117] indefinite answers on the card,[118] misspellings of common words on the card,[119] and inconsistencies between the information on the card and the voir dire testimony.[120]

3. Problems Objectively Determinable from Voir Dire

Obviously, many peremptory strikes are made based upon information obtained through responses to voir dire questions. That is the purpose of voir dire. It is therefore not uncommon that a party's neutral explanation will often be based upon a response elicited during voir dire. In this regard, facially nondiscriminatory explanations have often referred to a venireman's equivocal responses to important questions about matters important to a party's case, as well as to verifiable behaviors during voir dire which a party did not like.[121] For example, falling asleep during voir dire is a facially acceptable reason for a

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115. *See*, Roy v. State, 813 S.W.2d 532, 538 (Tex. App.—Dallas 1991, no pet. h.); Allen v. State, 811 S.W.2d 673, 675-77 (Tex. App.—Dallas 1991, pet. ref'd); Straughter v. State, 801 S.W.2d 607, 611 (Tex. App.—Houston [1st Dist.] 1990, no pet.); Dennis v. State, 772 S.W.2d 525, 526 (Tex. App.—Beaumont 1989), *pet. dism'd*, 798 S.W.2d 573 (Tex. Crim. App. 1990); Jones v. State, 756 S.W.2d 376, 379 (Tex. App.—Houston [14th Dist.] 1988), *pet. dism'd*, 799 S.W.2d 263 (Tex. Crim. App. 1990); Chandler v. State, 744 S.W.2d 341, 344 (Tex. App.—Austin 1988, no pet.); Johnson v. State, 740 S.W.2d 868, 870-71 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd); Rodgers v. State, 725 S.W.2d 477, 480-81 (Tex. App.—Houston [1st Dist.] 1987, pet. ref'd).

116. *Allen*, 811 S.W.2d at 675-77; *see also* Moore v. State, 811 S.W.2d 197, 199-200 (Tex. App.—Houston [1st Dist.] 1991, pet. ref'd) (venireperson unresponsive); Gardner v. State, 782 S.W.2d 541, 544 (Tex. App.—Houston [1st Dist.] 1989, pet. ref'd) (answering questionnaire wrongly); Catley v. State, 763 S.W.2d 465, 466-67 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd) (improper answers on questionnaire); Hastings v. State, 755 S.W.2d 183, 186 (Tex. App.—San Antonio 1988, pet. ref'd) (improper questionnaire answers); Johnson v. State, 740 S.W.2d 868, 870-71 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd) (failure to answer or wrongly answered questionnaire).

117. *See Allen*, 811 S.W.2d at 675-77; Townsend v. State, 730 S.W.2d 24, 26 (Tex. App.—Texarkana 1987, no pet.); Chambers v. State, 724 S.W.2d 440, 442 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd).

118. *See Townsend*, 730 S.W.2d at 26.

119. *See Hastings*, 755 S.W.2d at 186; Rice v. State, 746 S.W.2d 356, 357 (Tex. App.—Fort Worth 1988, pet. ref'd); *Johnson*, 740 S.W.2d at 870-71.

120. Rodgers v. State, 725 S.W.2d 477, 480-81 (Tex. App.—Houston [1st Dist.] 1987, pet. ref'd).

121. Subjective impressions, which are less capable of verification, are discussed in the next subsection.

strike.[122] Giving nonresponsive answers to voir dire questions has also been found to be a neutral explanation for a strike,[123] as has giving answers which manifest poor recollection of a venireman's past jury service.[124] Similarly, an explanation that the struck venireman's answers were not as favorable to the party as were other veniremen's responses has also been found facially neutral.[125]

Strikes will also be facially nondiscriminatory if they relate to a venireman's apparent inability to understand the trial process or to an unwillingness follow the law of the case. Equivocation on these points also suffices. Therefore, peremptory strikes will be found facially neutral where veniremen equivocate on, express hostility or hesitation towards, or fail to comprehend important legal propositions such as: following the law as to the elements of the offense or cause of action,[126] as to the burden of proof,[127] as to the use of circumstantial or other evidence,[128] as to consideration of the full range of punishment for an offense,[129] and, by analogy, as to the full measure of damages, including punitive damages, in a civil case.

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122. *See, e.g.*, United States v. Ratcliff, 806 F.2d 1253, 1256 (5th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987); Woods v. State, 801 S.W.2d 932, 940 (Tex. App.—Austin, 1990, pet. ref'd); Ivatury v. State, 792 S.W.2d 845, 847-48 (Tex. App.—Dallas 1990, pet. ref'd); Holman v. State, 772 S.W.2d 530, 533 (Tex. App.—Beaumont 1989, no pet.).

123. *See, e.g.*, Gaines v. State, 811 S.W.2d 245, 248-50 (Tex. App.—Dallas 1991, no pet.); York v. State, 764 S.W.2d 328, 330-31 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd); Cuesta v. State, 763 S.W.2d 547, 552 (Tex. App.—Amarillo 1988, no pet.).

124. *See* Dennis v. State, 772 S.W.2d 525, 526 (Tex. App.—Beaumont 1989), *pet. dism'd*, 798 S.W.2d 573 (Tex. Crim. App. 1990).

125. *See* Townsend v. State, 730 S.W.2d 24, 26 (Tex. App.—Texarkana 1987, no pet.).

126. *See* DeBlanc v. State, 799 S.W.2d 701, 711-12 (Tex. Crim. App. 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 2912, 115 L. Ed. 2d 1075 (1991); Rodgers v. State, 725 S.W.2d 477, 480-81 (Tex. App.—Houston [1st Dist.] 1987, pet. ref'd).

127. *See, e.g.*, *DeBlanc*, 799 S.W.2d at 711-12; Keeton v. State, 749 S.W.2d 861, 863-64, 870 (Tex. Crim. App. 1988) (*Keeton II*); Straughter v. State, 801 S.W.2d 607, 611-13 (Tex. App.—Houston [1st Dist.] 1990, no pet.); Grimes v. State, 779 S.W.2d 124, 126 (Tex. App.—Houston [1st Dist.] 1989, pet. ref'd).

128. *See, e.g.*, United States v. Roberts, 913 F.2d 211, 214-15 (5th Cir. 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 2264, 114 L. Ed. 2d 716 (1991); Tompkins v. State, 774 S.W.2d 195, 201 (Tex. Crim. App. 1987), *aff'd by an equally divided court*, 490 U.S. 754 (1989).

129. *See, e.g.*, *Straughter*, 801 S.W.2d at 611-13; Yarbough v. State, 732 S.W.2d 86, 90 (Tex. App.—Dallas 1987), *vacated on other grounds*, 761 S.W.2d 17 (Tex. Crim. App. 1988); Grady v. State, 730 S.W.2d 191, 194-95 (Tex. App.—Dallas 1987), *vacated on other grounds*, 761 S.W.2d 19 (Tex. Crim. App. 1988); Rijo v. State, 721 S.W.2d 562, 564-65 (Tex. App.—Amarillo 1986, no pet.).

4. Subjective Impressions from Voir Dire

By far the most difficult task which faces opposing litigants, trial judges, and appellate courts is the peremptory strike of a minority ostensibly made on the basis of a lawyer's subjective impressions of the venireman, or the feel which the lawyer has after hearing the responses to the voir dire questions. By definition, a subjective impression is extremely difficult to document, making appellate review problematic at best. Trial judges have accepted the most ephemeral of reasons for peremptory strikes, obviously making a credibility fact-finding that, for example, the venireman really was staring at the prosecutor or plaintiff's lawyer in a hostile way. There is no doubt, however, that the subjective strike will be scrutinized very closely on appeal, although appellate courts have reached confusing and inconsistent rationales for their holdings.[130]

Be that as it may, the following neutral reasons for subjective strikes have been believed by the trial court and upheld on appeal as either "supported by the record," not "clearly erroneous," or as the result of "great deference" to the trial court:[131] that the venireman's general demeanor, including "body english" and facial expressions, led a party to believe that the person would not be a good juror for their case;[132] that a venireman appeared generally inattentive, or attentive only to one party's counsel during voir dire;[133] that a venire-

130. *See* discussion *infra* part IV.D.

131. *See infra* notes 245-48 and accompanying text (trial court decisions reviewed in light most favorable to court's findings).

132. *See, e.g.*, Gardner v. State, 782 S.W.2d 541, 544 (Tex. App.—Houston [1st Dist.] 1989, pet. ref'd); Anderson v. State, 758 S.W.2d 676, 680-681 (Tex. App.—Fort Worth 1988, pet. ref'd); Williams v. State, 752 S.W.2d 729, 729-30 (Tex. App.—Corpus Christi 1988, no pet.); Yarbough v. State, 732 S.W.2d 86, 90 (Tex. App.—Dallas 1987), *vacated on other grounds*, 761 S.W.2d 17 (Tex. Crim App. 1988); Chambers v. State, 724 S.W.2d 440, 442 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd).

133. *See, e.g.*, United States v. Roberts, 913 F.2d 211, 214-15 (5th Cir. 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 2264, 114 L. Ed. 2d 716 (1991); United States v. Melton, 883 F.2d 336, 338 (5th Cir. 1989); United States v. Lance, 853 F.2d 1177, 1180 (5th Cir. 1988); Moore v. State, 811 S.W.2d 197, 199-200 (Tex. App.—Houston [1st Dist.] 1991, pet. ref'd); Straughter v. State, 801 S.W.2d 607, 611-13 (Tex. App.—Houston [1st Dist.] 1990, no pet.); Dennis v. State, 772 S.W.2d 525, 526 (Tex. App.—Beaumont 1989), *pet. dism'd*, 798 S.W.2d 573 (Tex. Crim. App. 1990); Crawford v. State, 770 S.W.2d 51, 54 (Tex. App.—Texarkana 1989, no pet.); Jones v. State, 756 S.W.2d 376, 379 (Tex. App.—Houston [14th Dist.] 1988), *pet. dism'd*, 799 S.W.2d 263 (Tex. Crim. App. 1990); Johnson v. State, 740 S.W.2d 868, 870-71 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd); Townsend v. State, 730 S.W.2d 24, 26 (Tex. App.—Texarkana 1987, no pet.); *Chambers*, 724 S.W.2d at 442.

man appeared to be disinterested in or bored with the proceedings[134] or, on the other hand, was "overly animated;"[135] that a venireman appeared not to take the proceedings seriously;[136] that a venireman appeared gruff, antagonistic, or hostile towards the proceedings,[137] a party or counsel,[138] or towards a witness;[139] that counsel felt that a venireman distrusted him or her[140] or counsel believed that the venireman was offended by the voir dire questions;[141] that the venireman did not make eye-contact with counsel for the striking party, or only made eye-contact with the opposing counsel;[142] or that the venireman made too much eye contact.[143]

Subjective strikes have also been upheld as neutral under the circumstances when the professed motivation was "rapport" (probably an accurate label for most of the above complaints), be it lack of rapport with counsel or too much rapport with opposing counsel.[144] Per-

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134. *See, e.g., Moore*, 811 S.W.2d at 199-200; Jones v. State, 781 S.W.2d 415, 416-17 (Tex. App.—Houston [1st Dist.] 1989, pet. ref'd); Ybarra v. State, 775 S.W.2d 409, 410 (Tex. App.—Waco 1989, no pet.); Campbell v. State, 775 S.W.2d 419, 422 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd); Levy v. State, 749 S.W.2d 176, 178 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd).

135. *See Williams*, 752 S.W.2d at 729-30.

136. *See, e.g.*, Munson v. State, 774 S.W.2d 778, 779-80 (Tex. App.—El Paso 1989, no pet.); Dennis v. State, 772 S.W.2d 525, 526 (Tex. App.—Beaumont 1989), *pet. dism'd*, 798 S.W.2d 573 (Tex. Crim. App. 1990); *Johnson*, 740 S.W.2d at 870-71.

137. *See, e.g.*, United States v. Forbes, 816 F.2d 1006, 1009 (5th Cir. 1987).

138. *See, e.g.*, Anderson v. State, 758 S.W.2d 676, 680-81 (Tex. App.—Fort Worth 1988, pet. ref'd); *Levy*, 749 S.W.2d at 178.

139. *See, e.g.*, United States v. Moreno, 878 F.2d 817, 820 (5th Cir.) (jury strikes in drug case based on bad experiences with police), *cert. denied*, 493 U.S. 979 (1989).

140. *See, e.g.*, Allen v. State, 811 S.W.2d 673, 675-76 (Tex. App.—Dallas 1991, pet. ref'd); Rodgers v. State, 725 S.W.2d 477, 480-81 (Tex. App.—Houston [1st Dist.] 1987, pet. ref'd).

141. *See, e.g.*, Gaines v. State, 811 S.W.2d 245, 249-50 (Tex. App.—Dallas 1991, pet. ref'd); Woods v. State, 801 S.W.2d 932, 940 (Tex. App.—Austin 1990, pet. ref'd).

142. *See, e.g.*, United States v. Cartlidge, 808 F.2d 1064, 1070-71 (5th Cir. 1987); Agbogun v. State, 756 S.W.2d 1, 5 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd); Glenn v. State, 754 S.W.2d 290, 291 (Tex. App.—Houston [1st Dist.] 1988, no pet.); Townsend v. State, 730 S.W.2d 24, 26 (Tex. App.—Texarkana 1987, no pet.).

143. *See* Daniels v. State, 768 S.W.2d 314, 317 (Tex. App.—Tyler 1988, pet. ref'd) (struck venireman "glared" at the prosecutor).

144. *See, e.g.*, Gardner v. State, 782 S.W.2d 541, 544 (Tex. App.—Houston [1st Dist.] 1989, pet. ref'd); *Jones*, 781 S.W.2d at 416-17; Ortiz v. State, 773 S.W.2d 941, 946 (Tex. App.—San Antonio 1989, pet. ref'd); Holman v. State, 772 S.W.2d 530, 533 (Tex. App.—Beaumont 1989, no pet.); *Crawford*, 770 S.W.2d at 54; Cuesta v. State, 763 S.W.2d 547, 552 (Tex. App.—Amarillo 1988, no pet.); *Agbogun*, 756 S.W.2d at 5; *Glenn*, 754 S.W.2d at 291; *Williams*, 752 S.W.2d at 729-30; *Townsend*, 730 S.W.2d at 26.

emptory strikes have also been upheld when based in part upon striking counsel's impression that the venireman did not possess the requisite level of intelligence for the case;[145] and when counsel believed that, contrary to voir dire answers, the venireman would not in fact follow the law of the case given by the court.[146] In another case, counsel's belief that a potential juror appeared fearful of the defendant and defendant's counsel was also found to be a neutral and sufficient reason to explain a strike.[147] Smiling is no laughing matter if you want to be seated on the jury, as smiling at the opposing party or counsel is a neutral and relatively common reason for a peremptory strike.[148] Finally, do not chew gum, even if you did bring enough for everyone.[149]

5. Relationships Between a Venireman or a Venireman's Family and the Other Party, a Witness, Judge, or Lawyer

Having a relationship or other commonality with another person who in some way is connected with the proceedings, or is connected with the factual background of the case, are likewise facially valid, neutral reasons for exercising peremptory challenges against minority veniremen. The connection can be direct or very tenuous.

Being acquainted with one of the parties is a neutral reason for striking a potential juror.[150] The same is true where the venireman knows a party's mother,[151] a party's brother or sister,[152] or where a

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145. Prosper v. State, 788 S.W.2d 625, 628 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd).

146. *See, e.g.*, Ali v. State, 742 S.W.2d 749, 756 (Tex. App.—Dallas 1987, pet. ref'd); Grady v. State, 730 S.W.2d 191, 194-95 (Tex. App.—Dallas 1987), *vacated on other grounds*, 761 S.W.2d 19 (Tex. Crim. App. 1988).

147. *See Woods*, 801 S.W.2d at 940.

148. *See, e.g.*, Stewart v. State, 748 S.W.2d 543, 545 (Tex. App.—Dallas 1988, no pet.); *Yarbough*, 732 S.W.2d at 90; *Grady*, 730 S.W.2d at 194-95.

149. *See, e.g.*, United States v. Melton, 883 F.2d 336, 338 (5th Cir. 1989); *Daniels*, 768 S.W.2d at 316-17.

150. *See, e.g.*, United States v. Roberts, 913 F.2d 211, 214-15 (5th Cir. 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 2264, 114 L. Ed. 2d 716 (1991); DeBlanc v. State, 799 S.W.2d 701, 711-12 (Tex. Crim. App. 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 2912, 115 L. Ed. 2d 1075 (1991); Keeton v. State, 749 S.W.2d 861, 863-64, 870 (Tex. Crim. App. 1988) (*Keeton II*); Garza v. State, 739 S.W.2d 374, 375 (Tex. App.—Corpus Christi 1987, no pet.).

151. *See, e.g.*, *DeBlanc*, 799 S.W.2d at 711-12; *Keeton II*, 749 S.W.2d at 863-64, 870; Adams v. State, 740 S.W.2d 60, 62 (Tex. App.—Dallas 1987, no pet.).

152. *See DeBlanc*, 799 S.W.2d at 711-12.

close relative of the venireman is a friend of one of the parties.[153] A strike has also been found facially neutral where the potential juror was related to a party's father,[154] and where a venireman's uncle was a party's sister's ex-husband.[155] Clearly any familial connection, whether past or present, with a party is enough to show facial neutrality. Other connections with a party have also been recognized as facially neutral. For instance, sharing a common employer with one of the parties is sufficient,[156] as is living in the same neighborhood.[157]

Acquaintance with counsel for a party is also a sufficiently neutral explanation for utilizing a peremptory strike on a minority venireman.[158] This is especially true if the lawyer had sued or prosecuted the venireman or a family member.[159] Similarly, common membership of the venireman and counsel in a civic organization suffices as a facially neutral reason for the strike.[160] Further, it has been held that a strike based upon the fact that the juror knew one of the lawyer's parents was facially neutral.[161]

If a venireman is struck because he or she is acquainted with a witness, that strike would be upheld as facially neutral.[162] In a similar vein, a venireman's involvement with a witness in a civic activity or a quasi-employment situation is also sufficient.[163] A past relationship

153. *See* Grimes v. State, 779 S.W.2d 124, 126 (Tex. App.—Houston [1st Dist.] 1989, pet. ref'd).

154. *See* United States v. Clemons, 941 F.2d 321, 322 (5th Cir. 1991).

155. *See DeBlanc*, 799 S.W.2d at 712.

156. *See*, Prosper v. State, 788 S.W.2d 625, 628 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd); Holman v. State, 772 S.W.2d 530, 533 (Tex. App.—Beaumont 1989, no pet.).

157. Williams v. State, 752 S.W.2d 729, 729-30 (Tex. App.—Corpus Christi 1988, no pet.).

158. *See* United States v. Forbes, 816 F.2d 1006, 1009 (5th Cir. 1987) (striking two black venire persons).

159. *See DeBlanc*, 799 S.W.2d at 711-12 (striking venireman because he knew appellant's mother).

160. *See* Rice v. State, 746 S.W.2d 356, 357-58 (Tex. App.—Fort Worth 1988, pet. ref'd) (prosecutor struck juror because she belonged to NAACP and defense counsel was active member of that organization). Compare this case to *Somerville v. State*, 792 S.W.2d 265, 267-68 (Tex. App.—Dallas 1990, pet. ref'd), where the explanation was facially discriminatory when the reason for the strike was NAACP membership. Here, however, the critical fact is that counsel and the venireman shared this common interest.

161. Levy v. State, 749 S.W.2d 176, 178 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd).

162. *E.g.*, *DeBlanc*, 799 S.W.2d at 711-12; *Williams*, 752 S.W.2d at 729-30.

163. United States v. Roberts, 913 F.2d 211, 214-15 (5th Cir. 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 2264, 114 L. Ed. 2d 716 (1991) (venireman was involved in the political campaign of a witness in the case).

with the presiding judge, even if only by reputation, can also serve as a neutral explanation of a peremptory strike.[164] Finally, a peremptory strike has been upheld against a minority female venireman who was "a young and very pretty girl who might be attracted to Defendant or his counsel."[165]

As stated at the beginning of this subsection, any one of the foregoing strikes could, under many circumstances, be found pretextual in the last step of the *Batson* analysis. The point is that they have been found facially neutral, allowing the non-movant to survive this step of the *Batson* analysis.

6. Venireman or Counsel Has Similar Characteristics to One of the Parties

Strikes have been upheld where a venireman was similar in age to one of the parties,[166] as well as when there was similarity in age and appearance[167] or age and marital status.[168] A strike was also found facially neutral where the venireman and a party shared a poor financial condition.[169] Also, the fact that members of a venireman's family have a drug problem is a facially neutral reason for exercising a peremptory strike in a case involving drug use.[170] Similarly, a peremptory strike has been found facially netural when exercised against a gun owner in a prosecution for illegal possession of a firearm.[171] Finally, under certain circumstances, similarities between a venireman and opposing counsel in the case can be an appropriate facially neu-

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164. United States v. Melton, 883 F.2d 336, 338 (5th Cir. 1989).

165. Hernandez v. State, 808 S.W.2d 536, 544 (Tex. App.—Waco 1991, no pet. h.).

166. *See, e.g.*, United States v. Clemons, 941 F.2d 321, 322, (5th Cir. 1991); Jones v. State, 781 S.W.2d 415, 416-17 (Tex. App.—Houston [1st Dist.] 1989, pet. ref'd); Campbell v. State, 775 S.W.2d 419, 422 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd); Lee v. State, 747 S.W.2d 57, 59 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd); Johnson v. State, 740 S.W.2d 868, 870-71 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd).

167. *See* Grady v. State, 730 S.W.2d 191, 194-95 (Tex. App.—Dallas 1987) (venireperson struck for perceived sympathies with defendant), *vacated on other grounds*, 761 S.W.2d 19 (Tex. Crim. App. 1988).

168. *See* Yarbough v. State, 732 S.W.2d 86, 90 (Tex. App.—Dallas 1987), *vacated on other grounds*, 761 S.W.2d 17 (Tex. Crim. App. 1988).

169. *See* United States v. Cartlidge, 808 F.2d 1064, 1070-71 (5th Cir. 1987).

170. *See* United States v. Guerra-Marez, 928 F.2d 665, 673 (5th Cir.), *cert. denied*, __ U.S. __, 112 S. Ct. 322, 118 L. Ed. 2d 263 (1991).

171. *See* Jones v. State, 756 S.W.2d 376, 379 (Tex. App.—Houston [14th Dist.] 1988), *pet. dism'd*, 799 S.W.2d 263 (Tex. Crim. App. 1990).

tral ground for exercising a peremptory strike.[172]

7. The Age of the Venireman

While age cutoff points vary, striking young persons from the venire is apparently the sine qua non of many prosecutors.[173] Peremptory strikes have very often been found to have been facially neutral where the explanation was that the venireman was "too young."[174]

8. Marital and Parental Status

Under the circumstances of many cases, explanations based upon marital status or parental status, alone or in combination with each other, have been held facially nondiscriminatory. No reported Texas case has arisen in the *Batson* context where a minority venireman was stricken for being married. However, striking unmarried or divorced veniremen is very common. Thus, peremptories have been found facially neutral where the venireman was unmarried,[175] was unmarried and without children,[176] or was unmarried with a child.[177] Per-

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172. *See* Rasco v. State, 739 S.W.2d 437, 439 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd, untimely filed) (stricken venireman and defendant's counsel were both ministers).

173. In the previous subsection, age was relevant only insofar as it created a shared characteristic with one of the parties. In this subsection, the justification is age *qua* age, *regardless of the age of the parties to the case.*

174. *See, e.g.*, United States v. Moreno, 878 F.2d 817, 821 (5th Cir.), *cert. denied*, 493 U.S. 979 (1989); United States v. Lance, 853 F.2d 1177, 1180 (5th Cir. 1988); Woods v. State, 801 S.W.2d 932, 940 (Tex. App.—Austin 1990, pet. ref'd); Gardner v. State, 782 S.W.2d 541, 544 (Tex. App.—Houston [1st Dist.] 1989, pet. ref'd); Price v. State, 782 S.W.2d 266, 269-70 (Tex. App.—Beaumont 1989, pet. ref'd); Ybarra v. State, 775 S.W.2d 409, 410 (Tex. App.—Waco 1989, no pet.); Crawford v. State, 770 S.W.2d 51, 54 (Tex. App.—Texarkana 1989, no pet.); Catley v. State, 763 S.W.2d 465, 466-67 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd); Hastings v. State, 755 S.W.2d 183, 186 (Tex. App.—San Antonio 1988, pet. ref'd); Garza v. State, 739 S.W.2d 374, 375 (Tex. App.—Corpus Christi 1987, no pet.); Rasco v. State, 739 S.W.2d 437, 439 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd, untimely filed); Yarbough v. State, 732 S.W.2d 86, 90 (Tex. App.—Dallas 1987), *vacated on other grounds*, 761 S.W.2d 17 (Tex. Crim. App. 1988); Chambers v. State, 724 S.W.2d 440, 442 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd).

175. *See, e.g.*, United States v. Valley, 928 F.2d 130, 135-36 (5th Cir. 1991); United States v. Moreno, 878 F.2d 817, 821 (5th Cir.), *cert. denied*, 493 U.S. 979 (1989); United States v. Romero-Reyna, 867 F.2d 834, 837 (5th Cir. 1989), *cert. denied*, 494 U.S. 1084 (1990); Rasco v. State, 739 S.W.2d 437, 439 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd, untimely filed); Yarbough v. State, 732 S.W.2d 86, 90 (Tex. App.—Dallas 1987), *vacated on other grounds*, 761 S.W.2d 17 (Tex. Crim. App. 1988); Chambers v. State, 724 S.W.2d 440, 442 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd).

176. *See, e.g.*, United States v. Lance, 853 F.2d 1177, 1180 (5th Cir. 1988); Jones v. State, 781 S.W.2d 415, 416-17 (Tex. App.—Houston [1st Dist.] 1989, pet. ref'd); Ortiz v. State, 773 S.W.2d 941, 946 (Tex. App.—San Antonio 1989, pet. ref'd); Crawford v. State, 770 S.W.2d

emptory challenges exercised against divorced veniremen[178] and divorced veniremen without children[179] have also been upheld, as has a strike for not having any children, regardless of marital status.[180]

9. Prior Jury, Witness, or Litigation Experience

Using peremptory strikes against minority veniremen has often been found facially nondiscriminatory when based upon a venireman's past experiences as a juror, as a witness,[181] or as a party-litigant.[182] In this regard, lack of prior jury experience was found to be a facially neutral explanation.[183] Also, prior civil jury service at which a mistrial was declared has also been a sufficient excuse,[184] as has prior service on a criminal jury where a verdict of guilty was not reached.[185] Not surprisingly, a peremptory strike explained by a venireman's prior criminal jury service at which the same defendant was acquitted in an unrelated matter has been found facially

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51, 54 (Tex. App.—Texarkana 1989, no pet.); Townsend v. State, 730 S.W.2d 24, 26 (Tex. App.—Texarkana 1987, no pet.).

177. *See Romero-Reyna*, 867 F.2d at 837.

178. *See, e.g.*, United States v. Cartlidge, 808 F.2d 1064, 1071 (5th Cir. 1987); Ali v. State, 742 S.W.2d 749, 756 (Tex. App.—Dallas 1987, pet. ref'd). The presence *vel non* of children was not mentioned in the opinions.

179. *See* Cuesta v. State, 763 S.W.2d 547, 552 (Tex. App.—Amarillo 1988, no pet.).

180. *See* Hernandez v. State, 808 S.W.2d 536, 544 (Tex. App.—Waco 1991, no pet. h.).

181. The case of *Munson v. State*, 774 S.W.2d 778, 779-80 (Tex. App.—El Paso 1989, no pet.), is the only one which addresses prior experiences as a witness. In *Munson*, part of the explanation for striking the potential juror was that he had testified in a prior murder trial, although *Munson* was not a murder trial. Also, the opinion did not specify whether the venireman was a witness for the prosecution or the defense in the former trial, nor was the outcome of the former trial set forth. *See id.* at 779.

182. *See* Daniels v. State, 768 S.W.2d 314, 317 (Tex. App.—Tyler 1988, pet. ref'd) (justifying strike of venireman because of her past litigation experience). One aspect of the neutral explanation was that the venireman was a party to a discrimination lawsuit. There is, however, no discussion in the opinion of why this explanation was neutral, or of the details of the discrimination litigation. *See id.* at 317.

183. *See, e.g.*, Rasco v. State, 739 S.W.2d 437, 439 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd, untimely filed); Townsend v. State, 730 S.W.2d 24, 26 (Tex. App.—Texarkana 1987, no pet.).

184. *See, e.g.*, Yarbough v. State, 732 S.W.2d 86, 90 (Tex. App.—Dallas 1987), *vacated on other grounds*, 761 S.W.2d 17 (Tex. Crim. App. 1988); Grady v. State, 730 S.W.2d 191, 194-95 (Tex. App.—Dallas 1987), *vacated on other grounds*, 761 S.W.2d 19 (Tex. Crim. App. 1988).

185. *See, e.g.*, United States v. Moreno, 878 F.2d 817, 820 (5th Cir.), *cert. denied*, 493 U.S. 979 (1989); Levy v. State, 749 S.W.2d 176, 178 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd).

neutral.[186]

The use of peremptory strikes against veniremen with whom counsel had prior unsatisfactory experiences have also been upheld. For example, striking a venireman who had asked several "unusual" questions at a past voir dire has been found neutral.[187] Similarly, a strike made because counsel believed that the potential juror was too lenient, based upon a prior experience with that venireman as a grand juror, has also been held facially nondiscriminatory.[188] Finally, peremptories have been upheld when explained as being the product of a past "bad record" as a juror.[189]

10. Health of the Venireman

A potential juror's health can be a facially neutral explanation for striking a minority venireman. Poor health raises the specter of inability to sit through the entire trial, or the inability to pay close attention to the proceedings. Peremptory health strikes have consistently been upheld.[190]

11. Willingness to Serve on the Jury

When a veniremen is overheard expressing displeasure over the prospect of being selected as a juror, a peremptory strike of that person is facially neutral.[191]

12. Dress or Appearance of the Venireman

This category is similar in some respects to the subjective strike

186. *See* Garza v. State, 739 S.W.2d 374, 375 (Tex. App.—Corpus Christi 1987, no pet.).

187. *See* Townsend v. State, 730 S.W.2d 24, 26 (Tex. App.—Texarkana 1987, no pet.).

188. *See Garza*, 739 S.W.2d at 375.

189. *See, e.g.*, Woods v. State, 801 S.W.2d 932, 940 (Tex. App.—Austin 1990, pet. ref'd); Ivatury v. State, 792 S.W.2d 845, 847-48 (Tex. App.—Dallas 1990, pet. ref'd). The nature or format of these "bad records" is not, however, revealed in the opinions. Unless these records are objectively verifiable, such explanations are as vulnerable on appeal as are the subjective strikes.

190. *See, e.g.*, DeBlanc v. State, 799 S.W.2d 701, 711-12 (Tex. Crim. App.), *cert. denied*, __ U.S. __, 111 S. Ct. 2912, 115 L. Ed. 2d 1075 (1991); Roy v. State, 813 S.W.2d 532, 538 (Tex. App.—Dallas 1991, no pet. h.); Anderson v. State, 758 S.W.2d 676, 680-681 (Tex. App.—Fort Worth 1988, pet. ref'd).

191. *See, e.g.*, United States v. Roberts, 913 F.2d 211, 214-15 (5th Cir. 1990) (struck juror due to her disinterested demeanor), *cert. denied*, __ U.S. __, 111 S. Ct. 2264, 114 L. Ed. 2d 716 (1991); Woods v. State, 801 S.W.2d 932, 940 (Tex. App.—Austin 1990, pet. ref'd) (agreeing that displeasure over serving is neutral explanation); Price v. State, 782 S.W.2d 266, 269-70 (Tex. App.—Beaumont 1989, pet. ref'd) (affirming peremptory strike for disinterest).

discussed above in subsection four. However, these peremptories are physically verifiable, and concern dress or appearance which is objectively "unusual," or at least unusual to lawyers and judges who spend a fair amount of time at the courthouse. For instance, wearing sunglasses during voir dire has provided grounds for a neutral explanation.[192] Similarly, wearing "only a T-shirt to court"[193] also provided the required facially valid explanation for a peremptory strike.[194] While lawyers and judges are seldom accused of being up on the latest fashions and hairstyles, that does not mean it is discriminatory to strike a male venireman sporting a pony-tail.[195]

13. Employment of the Venireman

What a venireman does for a living, or does not do for a living, is a frequent source of peremptory strikes. Most often, such strikes are justified because various endeavors are perceived to attract eiher liberals or conservatives. It is also thought that tenure at one's position is indicative of stability and roots in the community, a trait often associated with conservatism. Like the purely subjective strike, these employment justifications are under particularly heavy attack by appellate courts. As seen below,[196] courts are struggling with many of these neutral explanations to make sure, as best they can, that such excuses do not conveniently disguise strikes which in fact are the result of racial animus.

Unemployment of the venireman[197] or the venireman's spouse[198] both have been held to be a facially neutral explanation for a peremptory strike. Being employed at a particular job for only a short time

192. *See* Jones v. State, 756 S.W.2d 376, 379 (Tex. App.—Houston [14th Dist.] 1988), *pet. dism'd*, 799 S.W.2d 263 (Tex. Crim. App. 1990).

193. Hernandez v. State, 808 S.W.2d 536, 544 (Tex. App.—Waco 1991, no pet. h.). Although not mentioned in the opinion, one presumes that pants, shoes, and perhaps socks were also worn to court by this venireman.

194. *Id.*

195. *See* United States v. Clemons, 941 F.2d 321, 322 (5th Cir. 1991).

196. *See infra* notes 252-63 and accompanying text (facially neutral explanations fail when found to be pretexts for discrimination).

197. *E.g.*, United States v. Moreno, 878 F.2d 817, 820-21 (5th Cir.), *cert. denied*, 493 U.S. 979 (1989); Hernandez v. State, 808 S.W.2d 536, 544 (Tex. App.—Waco 1991, no pet. h.); York v. State, 764 S.W.2d 328 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd); Johnson v. State, 740 S.W.2d 868, 870-71 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd).

198. *E.g.*, Williams v. State, 752 S.W.2d 729, 730 (Tex. App.—Corpus Christi 1988, no pet.); Levy v. State, 749 S.W.2d 176, 178 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd).

also has been accepted as facially neutral.[199] Aside from unemployment or the venireman's employment tenure, many strikes have been exercised based upon the particular type of job held. According to some, being a teacher supposedly makes one used to hearing excuses (and presumably believing them), and also makes one lenient. Thus, peremptories of teachers have been upheld.[200] Also in the "too lenient" category, at least according to certain prosecutors who have exercised peremptories in reported cases, are: hospital workers,[201] social service workers,[202] federal and postal employees,[203] and commercial artists.[204] These strikes were all upheld as facially neutral.

Under circumstances where counsel was apparently seeking jurors who have a certain amount of contact with others at work, a librarian was struck as not fitting that mold, and the strike was upheld as facially neutral.[205] A nightclub employee was explained to be an undesirable juror in a case involving prostitution, presumably because she was used to seeing prostitutes at the establishment where she worked. This passed muster as a neutral explanation.[206] Also, employees of the Texas Department of Corrections have been struck because of the possibility, according to prosecutors, that they some day might come into contact with the defendant while at work. This, too,

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199. *E.g.*, United States v. Valley, 928 F.2d 130, 135-36 (5th Cir. 1991); Stewart v. State, 748 S.W.2d 543, 545 (Tex. App.—Dallas 1988, no pet.); *Johnson*, 740 S.W.2d at 871; Yarbough v. State, 732 S.W.2d 86, 90 (Tex. App.—Dallas 1987), *vacated on other grounds*, 761 S.W.2d 17 (Tex. Crim. App. 1988); Townsend v. State, 730 S.W.2d 24, 26 (Tex. App.—Texarkana 1987, no pet.).

200. *See* Price v. State, 782 S.W.2d 266, 269-70 (Tex. App.—Beaumont 1989, pet. ref'd); Daniels v. State, 768 S.W.2d 314, 317 (Tex. App.—Tyler 1988, pet. ref'd); Rasco v. State, 739 S.W.2d 437, 439 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd, untimely filed).

201. Glenn v. State, 754 S.W.2d 290, 291 (Tex. App.—Houston [1st Dist.] 1988, no pet.).

202. *See* United States v. Romero-Reyna, 867 F.2d 834, 837 (5th Cir. 1989), *cert. denied*, 494 U.S. 1084 (1990); York v. State, 764 S.W.2d 328, 330-31 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd); *Glenn*, 754 S.W.2d at 291. Note that "leniency by association" is also facially valid, for in *Glenn*, it was the wife of the venireman who was employed in the field.

203. Tompkins v. State, 774 S.W.2d 195, 205 (Tex. Crim. App. 1987), *aff'd by an equally divided court*, 490 U.S. 754 (1989); Daniels v. State, 768 S.W.2d 314, 317 (Tex. App.—Tyler 1988, pet. ref'd).

204. *See* United States v. Moreno, 878 F.2d 817, 820-21 (5th Cir.), *cert. denied*, 493 U.S. 979 (1989) (commercial artist venireperson struck because of perceived sympathies for drug users).

205. *See* Levy v. State, 749 S.W.2d 176, 178 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd) (librarian lacked sufficient contact with public).

206. *See* Williams v. State, 752 S.W.2d 729, 729-30 (Tex. App.—Corpus Christi 1988, no pet.) (struck venireperson's employment in a nightclub cause of concern for prosecutor).

was found to be a facially nondiscriminatory explanation.[207]

Apparently, prosecutors are not enamored by the idea of precision in jury deliberations, as a statistical engineer was peremptorily struck for fear of excess precision in deciding whether to convict the defendant. Again, this was found to be a facially neutral explanation.[208] A neutral explanation was also found in the striking of a civilian employee of the Houston Police Department. For some reason, the prosecutor believed that such a person would be less likely to believe the testimony of a Houston police officer.[209] Strikes of people employed in religious endeavors have also been upheld, usually with the explanation that they might find it difficult to judge others. These strikes have been found facially neutral under the circumstances.[210]

In addition, the following potential jurors were peremptorily struck because of the jobs which they held, although no detailed explanation was given for the strikes: a clerical position with limited responsibility,[211] an employee of a motel,[212] a salesman,[213] and the holder of a "low income position."[214] These strikes too were all found facially neutral under the circumstances. Finally, some lawyers simply perceive that people employed in certain fields are just plain bad luck. Apparently, truckers are bad luck, at least for certain Texas prosecu-

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207. *See, e.g.*, Prosper v. State, 788 S.W.2d 625, 627 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd); Grimes v. State, 779 S.W.2d 124, 126 (Tex. App.—Houston [1st Dist.] 1989, pet. ref'd).

208. Henderson v. State, 788 S.W.2d 621, 625 (Tex. App.—Houston [14th Dist.] 1990), *rev'd on other grounds*, No. 601-90, 1991 Tex. Crim. App. LEXIS 140 (Tex. Crim. App., Jun. 19, 1991). The court of criminal appeals reversed the appeals court not because of the neutrality *vel non* of the explanation, but because it summarily affirmed the trial court's finding that that the defendant failed to make out a prima facie case. The reversal was based upon the Texas Court of Criminal Appeals' prior *Dewberry* holding regarding prima facie cases. *See* text *supra* part IV.A.

209. Rodgers v. State, 725 S.W.2d 477, 480 (Tex. App.—Houston [1st Dist.] 1987, pet. ref'd).

210. United States v. De La Rosa, 911 F.2d 985, 991 (5th Cir. 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 2275, 114 L. Ed. 2d 726 (1991) (church workers want to forgive people); Cuesta v. State, 763 S.W.2d 547, 552 (Tex. App.—Amarillo 1988, no pet.); Glenn v. State, 754 S.W.2d 290, 291 (Tex. App.—Houston [1st Dist.] 1988, no pet.). This type of strike, one ostensibly based upon being religious in the general sense, must be distinguished from the strike based upon adherence to any specific religion, such as strikes based upon just being Catholic or Jewish or Druid or Baptist. This latter type of strike is unconstitutional, although Texas courts have not realized this yet. *See* discussion *infra* part IV.C.14.

211. *See Levy*, 749 S.W.2d at 178 (librarian struck from venire).

212. *Romero-Reyna*, 867 F.2d at 837.

213. *See Price*, 782 S.W.2d at 269-70.

214. United States v. Cartlidge, 808 F.2d 1064, 1070-71 (5th Cir. 1987).

tors. This type of strike has also been upheld as facially neutral.[215]

14. Religion Related Reasons

As discussed above, strikes related to religion are discriminatory per se. The Fifth Circuit has recognized this,[216] but Texas courts have not. Thus, neutral explanations have consisted of such things as: affiliation with the Church of Christ, characterized as a "fringe" group;[217] being a Seventh Day Adventist;[218] or being Catholic.[219] These decisions are surprising given that the Texas Court of Criminal Appeals has long held that effective exclusion of religious groups from jury service (a *Swain*-type violation, the precursor of *Batson*) violates the Equal Protection Clause.[220]

Other, truly facially neutral religion-related reasons have been asserted and found acceptable by Texas courts. In one case, the prosecutor supposedly wanted jurors with religious affiliations, but the venireman's jury information card contained a blank space in the area reserved for identification of one's religious affiliation.[221] In other cases, expressed religiously-based discomfort about the prospect of "sitting in judgment" of a fellow human being was considered a facially neutral explanation for a peremptory strike of a minority venireman.[222]

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215. *See, e.g.*, Munson v. State, 774 S.W.2d 778, 780 (Tex. App.—El Paso 1989, no pet.); *York*, 764 S.W.2d at 330-31. Perhaps the same trucker frequents the road between Houston and El Paso.

216. *See* United States v. Greer, 939 F.2d 1076, 1086 & n.9 (5th Cir. 1991).

217. Chambers v. State, 724 S.W.2d 440, 442 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd).

218. Salazar v. State, 745 S.W.2d 385, 388-89 (Tex. App.—Fort Worth 1987), *rev'd on other grounds*, 795 S.W.2d 187 (Tex. Crim. App. 1990).

219. Glenn v. State, 754 S.W.2d 290, 291 (Tex. App.—Houston [1st Dist.] 1988, no pet.).

220. *See* Juarez v. State, 277 S.W. 1091, 1094 (Tex. Crim. App. 1925); *see also* Miller v. State, 733 S.W.2d 287, 288-89 & 289 n.1 (Tex. App.—Corpus Christi), *appeal after abatement*, 741 S.W.2d 501 (Tex. App.—Corpus Christi 1987, pet. ref'd).

221. *See* Yarbough v. State, 732 S.W.2d 86, 90 (Tex. App.—Dallas 1987) (leaving religious preference information blank on juror information card), *vacated on other grounds*, 761 S.W.2d 17 (Tex. Crim. App. 1988).

222. *See* DeBlanc v. State, 799 S.W.2d 701, 711-12 (Tex. Crim. App. 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 2912, 115 L. Ed. 2d 1075 (1991); Johnson v. State, 740 S.W.2d 868, 870-71 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd).

15. Exposure to Pre-Trial Publicity or Possible Familiarity with Subject Matter

Explanations for peremptory strikes of minority veniremen will be accepted as facially neutral if they relate to exposure to pre-trial publicity or to a venireman's possible familiarity with the facts or subject matter of the case. Exposure to news stories or other pre-trial publicity have, in fact, provided acceptably neutral explanations for strikes.[223] In one case, a venireman believed that there were problems in his city with undercover police officers. This preconception was sufficient explanation for a peremptory strike.[224] Other preconceived notions or negative attitudes about police officers or the government have also sufficed to explain peremptory strikes of minority veniremen.[225]

Insofar as familiarity with a case's subject matter is concerned, peremptory strikes have been neutrally explained where a venireman frequented the bar which was the site of the crime at issue.[226] Also, such strikes have been upheld in a case where insanity was an issue and the venireman had a close family member who had been treated for mental illness.[227]

16. Venireman's Ties to the Community

It has been frequently held that tenuous or insufficient ties to the community in which the trial is taking place is a sufficiently facially neutral explanation of a peremptory strike of a minority member of the venire.[228]

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223. *E.g.*, United States v. Roberts, 913 F.2d 211, 214-15 (5th Cir. 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 2264, 114 L. Ed. 2d 716 (1991); C— E— J— v. State, 788 S.W.2d 849, 856 (Tex. App.—Dallas 1990, writ denied); Yarbough v. State, 732 S.W.2d 86, 90 (Tex. App.—Dallas 1987), *vacated on other grounds*, 761 S.W.2d 17 (Tex. Crim. App. 1988).

224. *See* United States v. Moreno, 878 F.2d 817, 820 (5th Cir.), *cert. denied*, 493 U.S. 979 (1989).

225. *See, e.g.*, United States v. Ratcliff, 806 F.2d 1253, 1256 (5th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987) (in a tax prosecution, the venireman had prior problems with the IRS); Hernandez v. State, 808 S.W.2d 536, 544 (Tex. App.—Waco 1991, no pet.) (venireman had been involved in student demonstrations, did not like the way the situation was handled by the police); Straughter v. State, 801 S.W.2d 607, 611-13 (Tex. App.—Houston [1st Dist.] 1990, no pet.) (venireman was divorced from a policeman, and harbored negative feelings towards policemen).

226. Garza v. State, 739 S.W.2d 374, 375 (Tex. App.—Corpus Christi 1987, no pet.).

227. Barnett v. State, 771 S.W.2d 654, 657-58 (Tex. App.—Corpus Christi 1989, no pet.).

228. *See, e.g.*, United States v. Lance, 853 F.2d 1177, 1180-81 (5th Cir. 1988); Ortiz v.

17. Geographic Origin of the Venireman

Explanations for peremptory strikes as based upon the geographic origin of the venireman have been upheld in certain circumstances. Specifically, a venireman from Haiti was stricken because it was asserted that Haiti is a transition point for the Columbian drug trade with the United States. In this drug prosecution, this explanation was accepted as facially neutral.[229] In another case, a New Yorker was stricken because it was believed that all people from New York "tend to be opinionated."[230]

18. The Venireman's Place on the Panel

It has been held that striking a minority venireman in order to get further down the panel to what the lawyer perceives as a better juror for his case, is facially neutral.[231] When a strike is exercised for this reason, it is essential that it be explained why the juror seated further down in the panel was in fact better. If such an explanation is not required, this type of challenge can easily be transformed into an opportunity for invidious use of the strike.

19. Miscellaneous Explanations

Many strikes cannot be easily pigeon-holed. Thus, the miscellaneous category is born. The following peremptory strikes have also been held facially neutral: The attorney associated the venireman's name with someone else (who, presumably was undesirable as a juror from the lawyer's standpoint, although this was not explained);[232] the venireman had the same last name as someone who the prosecutor had previously prosecuted;[233] the prosecutor erroneously attributed criticism of the quality of wire-tap tapes to the venireman;[234] the

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State, 773 S.W.2d 941, 946 (Tex. App.—San Antonio 1989, pet. ref'd); Crawford v. State, 770 S.W.2d 51, 54 (Tex. App.—Texarkana 1989, no pet.).

229. *See* Campbell v. State, 775 S.W.2d 419, 422 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd).

230. *See* Henderson v. State, 788 S.W.2d 621, 625 (Tex. App.—Houston [14th Dist.] 1990), *rev'd on other grounds*, No. 601-90, 1991 Tex. Crim. App., LEXIS 140 (Tex. Crim. App., Jun. 19, 1991) (trial court judged no showing of discrimination).

231. *E.g.*, United States v. Melton, 883 F.2d 336, 338 (5th Cir. 1989); United States v. Cartlidge, 808 F.2d 1064, 1071 (5th Cir. 1987).

232. Chambers v. State, 724 S.W.2d 440, 442 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd).

233. United States v. Terrazas-Carrasco, 861 F.2d 93, 95 n.1 (5th Cir. 1988).

234. *See* United States v. Guerra-Marez, 928 F.2d 665, 673 (5th Cir.), *cert. denied*, __

venireman was not a past victim of a crime;[235] the venireman saw the criminal defendant talking and laughing with the court bailiffs;[236] the venireman would be getting a ride to the trial each day in a police car, which, according to the prosecutor, would have the appearance that the police were showing this particular juror favoritism;[237] the venireman stated, either seriously or jokingly, in response to a voir dire question, that she was racially biased;[238] a venireman believed that black defendants receive unfair treatment in Dallas County;[239] a female venireman listed a female in the space reserved for spouses' names on the juror information card, and the prosecutor did not want a possible homosexual on the jury;[240] and, finally, a venireman had a bumper-sticker on his car proudly proclaiming—"same day, same bulls**t."[241]

D. *Is It Real, or Is It Pretext?*

After the non-movant has come forward with evidence that the peremptory strike exercised against a minority venireman had a facially neutral justification, issue is joined and it is then up to the court, after observing the testimony, to decide whether the ostensibly neutral reason given for the strike was an honest one, or instead a pretext to cloak invidious discrimination.[242] Significantly, it takes but one strike to violate *Batson* and *Edmonson*—the fact that all of the remaining strikes were pure as the driven snow will not prevent reversal.[243] A *Batson* violation is never "harmless error."[244]

At the pretext analysis stage, the burden of proof remains on the

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U.S. __, 112 S. Ct. 322, 116 L. Ed. 2d 263 (1991) (no racial intent inferred from inadvertent error).

235. Dennis v. State, 772 S.W.2d 525, 526 (Tex. App.—Beaumont 1989), *pet. dism'd*, 798 S.W.2d 573 (Tex. Crim. App. 1990).

236. Perry v. State, 770 S.W.2d 950, 952-53 (Tex. App.—Fort Worth 1989, no pet.).

237. Adams v. State, 740 S.W.2d 60, 62 (Tex. App.—Dallas 1987, no pet.).

238. Moore v. State, 811 S.W.2d 197, 199 (Tex. App.—Houston [1st Dist.] 1991, no pet.).

239. *See* Gaines v. State, 811 S.W.2d 245, 248-50 (Tex. App.—Dallas 1991, pet. ref'd).

240. Hastings v. State, 755 S.W.2d 183, 186 (Tex. App.—San Antonio 1988, pet. ref'd).

241. Stewart v. State, 748 S.W.2d 543, 545 (Tex. App.—Dallas 1988, no pet.).

242. Batson v. Kentucky, 476 U.S. 79, 98 (1986); Tennard v. State, 802 S.W.2d 678, 681 (Tex. Crim. App. 1990).

243. *See, e.g.*, Keeton v. State, 724 S.W.2d 58, 65 n.5 (Tex. Crim. App. 1987) (*Keeton I*) (interpreting *Batson* holding to mean no potential juror can be eliminated because of race), *aff'd on reh'g*, 749 S.W.2d 861 (Tex. Crim. App. 1991).

244. *See* Sloan v. State, 809 S.W.2d 234, 238 (Tex. App.—Tyler 1988, no pet.) (error that affects substantial rights can't be harmless).

movant to prove, by a preponderance of the evidence, that the strike was exercised in violation of the Equal Protection Clause.[245] The decision of the trial court will receive "great deference" and the record will be viewed in a light most favorable to the trial court's findings, because they are findings of fact which draw heavily upon determinations of credibility and witness demeanor.[246] Therefore, the trial court's determination will not be disturbed on appeal unless it is clearly erroneous:[247]

> a finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it would have decided the case differently. . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.[248]

Prior to *DeBlanc* and *Whitsey*, the court of criminal appeals utilized a different standard for appellate review; that is, whether considering the evidence in the light most favorable to the trial court's ruling, those findings are "supported by the record."[249]

In the court of criminal appeals' seminal *Keeton II* opinion, the court set forth an analytical framework for deciding whether the "facially neutral" explanation was truly benign. In *Keeton II*, the court noted a number of factors, the proof of which can establish that a so-called "neutral explanation" was really a pretext for prohibited discrimination:

> 1. Evidence that the 'jurors in question share[d] only this one characteristic—their membership in the group—and that in all other respects they [were] as heterogeneous as the community as a whole.' For in-

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245. Tennard v. State, 802 S.W.2d 678, 681 (Tex. Crim. App. 1990).

246. *Batson*, 476 U.S. at 98 n.21; *Tennard*, 802 S.W.2d at 681.

247. Williams v. State, 804 S.W.2d 95, 101 (Tex. Crim. App.), *cert. denied*, __ U.S. __, 111 S. Ct. 2875, 115 L. Ed. 2d 1038 (1991).

248. DeBlanc v. State, 799 S.W.2d 701, 713 (Tex. Crim. App. 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 2912, 115 L. Ed. 2d 1075 (1991) (quoting Whitsey v. State, 796 S.W.2d 707, 721-22 (Tex. Crim. App. 1990)).

249. Keeton v. State, 749 S.W.2d 861, 870 (Tex. Crim. App. 1988) (*Keeton II*).

stance, 'it may be significant that the persons challenged, although all black, include both men and women and are a variety of ages, occupations, and social or economic conditions,' indicating that race was the deciding factor.

2. A pattern of strikes against black jurors on the particular venire; e.g., 4 to 6 peremptory challenges were used to strike black jurors.

3. The past conduct of the state's attorney is using peremptory challenges to strike all blacks from the jury venire.

4. The type and manner of the state's attorney's questions and statements during voir dire, including nothing more than desultory voir dire.

5. The type and manner of questions directed to the challenged juror, including a lack of questions, or a lack of meaningful questions.

6. Disparate treatment of members of the jury venire with the same characteristics, or who answer a question in the same or similar manner; e.g., in *Slappy*, a black elementary school teacher was struck as being potentially too liberal because of his job, but a white elementary school teacher was not challenged.

7. Disparate examination of members of the venire; e.g., in *Slappy*, a question designed to provoke a certain response that is likely to disqualify a juror was asked to black jurors, but not to white jurors.

8. Circumstantial evidence of intent may be proven by disparate impact where all or most of the challenges were used to strike blacks from the jury.

9. The state used peremptory challenges to dismiss all or most black jurors.[250]

In addition, the Court in *Keeton II* held as follows:

The trial judge's task is extremely difficult. *One doubts that a prosecutor will admit that his decision to challenge a particular member of the venire was based on race. The court is left with determining from the totality of the circumstances whether an articulated neutral explanation is but an excuse for improper discrimination. Batson* thus requires the trial judge to embrace a participatory role in voir dire, noting the subtle nuance of both verbal and nonverbal communication from each member of the venire and from the prosecutor himself.

. . .

We do not believe, however, that Batson is satisfied by "neutral explanations" which are no more than facially legitimate, reasonably specific and clear. Were facially neutral explanations sufficient without more, Batson would be meaningless. It would take little effort for prosecutors who are

250. *Keeton II*, 749 S.W.2d at 867 (quoting *Ex Parte* Branch, 526 So.2d 609, 622-23 (Ala. 1987)).

of such a mind to adopt rote "neutral explanations" which bear facial legitimacy but conceal a discriminatory motive. We do not believe the Supreme Court intended a charade when it announced Batson.

. . .

[W]e read *Batson* to require the trial judge to assess the entire milieu of the voir dire *objectively and subjectively*. The judge must consider his personal, lifetime experiences with voir dire, comparing his observations and assessments of veniremen with those explained by the State. In addition, he must consider both his personal experiences with the prosecutor and any evidence offered by a defendant to show a pattern or practice of a prosecutor using peremptory challenges in a racially discriminatory manner over the course of time. Other factors must be considered as circumstances demand.

Ultimately, however, the trial judge must focus all of the information and intuitive perceptions he has gathered to determine whether the prosecutor's use of his peremptory challenges proceeds from a racially discriminatory motive.[251]

The Texas Court of Criminal Appeals went on to note that:

The following will weigh heavily against the legitimacy of any race-neutral explanation:

1) an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically;

2) no examination or only a perfunctory examination of the challenged juror;

3) disparate examination of the challenged juror, i.e., questioning challenged venireperson so as to evoke a certain response without asking the same question of other panel members;

4) the reason given for the challenge is unrelated to the facts of the case; and

5) disparate treatment where there is no difference between responses given and unchallenged venirepersons.

. . .

We hold now that is not sufficient that a prosecutor's explanations, in meeting the presumption that the peremptory challenge is being abused, are facially race-neutral. The trial court must further evaluate the proffered explanations in light of the standards we recognize here, other circumstances of the case, and the judges' knowledge of trial tactics in order

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251. *Keeton II*, 749 S.W.2d at 865-66 (quoting State v. Antwine, 743 S.W.2d 51, 64-65 (Mo. 1987)); Slappy v. State, 503 So.2d 350, 355 (Fla. Dist. Ct. App. 1987) (emphasis added in *Keeton II*); *see also* Tompkins v. State, 774 S.W.2d 195, 202 n.6 (Tex. Crim. App. 1987), *aff'd by an equally divided court*, 490 U.S. 754 (1989).

> to make a reasoned determination that the prosecutor's facially innocuous explanations are not contrived to avoid admitting acts of group discrimination.[252]

As seen above in section IV.C, just about any explanation will be found facially neutral. The tough questions are decided in the pretext stage of the proceeding. While *Keeton II* gave valuable guidance to courts, especially trial courts, the extremely deferent standard of review given to trial courts' *Batson* decisions has resulted in a quandry for appellate courts. Those courts have struggled mightily to reconcile the standard of review and simultaneously monitor the perceived actual and potential abuses inherent whenever subjective strikes are at issue. Not surprisingly, there have in fact been more reversals than one would expect given the nature of and standards for reviewing *Batson* decisions.

In nearly every case which has reversed a trial court's findings made at the pretext stage, one or both of two key factors were present. Those factors are: (1) disparate treatment of veniremen such as striking minority veniremen who share the same supposedly objectionable trait as non-minorities who were not challenged, and (2) explanations based upon supposed group biases, without connecting the specific venireman with the supposed group bias. A sub-set of this second ground is almost always a perfunctory or even a contrary voir dire.

Thus, in *Wiese v. State*,[253] the reversal of a trial court's *Batson* ruling in favor of the prosecution was based upon the lack of any meaningful voir dire of the stricken minority veniremen coupled with disparate treatment and disparate questioning of minority veniremen.[254] In *Woods v. State*,[255] cogently written by former Judge Onion of the court of criminal appeals, a strike based upon appearance (haircut) was held to be pretextual and discriminatory because there was not even an attempt to tie the perceived group trait, "liberalism, radicalism and the drug culture," to the individual venireman. This finding of pretext was also based upon disparate treatment of that

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252. *Keeton II*, 749 S.W.2d at 866-67 (quoting *Slappy*, 503 So. 2d at 355-56).

253. 811 S.W.2d 958 (Tex. App.—Fort Worth 1991, pet. ref'd).

254. *Wiese*, 811 S.W.2d at 960. Disparate questioning is questioning directed solely at minority veniremen calculated to elicit a response which will form the basis of a supposedly neutral explanation for the planned peremptory strike of that venireman. *Keeton II*, 749 S.W.2d at 867.

255. 801 S.W.2d 932 (Tex. App.—Austin 1990, pet. ref'd) (opinion by Onion, J., by assignment).

venireman, because another non-minority venireman with an unusual hairstyle was not stricken. Another juror, a speech teacher, was similarly struck on the basis of supposed group bias—excessive assertiveness. Like the hairstyle strike, there was no effort to confirm or refute the existence of this supposed bias through voir dire examination. Furthermore, other non-minority teachers or school administrators were not stricken, establishing disparate treatment. Next, the *Woods* court analyzed a typical subjective strike based upon rapport and lack of eye-contact. The court found that this strike was pretextual as well, because (1) the individual voir dire consisted of but a single question unrelated to the reason for the strike; and (2) the record was completely lacking of anything objectively verifiable to support the existence of the supposed absence of rapport or eye contact.[256] Similarly, in *C— E— J— v. State*,[257] reversal was based upon disparate strikes and the lack of meaningful voir dire. More importantly, however, the *C— E— J—* court stressed the importance of coupling a subjective strike with some objectively verifiable reason for the challenge.[258]

In *Chivers v. State*,[259] the court was faced with a situation easier to address than the average subjective strike case. In *Chivers*, the prosecutor struck the minority venireman based upon what could have been a reasonably objective basis; i.e. low intelligence. Unfortunately for the state, the prosecutor failed to do anything during voir dire to ascertain the venireman's intelligence level. Also, one of the prosecutor's "primary reasons" in support of the claimed lack of intelligence was the stricken potential juror's occupation as a bus driver. That, however, was found not to be a valid group bias because no voir dire

256. *Woods*, 801 S.W.2d at 935-41. It should be noted that not all subjective strikes were found to be pretexual in *Woods*. Although termed "a close one," the court held that it was not clearly erroneous for the trial court to have found that a venireman could have appeared offended by some of the voir dire questions. The only distinction which is apparent regarding this particular subjective strike is that the recorded voir dire comments of the venireman could be interpreted in a way that at least verifies that the verbal response alluded to was made, albeit without the critical vocal inflections, facial expressions, or body language. The court apparently would have liked the movant to follow-up on this supposedly hostile response, although unless the response truly was hostile, it is difficult to understand why the movant would have felt obliged or even interested in doing so. This case highlights the difficulties in dealing with the subjective strike on appeal.

257. 788 S.W.2d 849 (Tex. App.—Dallas 1990).

258. *Id.* at 856-58.

259. 796 S.W.2d 539 (Tex. App.—Dallas 1990, pet. ref'd).

was directed at the supposedly shared trait.[260] *Chivers* was reversed. A very similar situation with an identical result occurred in *Sloan v. State*.[261] In *Sloan*, the strike, which had both objective and subjective elements to it, was not only unsupported in the record, but arguably contradicted by the voir dire transcription itself.[262]

A purely subjective strike was struck down in *Smith v. State*.[263] In *Smith*, at issue was a strike ostensibly made because "during the entire voir dire this juror *stared* at the State's attorney."[264] Although facially neutral, the explanation did not impress the appeals court because no individual voir dire of the stricken venireman was conducted, nor is there any objective support in the record for the prosecutor's averments regarding the venireman's behavior.[265] Disparate treatment was the reason for reversal in *Miller-El v. State*,[266] where the reason proferred for the strike was the supposed business hardship which would be visited upon a minority female with children who had been at her employment for a short time should she not be stricken. Yet, similarly situated non-minority veniremen were not struck.[267]

The law in this area continues to evolve. Obviously, the primary admonishment which can be given is simple—do not discriminate on account of race, religion, or national origin in exercising your peremptory strikes. If you do exercise them against a member of a minority group, be sure that the record fully discloses your neutral reasons, especially any objective data which can be introduced into the record.

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260. *See id.* at 542-43.

261. 809 S.W.2d 234 (Tex. App.—Tyler 1988, no pet.)

262. *See id.* at 236-38.

263. 790 S.W.2d 794 (Tex. App.—Beaumont 1990, no pet.)

264. *Id.* at 795.

265. *See id.* at 795-96. Presumably, objective corroboration could and should take the form of voir dire questions directed towards the venireman inquiring, for example, as to why he was staring at the prosecutor.

266. 790 S.W.2d 351 (Tex. App.—Dallas 1990, pet. ref'd).

267. *Id.* at 357. Several other trial court findings of non-discrimination have been reversed by the courts of appeals. *See, e.g.*, Vann v. State, 788 S.W.2d 899 (Tex. App.—Dallas 1990, pet. ref'd) (reversal based upon disparate strikes and insufficient voir dire to attribute group characteristics to the individual veniremen); Lewis v. State, 779 S.W.2d 449 (Tex. App.—Tyler 1989, pet. ref'd) (reversal based upon lack of meaningful voir dire and disparate strikes); Hill v. State, 775 S.W.2d 754 (Tex. App.—Dallas 1989, pet. ref'd) (reversal based upon disparate strikes, an explanation of "appearing to be friendly" with two other black veniremen, and no meaningful voir dire); Lewis v. State, 775 S.W.2d 13 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd) (disparate strikes, unsupported subjective strikes, voir dire does not support reasons given for the strikes exercised).

Even the purest of subjective strikes will more than likely have some related and *objectively verifiable* element associated with it. Put it in the record. Finally, it is advisable not to peremptorily strike a member of the venire whom you have not addressed individually on voir dire.[268]

268. Obviously, in federal court that is not as easy as it sounds. In federal court, you must be ready to submit supplemental voir dire questions to the court, and impress upon the court the urgent necessity that the questions be asked in light of a possible *Batson/Edmonson* challenge.