NOTES

Batson v. Kentucky: Will "O'Batson" Be Next?*

I. INTRODUCTION

When the Court decided *Strauder v. West Virginia*,[1] it applied the fourteenth amendment's equal protection clause to strike down a West Virginia statute that made only white males eligible for jury service.[2] Some eighty five years later, the Court expanded the defendant's right to challenge the process by which the jury was chosen. This decision, *Swain v. Alabama*,[3] established the standard of "systematic exclusion."[4] While the Court declined to apply the equal protection clause to the state's use of peremptory challenges, it seemed to do so based mainly on the lack of evidence of purposeful racial discrimination against the defendant, as reflected in the record before the Court.[5]

In 1986, when the Supreme Court handed down its decision in *Batson v. Kentucky*,[6] the main effect was a broadening of the criminal defendant's right to challenge the racial make-up of the jury that tries him. The Court extended the protection of the fourteenth amendment to include the use of peremptory challenges. *Batson v. Kentucky* represented the Court's recognition that if the equal protection clause were to mean anything, it would have to apply to all phases of the jury selection process.[7]

Batson held that upon the making of a *prima facie* case of purposeful discrimination,[8] a minority defendant[9] may challenge the state's use of peremptory strikes in the selection of the jury. However, meeting the burden of proof is only the beginning for the defendant; it merely rebuts the presumption that the prosecution has used its peremptory strikes in a constitutionally permissible fashion.[10]

The legal precedents leading to *Batson* have been laid out in great detail elsewhere,[11] and for this reason only a few historical details will be included here. This comment will examine the effect *Batson* has had on criminal procedure in general, and on Texas criminal procedure in particular. Also, several

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* Thanks to The Texas Prosecutor, Vol. 18, No. 7 at 4 (September/October 1988).

1. 100 U.S. 303 (1879).
2. *Id.* at 305.
3. 380 U.S. 202 (1965).
4. *Id.* This standard is more concisely enunciated in *Batson*, 476 U.S. at 88-89.
5. *See id.* at 209-22. The history of the peremptory challenge, as put forth by Justice White, demonstrates clearly the Court's traditional reluctance to change the status quo.
6. 476 U.S. 79 (1986).
7. *See Batson*, 476 U.S. at 88.
8. *Id.* at 95.
9. The Court has primarily limited its considerations to Black defendants, although several cases have involved challenges by Hispanic defendants. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475 (1954). An explanation may be that the fourteenth amendment was designed primarily as a protection for Blacks. *See also* note 20 and accompanying text.
10. *See Batson*, 476 U.S. at 96.
11. *See, e.g.*, Beckley, *Batson v. Kentucky: Challenging the Use of the Peremptory Challenge*, 15 AM. J. CRIM. L. 263 ( ).

possible solutions to the confusion that has surfaced in the wake of *Batson* will be outlined.

II. THE MECHANICS OF A *BATSON* CHALLENGE

A *Batson* challenge is based upon the defendant's fourteenth amendment right to equal protection under the law.[12] A major accomplishment of the decision in *Batson* was the realization that the burden of proof which *Swain* placed upon a defendant was "crippling."[13] Under *Swain*, a Black defendant had to prove that the state had a history of using peremptory strikes against Blacks in order to exclude them from jury service. It was not enough for a Black defendant to prove that the prosecution had done so only in his case; the defendant had to show that the state had engaged in discriminatory peremptory strikes in many cases over a considerable period of time.[14] *Batson* rejected *Swain*'s evidentiary formulation because it was "inconsistent with standards that have been developed since *Swain* for assessing a *prima facie* case under the equal protection clause."[15] In support of this position, the Court cited *McCray v. Abrams*,[16] *United States v. Pearson*,[17] and *People v. Wheeler*.[18]

A. *The Defendant's Burden of Proof.*

Instead of the *Swain* burden, the Court now imposes a more lenient burden of proof which the defendant must meet to make a *prima facie* case of unlawful discrimination and thereby get a hearing on a motion to quash the jury. Essentially, the Court has adopted a three-part test for the defendant's *prima facie* case. The defendant must show that: 1) the defendant is a member of a cognizable racial group; 2) the state has exercised its peremptory strikes to remove members of the defendant's race from the venire; and 3) the state used its peremptory challenges to exclude veniremembers solely on account of their race.[19] In establishing a *prima facie* case, "the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' "[20]

To determine whether the defendant has made the requisite showing of discrimination, the Court instructs trial judges to "consider all relevant circumstances," such as "a 'pattern' of strikes against Black jurors included in the particular venire," or "the prosecutor's questions and statements during

12. *See Batson*, 476 U.S. at 84 n.4. Petitioner framed his appeal in both sixth and fourteenth amendment terms; the Court, however, recognized this as mainly an attempt by petitioner to avoid inviting the Court to reconsider its own precedents, and accordingly decided the case solely on fourteenth Amendment grounds.

13. *Id.* at 92.

14. *See* Swain v. Alabama, 380 U.S. 202, 209 (1965).

15. *See Batson*, 476 U.S. at 93.

16. 750 F.2d 1113 (2d Cir. 1984).

17. 448 F.2d 1207, 1217 (5th Cir. 1971)(listed the voluminous data the defendant would be required to gather to support his prima facie case).

18. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978) (where the voir dire is not transcribed, the defendant's burden would be impossible).

19. *See Batson*, 476 U.S. at 96.

20. *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

voir dire examination and in exercising his challenges."[21] Having provided these "merely illustrative" examples, the Court goes on to express its "confidence that trial judges . . . will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a *prima facie* case of discrimination against Black jurors."[22]

B. *The State's Burden of Proof.*

Upon the *prima facie* showing of discrimination by the defendant, the burden then shifts to the prosecutor to provide the trial court with "neutral" reasons why the Black jurors were struck.[23] Those reasons, however, "need not rise to the level justifying exercise of a challenge for cause."[24] While the Court declines to provide any "illustrative examples" of permissibly neutral explanations, it does say that the explanation must be "clear and reasonably specific" and the reasons "legitimate."[25] The Court also furnishes two impermissible explanations: 1) that jurors of the defendant's race were struck on the intuitive assumption that they would be sympathetic to the defendant because of their shared race; and 2) the mere denial of any discriminatory motive or lack of good faith in the exercise of the peremptory strikes.[26] The Supreme Court of Florida, following the United States Supreme Court's lead in providing guidelines only in the form of what are *not* permissible excuses for peremptory challenges by the state, has added the following:

> We agree that the presence of one or more of these factors will tend to show that the state's reasons are not actually supported by the record or are an impermissible pretext:
> (1) alleged group bias not shown to be shared by the juror in question;
> (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror;
> (3) singling the juror out for special questioning designed to evoke a certain response;
> (4) the prosecutor's reason is unrelated to the facts of the case; and
> (5) a challenge based on reasons equally applicable to juror [sic] who were not challenged.[27]

As in the case of the defendant's *prima facie* showing, the trial judge must determine whether the prosecutor has met his burden of proof.[28] This burden consists of providing the trial judge with such evidence as is legally adequate to support a judgment for the state.[29] Should the state fail to contradict, impeach, or rebut the defendant's *prima facie* case with other evidence, the defendant's conviction must be reversed.[30]

21. *Id.* at 97.
22. *Id.*
23. *Id.* at 98 n.20 (citing McCray v. Abrams, 750 F.2d 1113, 1132 (2d Cir. 1984), for the proposition that " '[t]here are any number of bases' " upon which a prosecutor might reasonably exercise his peremptory challenges).
24. *Id.* at 97.
25. *Id.* at 98 n.20 (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)).
26. *Id.* at 97.
27. *See* State v. Slappy, 522 So.2d 18, 22 (Fla. 1988).
28. *See Batson*, 476 U.S. at 97.
29. Tompkins v. State, 774 S.W.2d 195, 201-202 (Tex. Crim. App. 1987) *reh'g denied*, 110 S. Ct. 16 (1989); *see also Batson*, 476 U.S. at 94 n.18.
30. *See Batson*, 476 U.S. at 100.

The trial judge's findings regarding the sufficiency of the State's rebuttal evidence will necessarily turn upon evaluations of the credibility of the prosecutor's explanations. For this reason, the Court advises trial courts to "consider all relevant circumstances."[31] This, along with the power to determine when a *prima facie* showing has been made by the defendant, supports the conclusion that the application of the principles laid down in *Batson* are almost entirely within the discretion of the trial court. In fact, the Court went so far as to say: "We decline . . . to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges."[32] The Court also declined to endorse any one method of implementing *Batson* in terms of how the trial is to proceed once the defendant has made a successful showing of unlawful discrimination.[33] The next section of this paper will examine how Texas has implemented the holding in *Batson*.

III. *BATSON* IN TEXAS: THE GROUND RULES

The first case to reach the Texas Court of Criminal Appeals after *Batson* was *Keeton v. State*.[34] After being remanded to the trial court for a *Batson* hearing,[35] the case went back to the Court of Criminal Appeals for a determination of the sufficiency of the prosecutors's explanations for his peremptory strikes against three Black veniremembers.[36] As a prelude to affirming the trial court verdict, the *Keeton II* court established some guidelines to define the role of the trial judge under *Batson*, as well as the standard of appellate review to be applied to a trial court's finding of fact pursuant to a *Batson* hearing.[37]

A. *Trial Court Standards*

Drawing upon a Missouri Supreme Court decision,[38] the *Keeton II* court determined that "*Batson* is [not] 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."[39] To determine whether the prosecutor has met the burden of proof, the trial judge must "assess the entire milieu of the *voir dire objectively* and *subjectively*," taking into consideration the judge's experience with voir dire in gen-

31. *Id.* at 96.

32. *Id.* at 99. The Court never expressly stated when "timely" is with regards to the defendant's objection; however, the defendant in *Batson* made his objection after the peremptories, and before the jury was sworn. This seems to be the accepted time for objection, at least in Texas courts. *See* TEX. CRIM. PROC. CODE ANN. § 35.261 (Vernon 1987).

33. *See Batson*, 476 U.S. at 99 n. 24. The Court mentions two possible scenarios in this instance: selecting an entirely new jury, or seating the impermissibly struck veniremen on the jury and proceeding with the trial.

34. 724 S.W.2d 58 (Tex. Crim. App. 1987).

35. *Keeton* was pending on direct appeal at the time Batson was decided, so a hearing was ordered pursuant to Griffith v. Kentucky, 479 U.S. 314 (1987). (*Keeton II*, 749 S.W.2d 861 (Tex. Crim. App. 1988).

36. *See Keeton II*, 749 S.W.2d 861 (Tex. Crim. App. 1988). By this time, Tompkins v. State, 774 S.W.2d 195 (Tex. Crim. App. 1987), had been decided. *See supra* note 30.

37. *See Keeton II*, 749 S.W.2d at 865-870. Actually, the *Keeton II* court "approv[ed] of the conceptual analysis of the proceedings in the trial court [as] employed by the Supreme Courts of Alabama, Florida, and Missouri . . . ." *Id.* at 868.

38. State v. Antwine, 743 S.W.2d 51 (Mo. 1987).

39. *See Keeton II*, 749 S.W.2d at 866.

eral, his assessment of veniremen in light of the prosecutor's explanation, and his personal knowledge of the patterns or practice of the prosecutor.[40]

From the Florida District Court of Appeals[41] came a list of five types of evidence which "*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 [by challenged] and unchallenged venirepersons.[42]

The Florida court, and by adoption the Texas court, continued by saying that the trial court is not bound to accept the prosecutor's explanations at face value,[43] but rather "must further evaluate the proffered explanation in light of the standards we recognize here, other circumstances of the case, and the judge['s] knowledge of trial tactics. . . ."[44]

The contribution made by the Alabama Supreme Court to Texas jurisprudence was even more extensive than that made by Florida or Missouri. In *Ex Parte Branch*,[45] the Alabama court provided nine illustrations of the "types of evidence that can be used to raise the inference of discrimination."[46] Also provided were two types of evidence which "can be used to overcome the presumption of discrimination and show neutrality."[47] In the area of "evidence that can be used to show sham or pretext," the *Branch* decision outlined six illustrative examples.[48]

The Texas court in *Keeton II* followed the Alabama court in *Branch*.[49] The Texas Court of Criminal Appeals recognizes these types of pretextual evidence and requires the trial court to "further evaluate the proffered explanations in light of the standards recognize[d] here, other circumstances of the case, and the judge['s] knowledge of trial tactics in order to make a reasoned determination that the prosecutor's facially innocuous explanations are not contrived. . . ."[50]

B. *Appellate Review Standards*

Having determined the trial court's "burden" when conducting a *Batson* hearing in *Keeton v. State*, Judge Miller turned his attention to the role of the

40. *See Antwine*, 743 S.W.2d at 65 (emphasis added).
41. Slappy v. State, 503 So. 2d 350 (Fla. Dist. Ct. App. 1987).
42. *See Keeton II*, 749 S.W.2d at 866 (emphasis in original).
43. *Id.*
44. *Id.* at 867 (emphasis supplied by Judge Miller).
45. 526 So. 2d 609 (Ala. 1987).
46. *See id.*, 526 So. 2d at 622-623; *accord Keeton II*, 749 S.W.2d at 867.
47. *See Keeton II*, 749 S.W.2d at 868.
48. *See Branch*, 526 So. 2d at 624. These examples are similar to the illustrations in Slappy v. State, 503 So. 2d 350, 355. *See supra* notes 39-42 and acccompanying text.
49. *See Keeton II*, 749 S.W.2d at 866-867.
50. *Id.* at 867 (citing Slappy v. State, 503 So. 2d 350 (Fla. Dist. Ct. App. 1987)).

appellate court in reviewing the findings of the trial court. He began, as he did with the trial court's role, by examining the standards applied by other states. The Missouri court in *Antwine*,[51] and the Alabama court in *Ex Parte Branch*,[52] adopted the "clearly erroneous" standard: So long as the trial court's findings are supported by the record, its decision will not be disturbed on appeal.[53] The Supreme Court of Indiana adopted the standard of "manifest abuse of discretion and denial of a fair trial."[54]

The Arizona Court of Appeals in *State v. Tubbs*[55] seemingly adopted the standard of "objective verifiability;" as explained by the court, "[w]hile it is true that an elusive, intangible explanation for exclusion might not qualify as racially neutral, such is not the case when the explanation is coupled with an objectively verifiable reason."[56]

The Texas Court of Criminal Appeals purportedly rejected these standards in favor of one of its own making. The Texas standard of appellate review of the trial court's findings in a *Batson* hearing is "whether purposeful discrimination was established[,] . . . consider[ing] the evidence in the light most favorable to the trial judge's rulings and determin[ing] if those rulings are supported by the record."[57] As will be seen in the next section, this standard has been problematic in its application to Texas criminal cases.[58]

IV. *BATSON* IN PRACTICE: WHAT WORKS, WHAT DOESN'T

A. *Texas Applications*

Judge Teague, in his concurring opinion in *Keeton II*, provided us with a perceptive evaluation of the possible prosecutorial abuses in the form of explanations which may be — or may appear to be — racially neutral for the purposes of a *Batson* hearing.[59] At the top of Judge Teague's list is the explanation that the venireperson was struck "because he appeared to be inattentive when I spoke with him, but he appeared attentive when defense counsel spoke with him."[60] Concerning this explanation, Judge Teague stated that "[i]t is true, of course, that [this] is a generic 'race-neutral' reason, but there is nothing . . . that might cause it to be related to the case to be tried."[61]

In *Bennett v. State*,[62] decided by the Court of Appeals for the First Dis-

51. *See* State v. Antwine, 743 S.W.2d 51, 66 (Mo. 1987).

52. *See Ex Parte Branch*, 526 So. 2d at 625.

53. *See Keeton II*, 749 S.W.2d at 870.

54. *See* Stamps v. State, 515 N.E.2d 507, 510 (Ind. 1987).

55. 155 Ariz. 533, 747 P.2d 1232 (Ariz. Ct. App. 1987).

56. *Id.* at 537, 747 P.2d at 1236.

57. *See Keeton II*, 749 S.W.2d at 870. The Texas standard includes both the "clearly erroneous" and "abuse of discretion" standards adopted by the other courts.

58. *But see* Whitsey v. State, 796 S.W.2d 707 (Tex. Crim. App. 1989)(en banc), in which the court reversed for the first time based upon a *Batson* challenge. The court reaffirmed the holding and reasoning of *Keeton II*.

59. *See Keeton II*, 749 S.W.2d at 874, 877-78.

60. *Id.* at 874.

61. *Id.* In essence, what Judge Teague opined was that certain excuses, such as this one, should require more than the mere assertion of the excuse; this type of excuse should not be allowed to stand alone, because "[i]f such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on non-racial grounds, then the protection erected by the Court [in *Batson*] may be illusory." (quoting Marshall, J., concurring opinion in *Batson*, 476 U.S. at 107).

62. No. 01-86-00953-CR (Tex. Ct. App. July 28, 1988)(LEXIS, States Library, Texas file).

trict Houston some three or four months after *Keeton II*, the prosecutor struck a prospective juror solely because he "made no eye contact whatsoever. . . . He had his head down during the State's *voir dire*, but at the time the defense questioned him, he seemed to perk up and respond thoroughly . . . ."[63] As the defense pointed out, "[t]hat is simply something she can say. There's no way to prove it. It's simply an excuse. It is not proof [of] the actual reason . . . ."[64] Apparently, neither the Court of Appeals nor the prosecutor had read *Batson* and *Keeton II* — or else they merely ignored both Justice Marshall and Judge Teague. In both cases the court accepted the prosecutor's reason at face value.[65]

The Court of Appeals, on the other hand, seems to have adopted Judge Teague's approach in *Daniels v. State*.[66] In *Daniels*, the prosecutor struck two jurors for inattentiveness.[67] Upon review, the Court of Appeals reversed the conviction, holding:

> Although we are unwilling to say that a juror's demeanor cannot ever be a racially neutral motive for a prosecutor's peremptory challenge, the protection of the constitutional guarantees that *Batson* recognizes requires the court to scrutinize such elusive, intangible, and easily contrived explanations with a healthy skepticism. Otherwise, "inattentiveness" will inevitably serve as a convenient talisman transforming *Batson*'s protection against racial discrimination in jury selection into an illusion and the *Batson* hearing into an empty ceremony.[68]

The *Daniels* court was concerned that the prosecutor had conducted no examination, or only perfunctory examination, of the struck jurors, a fact that *Keeton II* held would weigh heavily against the legitimacy of the strike.[69] Even though the prosecutor did discover that one juror was forty two years of age with no children, and the other was a maid with a disabled husband, "the prosecutor never explained why these characteristics constituted trial related reasons for peremptorily striking these two Black veniremen. Unexplained personal characteristics of a venireman will not ordinarily constitute trial related racially neutral reasons for the use of peremptory challenges."[70] Since these characteristics were not explained so as to be trial related, the state failed to discharge its burden by offering racially neutral explanations and the judgement was reversed and remanded.[71]

In general, it would appear that many prosecutors are beginning to take the admonitions of Judge Teague and the Texas Court of Appeals into account

63. *Id.* at 6.

64. *Id.* at 8.

65. *Id.* at 10. The court explains its acceptance by stating that "[f]acial expressions and body posture have been upheld as sufficiently neutral." *Id.* (citing Chambers v. State, 724 S.W.2d 440, 442 (Tex. Ct. App. 1987)). However, the court's characterization of eye contact and looking down as being "body posture" is erroneous in this instance. These two excuses are really just another way of saying the juror was inattentive to the State and attentive to the defense.

66. *See* Daniels v. State, 768 S.W.2d 314 (Tex. Ct. App. 1988).

67. *Id.* at 317.

68. *Id.*

69. *See supra* note 43 and accompanying text.

70. *See Daniels*, 768 S.W.2d at 318. The court also used the lack of meaningful questioning on *voir dire* to invalidate the striking of the juror in Lewis v. State, 779 S.W.2d 449 (Tex. Ct. App. 1989)(juror dismissed for grinning and laughing at defense counsel).

71. *Id.*

when explaining their peremptory strikes against minority venirepersons.[72] But whether this means that they are making an effort to comply with *Batson* or merely "padding" their explanation to avoid reversal is nearly impossible to determine.[73]

Other explanations questioned by Judge Teague whether they are sufficient, standing alone, to support a peremptory strike against a minority venireperson include: "because he appeared unkempt;"[74] "because he was unemployed;"[75] "because he was a [name of occupation];"[76] "because he was the same age as the defendant."[77] Each of these excuses has been upheld on appeal in Texas.[78] What is not clear, however, is whether these excuses will be sufficient *standing alone*, or whether other factors must be shown as well.[79]

Before leaving the subject of the validity of prosecutors' reasons for exercising peremptory strikes, it is necessary to give examples of questionable reasons offered — and accepted by a trial judge — in support of peremptory strikes against minority venirepersons, as well as of prosecutorial candor which worked or should have worked to the state's disadvantage on appeal.

The first example is found in *Reed v. State*.[80] When challenged as to her

72. *See, e.g.*, Crawford v. State, No. 06-88-00037-CR (Tex. Ct. App. April 11, 1989)(LEXIS, States library, Texas file) (inattentiveness and new to community); Oliver v. State, No. 01-88-00095-CR (Tex. Ct. App. March 1, 1989)(LEXIS, States library, Texas file)(no eye conact and failed to complete juror information form properly); Young v. State, No. 01-88-00205-CR (Tex. Ct. App. Dec. 8, 1988)(LEXIS, States library, Texas file) (uncommunicativeness and occupation - nurse).

73. In fact, Judge Teague observed that

> [t]he main flaw . . . with the majority opinion of *Batson*, and this Court's majority opinion in this cause is that they fail to address what Justice Marshall correctly observed in the concurring opinion that he filed in *Batson*, namely, that "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial judges are ill-equipped to second-guess those reasons."

Keeton II, 749 S.W.2d at 877 (quoting Batson v. Kentucky, 476 U.S. 79, 106 (1986)(Marshall, J., concurring).

74. *See Keeton II*, 749 S.W.2d at 877 (Teague, J., concurring opinion).

75. *Id.* at 877.

76. *Id.*

77. *Id.* at 878.

78. *See, e.g.*, Daniels v. State, 768 S.W.2d 314 (Tex. Ct. App. 1988)(federal employee [secretary to Postmaster] struck, special education teacher, elementary school teacher); York v. State, 764 S.W.2d 328 (Tex. Ct. App. 1988)(truck driver); Lee v. State, Nos. 01-87-00521-CR, 01-87-00522-CR (Tex. Ct. App. Dec. 29, 1988)(LEXIS, States library, Texas file)(social worker); Rosario v. State, No. 1314-88-00041-CR (Tex. Ct. App. Dec. 29, 1988)(LEXIS, States library, Texas file)(social worker); Young v. State, No. 01-88-00205-CR (Tex. Ct. App. Dec. 8, 1988)(LEXIS, States library, Texas file)("extremely casual attire" showing lack of respect for the criminal justice system; one juror struck for being a nurse; one struck for being too young); White v. State, No. C14-87-00291-CR (Tex. Ct. App. Oct. 13, 1988)(LEXIS, States library, Texas file)(juror struck for being a dock worker, because prosecutor said state's "common knowledge" of dock workers' tendency to settle disputes without police would incline juror to believe the defendant's self-defense theory; one juror struck for only having been employed for ten months, apparently equating employment for less than one year with unemployment); Bennett v. State, No. 01-86-00953-CR (Tex. Ct. App. July 28, 1988)(LEXIS, States library, Texas file) (too young); Grady v. State, 730 S.W.2d 191 (Tex. Ct. App. 1987)(age is valid and neutral).

79. Even though the Texas Court of Criminal Appeals seems to maintain that the reason must be tied to the case at bar, it is rare that a prosecutor gives only one reason for a strike, and therefore no hard decisions have had to be made on this question. Or, perhaps, relying on the various holdings of appellate courts in Texas, prosecutors are more attuned to the need for more than one explanation per strike.

80. 751 S.W.2d 607 (Tex. Crim. App. 1988). The references to the *Batson* hearing in this case came to me in the form of a letter from Reed, containing a partial transcript of the hearing itself. At the request of defense counsel the *voir dire* was not recorded in its entirety. *Id.* at 610. It is well-settled

strikes against Black venirepersons, the prosecutor responded that she always strikes law enforcement personnel,[81] because they are "sympathetic to defendants." The trial court decided this was sufficiently neutral and allowed the strike, which was later affirmed on appeal.[82] Apparently, the logic of the prosecutor's assertion is irrelevant.

Another example from *Reed* concerns the prosecutor's peremptory challenge of a juror because that juror worked for the U.S. Postal Service.[83] This was not the first time a strike had been made against a postal employee.[84] In *Tompkins v. State*,[85] a juror was struck for the same reason.[86] The *Tompkins* court expressed its uncertainty as to the relationship between a juror's employment with the federal government and the fitness of that juror for jury duty.[87] But rather than reverse the conviction, the court contented itself by saying: "Whether this Court would have made the same judgement as the trial judge did is unimportant, because her conclusion, given a subjective belief in the truth of the prosecuting attorney's explanation, which is supported by sufficient evidence, comports with that of a rational trier of fact."[88]

In the prosecutorial candor category, there is *Brooks v. State*.[89] Here the trial court found that the state had considered race as one of the factors when deciding whom to strike.[90] The court of appeals affirmed, applying the "clearly erroneous" standard which was expressly discarded in *Keeton*.[91] A different court of appeals, however, reached a proper conclusion by disallowing strikes which were based upon race as one of several factors.[92] It is obvious that there is a need for some sort of standardization across the state; the question is, will the court of criminal appeals furnish it, or will they wait until the United States Supreme Court orders it?

B. Batson *in the Context of Non-Black Defendants.*

On July 19, 1988, the Arizona Supreme Court ruled that a white defendant has standing, under the Sixth Amendment of the U.S. Constitution, to

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that complaints as to *voir dire* error cannot be reviewed in the absence of a transcription of the complete *voir dire* examination. *Id. See, e.g.*, Burkett v. State, 516 S.W.2d 147, 150 (Tex. Crim. App. 1974), Graves v. State, 513 S.W.2d 57, 62 (Tex. Crim. App. 1974).

81. One juror was an employee of the Dallas Police Department, the other a fireman.

82. The Dallas Court of Appeals refused to review the *Batson* findings of the trial court because Reed's trial counsel, on the record, declined to have the voir dire recorded, and so an incomplete record was before the appeals court. *See Reed*, 751 S.W.2d at 610.

83. *See supra* note 82.

84. Strikes have also been made against federal employees in general. *See* Daniels v. State, 768 S.W.2d 314, 317 (Tex. Ct. App. 1988).

85. 774 S.W.2d 195 (Tex. Crim. App. 1987), *aff'd*, 490 U.S. 754 (equally divided Court, O'Connor, J., abstaining), *reh'g denied*, 110 S. Ct. 16 (1989).

86. *See Tompkins*, 774 S.W.2d at 205.

87. *Id.* at 204-205. The prosecuting attorney indicated that "I have not had very good luck with postal employees." *Id.* at 205.

88. *Id.* at 205-06. It is curious that, having admitted that the record shows nothing regarding why a federal employee would not make a good juror, the court decided that a rational trier of fact could reach this conclusion. Also, in light of the majority reasoning in *Keeton II*, this decision also appears to be in error; because, if the entire record is considered, there is insufficient evidence to support this conclusion.

89. No. A14-85-00796-CR (Tex. Ct. App. Feb. 2, 1989)(LEXIS, States library, Texas file).

90. *Id.*

91. *See supra* notes 42-45 and accompanying text.

92. McKinney v. State, 761 S.W.2d 549, 550 (Tex. Ct. App. 1988).

attack the state's use of peremptory challenges to strike prospective Black jurors from the criminal trial jury.[93] In the words of the court: "The *discriminatory* exclusion of jurors from any cognizable group necessarily violates the right to a chance for a fair cross-section (of the public on the jury), no matter what the racial or ethnic characteristics of the defendant, his lawyer, the judge or any party to the action."[94] Not content to apply *Gardner* in a prospective fashion, the Arizona court went on — in the spirit of the United States Supreme Court in *Griffith v. Kentucky*,[95] — to apply it to all cases pending on direct appeal as of the date of the *Gardner* opinion.[96]

The court in *Gardner* expressly limited the holding in *Batson* — for the purposes of criminal trials in Arizona — to "the specific facts and legal issues presented to the court."[97] But laying aside all the sixth amendment rhetoric in the court's opinion, there still remains the fact that in *Gardner* the defendant's attorney was a Black public defender.[98] The question left unanswered is whether, assuming a white defendant and a *white* defender, the Arizona court would find the same sixth amendment argument persuasive. Such questions, however, are best left for future cases before that court.

The Arizona Supreme Court is not the only state court that has considered the standing of a white defendant to challenge the striking of Black jurors.[99] Citing *Peters v. Kiff*,[100] a Texas Court of Appeals held that a white defendant has standing, under the due process clause of the fourteenth amendment,[101] to challenge the striking of Black jurors. For those keeping score, this decision, when combined with *Batson* and *Gardner*, supports a conclusion that a *Batson* challenge might be pressed on any of three different grounds: the fourteenth amendment's due process or equal protection clauses, or the sixth amendment's "impartial jury [from a cross-section of the community] clause."

The Supreme Court, in a recent decision, *Holland v. Illinois*,[102] determined that a white defendant has standing to raise a sixth amendment challenge to the exclusion of Blacks from the jury. However, the Court went on to say that the defendant, for an equal protection challenge, must establish that he is a member of a cognizable racial group . . . [and] that the prosecutor has exercised peremptory challenges to remove from the venire members of the *defendant's* race."[103] In other words, for an equal protection challenge the defendant must first meet the *Batson* requirements. But, for a sixth amendment challenge, every defendant is entitled to object to a venire that does not represent a fair cross-section of the community. This does not mean that the defendant is entitled to a representative jury, only an impartial one; therefore, this decision does not go so far as to permit the fair cross-section requirement

93. State v. Gardner, 157 Ariz. 541, 760 P.2d 541 (1988).
94. *Id.* at 545, 760 P.2d at 545 (Emphasis in original).
95. 479 U.S. 314 (1987).
96. *See Gardner*, 157 Ariz. at 546, 760 P.2d at 546.
97. *Id.* at 545, 760 P.2d at 545.
98. *Id.* at 542, 760 P.2d at 542.
99. *See* Seubert v. State, 749 S.W.2d 585 (Tex. Ct. App. 1988).
100. 407 U.S. 493 (1972).
101. *See Seubert*, 749 S.W.2d at 588.
102. 110 S. Ct. 803, 58 U.S.L.W. 4162 (1990).
103. *See* Batson v. Kentucky, 476 U.S. 79, 96 (1986); *see also supra* note 20 and accompanying text.

of the sixth amendment to prohibit peremptory challenges. The Court was clear in its holding that the *Batson* rule is not a part of a sixth amendment objection.

State courts appear to be more willing than are federal courts to afford *all* defendants the right to a jury composed of a cross-section of the community. State court rationales vacillate between the fourteenth amendment claim, due process, and the claim based on the sixth amendment, fair cross-section. However, the main contrast between state and federal considerations of the standing of non-Black defendants to challenge the state's exclusion of Black jurors consists of the adherence by federal courts to the strict letter of the *Batson* opinion.

On the surface, the Eighth Circuit Court of Appeals' decision in *U.S. v. Townsley*,[104] appears to be merely a reaffirmation of *Batson*. The court decided that two white defendants, tried with a Black co-defendant, lacked standing to challenge the state's use of peremptory strikes to remove Blacks from the jury.[105] The majority, strictly applying *Batson*, held that "a defendant must show that he belongs to a cognizable racial group and that the prosecution exercised peremptory challenges to remove members of the defendant's race."[106]

The interesting aspect of this particular case is that five judges, including the Chief Judge, dissented, alleging that there were "a host of ways in which whites have been subjected to hostility in the past for consorting with Blacks."[107] The majority, however, took issue with such a "grandiloquent attempt to liken [the white defendants] to white civil rights workers . . . ."[108] Based on the fact that this case involved vote fraud, the majority pointed out that the white defendants' "association with Blacks . . . has consisted of enlisting them in criminal pursuits."[109]

From the other end of the spectrum comes *Alabama v. Cox*,[110] wherein the state urged the Supreme Court to hold that the defense may not exclude jurors from the panel on account of race,[111] although the Court in *Batson* "express[ed] no view on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel."[112] The defendants in *Alabama v. Cox* were two Ku Klux Klansmen accused of murdering a Black teenager. The defense struck all Blacks from the jury on the assumption that the defendants could not get a fair trial if there were any Blacks on the jury.[113] The prosecution, predictably, asserted its claim of discrimination in terms of the rights of the prospective jurors who were struck by the defense. The state argued that the defense's use of peremptories to remove Black jurors "violate[d] the constitutional rights of the excluded jurors, harm[ed] every member of their race, prejudice[d] the administration of justice and damage[d] society

104. 856 F.2d 1189, *on reh'g of* 843 F.2d 1070 (1988).
105. *Id.* 1083.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. 531 So. 2d 71 (Ala. Crim. App. 1988), *cert. denied*, 488 U.S. 1018 (1989).
111. Coyle, *Peremptory Challenges Examined: Can Bias by Defense be Banned?*, The National Law Journal, Nov. 14, 1988, at 3, vol. 11, no. 10.
112. *See* Batson v. Kentucky, 476 U.S. 79, 90 n.12 (1986).
113. 531 So. 2d 71 (Ala. Crim. App. 1988), *cert. denied*, 488 U.S. 1018 (1989).

as a whole."[114]

Of the many permutations of the *Batson* decision, this particular one carried the most potent emotional punch. The State of Alabama argued that "[i]t simply adds insult to injury to say that our justice system can discriminate against [B]lacks on the same basis as the Klan has discriminated all these years."[115] On the other hand, the thrust of *Batson* was the protection of *Black defendants* from intentional state discrimination.[116] Given the disparity in the relative positions of the state and the defendant in terms of money and investigative resources, perhaps there is some merit to the defense's contention that "this isn't a situation where we ought to automatically balance the right of the defense and prosecution."[117] Since this case is currently before the Supreme Court, perhaps a resolution of these troubling issues will be reached sometime in the near future.

Perhaps the most outrageous attempt at expanding *Batson* into ever broader territory is a case which is purported to have come before the Second Circuit Court of Appeals recently. In that case, the court was asked to hear a claim by two defendants of Italian descent that their constitutional rights were violated when the prosecutors used its peremptory strikes to remove all veniremembers whose surnames ended with a vowel.[118] The Second Circuit, instead of rejecting appellants' arguments out of hand, ruled that the state "had offered sufficiently neutral and reasonable explanations for its actions."[119]

C. Batson *in the Civil Context.*

On September 29, 1988, at the annual conference of the State Bar of Texas' judicial section, Judge Michael Schattman of the 348th District Court of Fort Worth warned his colleagues that *Batson* is "out there and it is coming this way."[120] By this remark, Judge Schattman meant that there is a distinct possibility that the holding in *Batson* may soon be applied to jury selection in civil cases.[121] The questions raised by this possibility are the focus of this subsection, beginning with: "Will *Batson* apply to all civil cases, or only those where the state is a party?"[122]

Given *Batson*'s grounding in the equal protection clause, which prohibits the state from practicing discrimination, it would seem logical that the state would be under the same constraints whether the suit to which it is a party is criminal or civil in nature. This reasoning would require not only that the state as plaintiff refrain from exercising race-based peremptories, but also that

114. *See* Coyle, *supra* note 112, at 30.
115. *Id.*
116. *See* Batson v. Kentucky, 476 U.S. 79 (1986).
117. *See* Coyle, *supra* note 112, at 30.
118. The Texas Prosecutor, September/October 1988, at 4, vol. 18, no. 7.
119. *Id.*
120. *Batson Lurks on Civil Horizon*, Texas Lawyer, October 17, 1988, at 6.
121. It is assumed that Judge Schattman is speaking about Texas state courts applying *Batson* in civil cases, rather than the United States Supreme Court applying it to civil cases. The Supreme Court has already been invited to consider *Batson*'s applicability in civil cases, and has refused. *See* Fleming v. Moore, 55 U.S.L.W. 3100 (U.S. Aug. 12, 1986), *cert. denied*, 55 U.S.L.W. 3258 (U.S. Oct. 14, 1986), *cited in* C. Beckley, *Batson v. Kentucky: Challenging the Peremptory Challenge*, 15 AM. J. CRIM. L. 263, 300 n.261).
122. *See supra* note 8.

the state as defendant likewise be careful not to discriminate based upon race.[123] In the context of civil litigation, where no one's life or personal freedom is at stake, this fettering of the state in the conduct of its case strikes one as somewhat less than equitable. If *Batson* is to be applied in civil cases where the state is a party, and the state may be subject to review of its peremptory challenges, logic — as well as fairness — dictates that the other private party be exposed to the same liability.

When both parties to a civil suit are private, non-governmental entities, the question becomes more difficult. On the surface, the principle enunciated in *Batson* seems to be applicable to any and all jury trials. That is, purposeful discrimination against members of the jury venire based solely upon their race is unjust, and is prohibited by the fourteenth amendment. However, the real principle brought forth is not that prospective jurors are to be protected from discrimination, but that it is the criminal defendant's right to equal protection which must be preserved at all costs. But again, in the civil context, it seems manifestly unfair to burden one side of the dispute without equally burdening the other.

Perhaps, in the case of private party litigation, the Court might adopt the position that, since the trial court is an organ of the state, and as such is charged with overseeing the conduct of the trial to be sure it runs in accordance with all applicable laws, it is the duty of the trial judge, under the fourteenth amendment, to ensure that no impermissible discrimination occurs in the courtroom. To do otherwise would be tantamount to state-sponsored discrimination, a clear violation of the equal protection clause. This is an unlikely scenario in light of *Flagg Bros., Inc. v. Brooks*.[124] The Court stated in *Brooks* that it had never adopted the position that "a State's mere acquiescence in a private action converts that action into that of the State."[125] It is more likely that the Supreme Court will continue to apply *Batson* only in criminal cases, leaving to the states the decision whether their respective statutes or constitutions require its application in civil actions.[126]

V. Is There Any Hope That *Batson* Will Achieve the Desired Result?

Racial discrimination in this country has a long and shameful history, and the fact that it exists to this day, in spite of every statute, Supreme Court decision, and the Constitution itself, casts a shadow of doubt upon any assertion that *Batson* can change the way we feel about the various groups which make up American society. What *Batson* has fostered is the art of "creative perjury," an art which criminal prosecutors are learning to practice with in-

123. As Beckley points out, however, "this might be because of a generally lower concern that the defendant will overpower the state in a criminal proceeding." Beckley, *supra* note 12, at 300.

124. 436 U.S. 149 (1978).

125. *Id.* at 164.

126. California has already addressed the problem and found that *Batson* does apply to civil proceedings based on a state statute guaranteeing defendants the right to an impartial jury drawn from a cross-section of the community. Holley v. J & S Sweeping Co., 143 Cal. App. 3d 588, 192 Cal. Rptr. 74 (1983). The state courts, however, are not alone in their application of *Batson* to civil cases. *See* Maloney v. Washington, 690 F. Supp. 687 (N.D. Ill. 1988), where a federal district court held that *Batson* applies equally to criminal and civil jury selections.

creasing skill. This section inquires about alternative solutions to the problem of discrimination in jury selection in Texas courts.

A. *Eliminate Peremptory Challenges Altogether?*

Of the three alternatives suggested in this paper, the elimination of peremptories is the one least likely to be adopted and most likely to ensure that no discrimination is allowed in the selection of juries in Texas criminal cases. Justice Marshall, in his concurring opinion in *Batson*, declared that "[t]he inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system."[127] Furthermore, only "by banning the use of peremptory challenges by prosecutors and by allowing the States to eliminate the defendant's peremptories as well" can such discrimination be eliminated.[128] In addition to ending the discrimination, it would also eliminate the fabrication of "race neutral" explanations by prosecutors who know they will be called upon to explain their peremptory strikes.

Any attempt to ban peremptory strikes in Texas criminal cases will be met by opposition from prosecutors and defenders alike. Interviews with many lawyers of both persuasions have yielded none willing to go so far for the sake of the fourteenth amendment. This opposition is founded, in large part, upon the widely held notion that trial lawyers develop a sort of "sixth sense" about jurors, based on body language or other non-articulable criteria. Perhaps they are right: we all, at one time or another, have met people to whom we took an instant dislike, for reasons which we could not quite put into words. But the problem with this assertion is that it is extremely hard, even for the prosecutors themselves, to determine whether or not these impressions are based upon the juror's race, or some other constitutionally permissible criterion.

Some prosecutors have expressed the opinion that, if the object of *voir dire* is to choose an impartial jury — or, in other words, to weed out jurors who would likely be partial to the other side, and try to keep jurors likely to be partial to our side — should not the fact that the defendant and this prospective juror are of the same race be considered? After all, are not Black jurors more likely to acquit a Black defendant than to convict him? The problem with this line of reasoning is that it flows from a faulty premise — the "birds-of-a-feather" concept.

The likelihood that a Black defendant will get an impartial trial from Black jurors might rather be viewed from a socio-economic perspective. If the juror and the defendant are of the same socio-economic class, perhaps the juror will be more empathetic, and therefore more disposed to give the defendant a break. On the other hand, if the juror is in a higher class than the defendant, that juror might be more likely to want to punish the defendant, to teach him a lesson; and if the juror is of a lower class than the defendant, that juror may to want to "get" the defendant to take him down a peg or two.

From the standpoint of impartiality, any of the foregoing three groups of jurors — those of the same, higher, and lower socio-economic status — should

127. *See* Batson v. Kentucky, 476 U.S. 79, 107 (1986)(Marshall, J., concurring).
128. *Id.* at 108-09.

be struck as being either pro- or anti-defendant. But it is unlikely that the state would want to strike jurors who are inclined to favor their case. Furthermore, how many jurors can be expected to appear for jury duty who are of the defendant's same class? The odds simply favor an interpretation of the state's removal of Black jurors as being based solely upon their shared membership in the defendant's racial group.

B. *Change the Jury Venire Selection Process?*

Along with the potential benefits eliminating peremptory challenges may produce, there may also be at least one major drawback: conceivably, without peremptories, jury trials would be even less fair than they are with peremptories. The method by which we select jury venires in Texas might create this result.[129]

The selection of jurors in Texas begins with the voter registration lists from all precincts in the county.[130] This means that if every eligible voter is registered to vote, whites will outnumber Blacks and Hispanics in most, if not all counties.[131] So from the outset, the deck is more likely to be stacked against a minority defendant. The situation is not likely to improve because the jury is usually going to be selected from those jurors seated in the first two or three rows during *voir dire*.

Assuming an inordinately low number of minority jurors at the outset, the chance that all of the minority jurors will be seated in the first three rows is certainly slim. Even a shuffling of jurors[132] does not significantly alter these odds. Moreover, the result is likely to be influenced by the party exercising the last shuffle.

The cure suggested here is a new method of compiling the master juror list. Names must be drawn from some source which contains a more comprehensive roster of the eligible jurors of the county. One source which comes immediately to mind is the drivers' license records of the Texas Department of Public Safety. From the DPS, the county could obtain a computer run of all county residents over eighteen years of age, which could probably include information concerning any disqualifications, such as felony convictions. This method, however, would not be completely painless. The cost of computer runs on all those people could be staggering; the employee hours necessary to assemble the information would be truly impressive. Yet, there is a source of revenue, still virtually untapped, which could be used to cover the extra costs: fines for failing to keep a current address on one's driver's license. This would also, after the first two elections, significantly abate the problem of calling jurors who no longer reside in the county. But even this solution is doubtful, since it would require sweeping legislative action, from a state government which is decidedly resistant to such change.

C. *Further Statutory Changes?*

Here is the most likely method for accomplishing *Batson*'s goals in Texas.

129. TEX. GOV'T. CODE ANN. §§ 62.001 *et seq.* (Vernon 1986).

130. *Id.* at § 62.001(b).

131. There may be counties in south Texas where Hispanics outnumber whites, and others where Blacks are the majority; however, Texas remains predominantly white.

132. TEX. CODE CRIM. PROC. ANN. § 35.11 (Vernon 1988).

In 1987, the Texas Legislature passed article 35.261, Texas Code of Criminal Procedure, which is a codification of the test and burdens handed down by the Court in *Batson*. As such, this article contains no illustrations to guide courts or prosecutors, nor instructions as to what might be permissible explanations for having struck minority jurors. The new law does provide the Texas criminal justice system with a means of forcing judges and prosecutors to comply with the rules laid down in *Batson*.

What is needed, if article 35.261 is to be effective in reducing the discriminatory use of peremptory challenges, is a set of threshold guidelines. For example, the law could stipulate that the prosecutor may not peremptorily strike a minority juror unless that juror has been asked at least one relevant question during voir dire.[133] General questions asked of the venire as a group should not suffice as a basis for a peremptory strike. While the state should not be held to proof amounting to challenge for cause, neither should it be allowed to strike based upon what a juror is wearing, or lack of eye contact during *voir dire* questioning.[134] Finally, although the case law says that peremptory strikes based *solely* upon the juror's race are constitutionally impermissible, the statute is somewhat ambiguous on this point. The law should be amended to read: "Any explanation for a peremptory challenge which includes as *one* of its bases that the juror was of the same race as the defendant shall be presumed to be impermissibly discriminatory."

VI. CONCLUSION.

Batson v. Kentucky is a perfect example of the Court recognizing a problem, but stopping short of solving it. Had the Court simply provided some procedural guidelines, much of the confusion over the last three years would have been avoided. Given the success rate for a *Batson* challenge in Texas to date,[135] it is likely that those guidelines would actually have benefitted at least some of those defendants for whose protection the fourteenth amendment was enacted in 1866.[136] At present, it appears that one of two things needs to be done: The Supreme Court should either provide the states with a workable, understandable set of parameters within which to evaluate *Batson* challenges, or the Court should abandon *Batson* altogether. For the confusion *Batson* has

133. Relevancy is tied to the case before the court and a prosecutor is entitled to strike a venireman for "any reason at all, as long as that reason is related to his view concerning the outcome of the case." *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986)(quoting United States v. Robinson, 421 F. Supp. 467, 473 (Conn. 1976)). Since a "person's race is simply unrelated to his fitness as a juror," *Id.* at 87 (quoting Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946), it is irrelevant.

134. It might be said that such guidelines would take away the peremptory challenge, and this is quite true; however, the challenge loses its peremptory nature under the statute as it currently stands, once the defendant has made a prima facie showing of impermissible discrimination.

135. By the fall of 1988, there were fewer than 10 *Batson* reversals among the more than 140 appellate opinions dealing with *Batson* challenges. (LEXIS, States library, Texas file). In fact, until May 1989, the Texas Court of Criminal Appeals had not reversed a single conviction based on a successful *Batson* challenge. *See supra* note 59.

136. As the Court pointed out in Strauder v. West Virginia, 100 U.S. 303 (1880), Swain v. Alabama, 380 U.S. 202 (1965), and Batson v. Kentucky, 476 U.S. 79 (1986), the fourteenth amendment was intended to guarantee Blacks the equal protection of the laws.

caused far outweighs its marginal benefit to minority defendants.[137] No matter which option the Court chooses, however, something must be done soon — before *Batson* is stretched to the breaking point.

Will "O'Batson" be next?

JOHN R. DUER

137. These two alternatives ignore the possibility of eliminating peremptories. Although Justice Marshall believes this to be the only way to ensure that discrimination in jury selection will not occur, it is nevertheless obvious that peremptory challenges will not be eliminated. *See Batson*, 476 U.S. at 107. (Marshall, J., concurring).