# VOICE FOR THE DEFENSE

Official Journal of the Texas Criminal Defense Lawyers Association

February 1994


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**February 24-25, 1994**
**Houston**

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## ANATOMY OF A DWI TRIAL:
## The Intoxilyzer on Trial, A Seminar of Demonstrations
## A Defense Show and Tell Learning Experience
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# THE BATSON BEAT

## Expanding Batson

*by Mark Stevens*

The Equal Protection Clause has long prohibited the state from purposefully excluding jurors based solely on their race.[1] Until recently, though, to establish an equal protection violation, a defendant had to prove purposeful racial discrimination over a long period of time. As a practical matter, this requirement of proof over a long period of time served as a formidable barrier. In fact, it was virtually impossible for the defense to prevail.[2]

*Batson v. Kentucky,* 476 U.S. 79 (1986), changed this. *Batson* is significant — indeed revolutionary — because it relaxes the defendant's burden of proof. Now, to make out an equal protection claim, the defendant need not shoulder the "crippling burden" of proving a *pattern* of discrimination in the past. Instead, the defendant may prove "purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case."[3] The effect of this change is that, for the first time, it is now actually possible to prove that the state has unconstitutionally used its peremptory challenges.

Batson Itself Is Of Limited Scope

In *Batson,* the challenge was made by a Black defendant who complained under the federal Equal Protection Clause that the state had used its peremptory challenges in a racially discriminatory way to strike all four Black persons on the venire. Initially, many lower courts interpreted *Batson* as narrowly as possible. That is, *Batson* relief was limited to Black defendants in criminal cases who were complaining that the state had illegally stricken Black venirepersons based on their race.

Predictably, lawyers have not been content with *Batson* at its narrowest, but instead have sought to broaden its holding whenever possible. Very recently, our court of criminal appeals has addressed "the evolving interpretations of *Batson.*"[4] This article will discuss the evolution that *Batson* has thusfar undergone, and will offer suggestions to those who would expand it even further.

Batson Applies in Civil Proceedings

Imaginative lawyers in *Edmonson v. Leesville Concrete Co., Inc.,* 111 S.Ct. 2077 (1991), sought to extend *Batson* to civil cases involving private litigants. The Supreme Court agreed. "Recognizing the impropriety of racial bias in the courtroom, we hold the race-based exclusion violates the equal protection rights of the challenged jurors." Id. at 2080. *Edmonson* also has implications for criminal lawyers.

1. Juvenile Cases

In a case of first impression, the Dallas Court of Appeals held that *Batson* applies in a delinquency proceeding involving a Black juvenile. *C.E.J. v. State,* 788 S.W. 2d 849, 852 Tex. App.—Dallas 1990, writ ref'd). This seems undeniable after *Edmonson.*

2. Competency Hearings

"[A] *Batson* claim appears to be cognizable under any setting wherein a jury is being selected, including a competency hearing." *Satterwhite v. State,* 858 S.W. 2d 412, 423 n.7 (Tex. Crim. App. 1993). Again, after *Edmonson,* there would seem to be no reason why *Batson* would not apply in a competency hearing.

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Batson Also Restricts The Defense

1. State versus Defense

*Georgia v. McCollum,* 112 S.Ct. 234 (1992), surprised some observers wh thought that *Batson* only limited th prosecution. There, the Supreme Cour held that "the Constitution prohibits criminal defendant from engaging i purposeful discrimination on the groun of race in the exercise of peremptor challenges. Accordingly, if the Stat demonstrates a prima facie case o racial discrimination by the defendants the defendants must articulate a racially neutral explanation for peremptory challenges." *Id.* at 2359.

2. Defense versus Defense

In a multi-defendant case, one co-defendant's racially discriminatory use of peremptory challenges might violate another codefendant's right to equal protection. *See State v. Anaya,* 825 P. 2d 961, 966 (Ariz. Ct. App. 1991).

Racial Identity Is Not Required

1. The Fourteenth Amendment

As noted, the defendant in *Batson* was Black, and he complained that the state's challenge against Black venirepersons violated the Equal Protection Clause of the Fourteenth Amendment. Some courts initially read *Batson* literally to hold that the defendant could not complain unless the

excluded venireperson was of his same race.[5]

The issue was settled in terms of the federal constitution in *Powers v. Ohio,* 111 S.Ct. 1364 (1991), in which the Court held that a White defendant may object to the state's peremptory challenges against Black venirepersons under the Equal Protection Clause. *Id.* at 1374. *Powers,* of course, has been followed in Texas and in the Fifth Circuit.[6]

2. Article 35.261

Article 35.261 of the Texas Code of Criminal Procedure was enacted by the legislature "[t]o codify and implement *Batson* in Texas. . . ."[7] This statute contains no requirement that the race of the defendant and the stricken venireperson be the same. *E.g., State v. Oliver,* 808 S.W.2d 492, 496 (Tex. Crim. App. 1991); *Garcia v. State,* 802 S.W.2d 817, 819 (Tex. App.—Houston [lst Dist.] 1990, pet. ref'd); *Atuesta v. State,* 788 S.W.2d 382, 384 (Tex. App.—Houston [lst Dist.] 1990, pet. ref'd). A cautious lawyer would be smart to include among her constitutional objections a reference to article 35.261, especially where the race of her client and the venireperson are different.

Cognizable Racial And Ethnic Groups

*Batson* seemed to require that the defendant and the excluded venireperson be members of the same "cognizable racial group.~8 As noted in the previous section, we now know that racial identity is not required. Subsequent cases have also delineated some of the racial and ethnic groups that are cognizable.

1. Hispanics

Complaint may be made of exclusion of Hispanic or "Latino" venirepersons. *Hernandez v. New York,* 111 S. Ct. 1859 (1991).

2. Native Americans

Native Americans are a recognized minority group for *Batson* purposes. *United States v. Roan Eagle,* 867 F. 2d 436, 441 (8th Cir.), *cert. denied,* 490 U.S. 1028 (1989); *accord, United States v. Bedonie,* 913 F. 2d 782, 795 (l0th Cir.), *cert. denied,* 111 S. Ct. 2895 (1991); *United States v. Willie,* 941 F. 2d 1384, 1399 (l0th Cir. 1991); *Tennie v. State,* 593 So. 2d 1199, 1200 (Fla. Dist. Ct. App. 1992); *State v. Pharris,* 846 P. 2d 454, 463 (Utah Ct. App. 1993).

3. Indians and Pakistanis

A Black defendant may complain of the exclusion of an Indian venireperson. *Minard v. State,* 836 S.W. 2d 287, 292 (Tex. App. —Dallas 1992); *see Bacy v. State,* 827 S.W. 2d 91, 92 (Tex. App. — Fort Worth 1992, pet. ref'd)(appellant of unspecified race had standing to object to exclusion of venireperson of Indian or Pakistani race, but error waived absent specific objection).

*Batson* was not violated where the prosecutor struck a venireperson from India, but testified that he believed the man was White. *Gambel v. State,* 835 S.W. 2d 788, 791 (Tex. App. — Houston [14th Dist.] 1992).

4. Asians

In a pre-Powers case, a Texas court recognized that an Oriental defendant is a member of a cognizable class. *Kline v. State,* 737 S.W.2d 895, 899 (Tex. App.—Houston [lst Dist.] 1987, pet. ref'd); *see State v. Jordan,* 828 P. 2d 786, 790 (Ariz. Ct. App. 1992)(Asians are cognizable group, since they have been historically subjected to discriminatory treatment and have required aid from the courts in securing equal treatment under the law); *accord, Wilsher v. State,* 611 So. 2d 1175, 1184 (Ala. Crim. App. 1992)(Asian female).

5. Italian-Americans

Italian-Americans may be entitled to protection under *Batson. United States v. Campione,* 942 F. 2d 429, 433 (7th Cir. 1991)(however, a person's surname alone is insufficient to prove that he is Italian-American); *see United States v. Biaggi,* 673 F. Supp. 96, 101 (E.D.N.Y. 1987)(court takes judicial notice that Italian-Americans share common experience and background, religion and culinary practices, and have been subjected to stereotyping, invidious ethnic humor and discrimination), *aff'd,* 853 F. 2d 89 (2d Cir. 1988).

Other courts have held that the defendant failed to carry the burden of proving that Italian-Americans were a cognizable group. *See United States v. Di Pasquale,* 864 F. 2d 271, 277 (3rd Cir. 1988)(no proof that Italian-Americans have been singled out for differential treatment or disparately represented on juries in state), *cert. denied,* 492 U.S. 906 (1989); *United States v. Angiulo,* 847 F. 2d 956, 984 (lst Cir.)(no proof that Italian Americans "either have been or are currently subjected to discriminatory treatment"), *cert. denied,* 488 U.S. 852 (1988); *United States v. Bucci,* 839 F. 2d 825, 833 (lst Cir.)(no attempt to show that Italian-Americans have been or are subjected to discriminatory treatment), *cert. denied,* 488 U.S. 844 (1988); *United States v. Sgro,* 816 F. 2d 30, 33 (lst Cir. 1987)(no evidence of cognizability).

6. Whites

In *Miller v. State,* 733 S.W. 2d 287 (Tex. App. — Corpus Christi 1987, no pet.), appellant was White, and complained that the prosecutor had struck seven venirepersons with "Anglo-sounding surnames. *Id.* at 289. The court of appeals held, in this pre-*Powers* case, that appellant could complain under *Batson* of the exclusion of members of his own race, explicitly noting that the equal protection clause applies universally to persons of all races. *Id.* at 288. The court abated the appeal for a *Batson* hearing in the trial court. *Id.* at 290. At that hearing, the trial court found that the state had exercised seven strikes against members of appellant's race, and that its explanations as to two of those venirepersons were not credible. The court of appeals reversed the conviction, holding "that appellant was denied a fair trial in violation of the equal protection clause of the fourteenth amendment." *Miller v. State,* 741 S.W. 2d 501, 501-502 (Tex. App. — Corpus Christi 1987, pet. ref'd).

The *Batson* analysis prevents either party from exercising its peremptory challenges in a manner discriminatory to White venirepersons. *Gilchrist v. State,* 627 A. 2d 44, S4 (Md. Ct. Spec. App. 1993).

In *Government of Virgin Islands v. Forte,* 865 F. 2d 59, 64-65 (3rd Cir. 1989), trial counsel of the White appellant was found ineffective for not objecting to the government's exclusion of all or almost all White venirepersons.

The Louisiana Supreme Court has held that the state may successfully object to a Black defendant using his peremptory challenges to strike White venirepersons in a discriminatory fashion. *State v. Knox,* 609 So. 2d 803, 806 (La. 1992).

7. Cognizable Sub-Groups

In *People v. Clair,* 828 P. 2d 705 (Cal. 1992), defendant complained, not of the exclusion of Blacks, or of women, but rather of the "sub-group" of Black women. The California Supreme Court has held that Black women are a cognizable "sub-group" under the state constitution. Id. at 717.

8. Procedure

Appellant does not preserve error concerning the exclusion of Anglos where he objects at trial about the

exclusion of Hispanics. *Mowbray v. State,* 788 S.W. 2d 658, 670 (Tex. App. — Corpus Christi 1990, pet. ref'd), *cert. denied,* 111 S.Ct. 999 (1991).

Gender-Based Discrimination

1. Federal Constitution

Courts in several jurisdictions have held that gender-based discrimination is prohibited under the Equal Protection Clause of the Federal Constitution. *See United States v. Omoruyi,* 7 F. 3d 880, 881 (9th Cir. 1993): *United States v. De Gross,* 960 F.2d 1433 (9th Cir. 1992)(en banc); *People v. Irizarry,* 560 N.Y.S. 2d 279, 280 (N. Y. App. Div. 1990); *City of Mandan v. Fern,* 501 N.W. 2d 739, 743-44 (N.D. 1993); *State v. Burch,* 830 P. 2d 357, 362 (Wash. Ct. App. 1992); *contra United States v. Broussard,* 987 F. 2d 215, 217 (5th Cir. 1993).

The justification for extending *Batson* protection to gender-based discrimination was well stated in *Fern:*

Gender discrimination, like racial discrimination, stimulates community prejudice which impedes equal justice for men and women. Peremptory strikes based on gender, like those based on race, harm excluded jurors because discriminatory strikes bear no relationship to an individual's qualifications or ability to perform or contribute to society. Full community participation in the administration of the criminal justice system, whether measured by race or gender, is critical to public confidence in the system's fairness.

*City of Mandan v. Fern,* 501 N.W. 2d at 744.

The United States Supreme Court has recently agreed to decide whether a male defendant in a paternity action has the right to raise a federal equal protection complaint about the state's use of its peremptory challenges to exclude males from his jury. *J.E.B. v. T.B.,* 606 So.2d 156 (Ala. Civ. App. 1992), *cert. granted,* 113 S. Ct. 2330 (1993).

2. Texas Cases

In *Mowbray v. State,* 788 S.W. 2d 658 (Tex. App. — Corpus Christi 1990, pet. ref'd), *cert. denied,* 111 S.Ct. 999 (1991), the appellant complained that trial counsel was ineffective for not objecting to the state peremptorily striking five Caucasian women. The court rejected this contention, noting: "Even if gender were included in *Batson,* appellant can hardly complain when eight of the twelve actual jurors were women." *Id.* at 670.

In *Adams v. State,* 862 S.W. 2d 139 (Tex. App. — San Antonio 1993), appellant complained, for the first time on appeal, that the state discriminated on the basis of gender. The court held that he waived error by not objecting on this basis at trial. *Id.* at 146.

Very recently, the court of criminal appeals has strongly hinted that gender discrimination might violate equal protection. Precisely speaking, *Curry v. Bowman,*___ S.W. ___2d No. 71,606 (Tex. Crim. App. December 8, 1993), was concerned with race, not gender discrimination. Commenting on the evolution of *Batson,* though, the court stated broadly that "group bias" is unconstitutional. The court went on to note: "The group bias may stem from gender, religion, ethnic or any other cognizable group." *Id.* at slip op. 4.

3. Texas Equal Rights Amendment

Our state constitution specifically forbids discrimination based, not only on race, but also on "sex . . . color, creed, or national origin." Tex. Const. Art. I, § 3a.

The Texas Supreme Court has recognized that the Texas Equal Rights Amendment provides more protection than does federal equal protection. Specifically, in *In Interest Of McLean,* 725 S.W. 2d 696, 697-98 (Tex. 1987), that Court constitutionally invalidated a provision of the Texas Family Code because it treated a male parent differently than a female parent. The Court ruled that the Texas Equal Rights Amendment is more extensive and provides more specific protection than federal equal protection. *Accord, Williams v. City of Fort Worth,* 782 S.W. 2d 290, 296 (Tex. App. — Fort Worth 1989, writ denied).

Several other state courts have held that *Batson*-type reasoning prevents gender-based discrimination under their respective state constitutions. *See State v. Levinson,* 795 P.2d 845, 849-50 (Ha. 1990)(gender based discrimination barred under Hawaii constitution); *Tyler v. State,* 623 A. 2d 648, 653 (Md. 1993)(Maryland Equal Rights Amendment); *State v. Gonzales,* 808 P. 2d 40, 49 (N.M. App. 1991)(New Mexico constitution); *People v. Blunt,* 561 N.Y.S. 2d 90, 92 (N.Y. App. Div. 1990)(New York constitution); *State v. Burch,* 830 P. 2d 357, 362-63 (Wash. Ct. App. 1992)(Washington constitution). *See also People v. Montiel,* 855 P. 2d 1277, 1292 (Cal. 1993)(California Constitution forbids discrimination against cognizable racial, religious, ethnic or other identifiable groups).

Religious Discrimination

1. Federal Constitution

The United States Supreme Court has not yet determined whether the Equal Protection Clause prevents a litigant from exercising peremptory challenges based on religion.

*Curry* suggests that the court of criminal appeals might extend *Batson* to claims of religious discrimination. *See Curry v. Bowman,*___ S.W. 2d __ , ___ No. 71,606 (Tex. Crim. App. December 8, 1993)("group bias may stem from gender, *religion,* ethnic or any other cognizable group")(emphasis supplied), slip op. 4.

In *Casarez v. State,* 857 S.W. 2d 779, 783 (Tex. App. — Fort Worth 1993, pet. granted), the court held that federal equal protection does not prevent the state from challenging venirepersons because they are Pentecostals. "Because we do not find any authority supporting the extension of the *Batson* holding beyond the boundaries of racial discrimination, and because the United States Supreme Court has repeatedly and consistently limited the holding of *Batson* and its progeny to race, we decline to apply an expanded version of *Batson* to peremptory challenges made on the basis of a venireperson's religious affiliation." *Id.* at 784. Chief Justice Hill dissented, arguing that the principles of *Batson* should also apply to strikes based upon religion. *Id.* at 789. The court of criminal appeals has granted a petition of discretionary review in this case.

2. Texas Equal Rights Amendment

As noted in the previous section, our state constitution specifically forbids discrimination based, not only on race, but also on "sex . . . color, *creed,* or national origin." Tex. Const. Art. I, § 3a(emphasis supplied).

Presently, there are no Texas cases which consider whether the state constitution bars a litigant from striking venirepersons for religious reasons. The majority opinion in *Casarez* is based on the federal constitution, and does not mention Article I, § 3a, of the Texas Constitution.

In a case pre-dating *Batson,* a New York court held that the New York Constitution prevents the state from using its peremptories to discriminate based on religion. *People v. Kagan,* 420 N.Y.S. 2d 987, 989 (N.Y. Sup. Ct. 1979).

The Minnesota Supreme Court has held that neither the federal nor the Minnesota constitutions prohibit challenging venirepersons because they are Jehovah's Witnesses, since "religious bigotry in the use of the peremptory challenge is not as prevalent, or flagrant, or historically ingrained in the jury selection process as is race . . . ." *State v. Davis,* 504 N.W. 2d 767, 771 (Minn. 1993).

### Other Possible Applications Of Batson

National Origin

Because Article I, § 3a expressly forbids discrimination based national origin, parties should include this objection where appropriate.

Disability

One New York court has concluded that "*Batson*-like protection should be afforded to a hearing impaired would-be juror and therefore disallows a proposed peremptory challenge by a prosecutor intended to eliminate a juror solely because she cannot hear." *People v. Green,* 561 N.Y.S. 2d 130, 131 (N.Y. Co.Ct. 1990). In support, the court cited both the New York Constitution and the Americans With Disabilities Act of 1990. Id. at 132-33.

Youth

Prosecutors frequently rely on age as a race-neutral reason for exercising a peremptory challenge.[9] Might this race-neutral reason constitute an equal protection violation of its own?

Most courts hold that young people do not constitute a cognizable group for *Batson* purposes. *E.g., United States v. Pichay,* 986 F. 2d 1259, 1260 (9th Cir. 1993); *United States v. Jackson,* 983 F. 2d 757, 762 (7th Cir. 1993); *United States v. Cresta,* 825 F. 2d 538, 545 (lst Cir. 1987), *cert. denied,* 486 U.S. 1042 (1988).

One court, at least, disagrees. In *State v. Zavala,* 611 A. 2d 1169 (N.J. Super. Ct. Law Div. 1992), the state admitted a group bias against young persons. "Although young persons do not constitute a cognizable group, the prosecution's admitted exclusion of all young persons from the jury constitutes an exclusionary tactic based on group bias." This conduct, when coupled with race based challenges, required a mistrial. *Id.* at 1173.

Death Penalty Opponents

In *Romano v. State,* 847 P. 2d 368 (Okla. Crim. App. 1993), the defendant argued that the prosecutor's use of peremptory strikes against venirepersons with reservations about the death penalty violated *Batson.* The Oklahoma Court of Criminal Appeals disagreed, holding that "[n]o authority supports the proposition that equivocal jurors create a suspect class which invokes the stringent requirements of the Equal Protection Clause, and which would permit extension of the limited *Batson* rule." *Id.* at 377. The Ohio Supreme Court agrees. *State v. Evans,* 586 N.E. 2d 1042, 1057 (Ohio 1992).

Marital Status Or Sexual Preference

Peremptory challenges against venirepersons based on their marital status do not violate the Equal Protection Clause. *United States v. Omoruyi,* 7 F. 3d 880, 881 (9th Cir. 1993); *Whitehead v. State,* 608 So. 2d 423, 428 (Ala. Crim. App. 1992).

Gay persons do not comprise a cognizable group for equal protection purposes. *State v. Spitler,* 599 N.E. 2d 408, 414 (Ohio Ct. App. 1991).

Conclusion

Those who favor expanding the reach of *Batson* owe some gratitude to Chief Justice Burger. Dissenting in that case, he helpfully suggested that "if conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis, not only of race, but also sex . . . age . . . religious or political affiliation . . . mental capacity . . . number of children . . . living arrangements . . . and employment in a particular industry . . . or profession . . . ." *Batson v. Kentucky,* 476 U.S. at 124 (Burger, C.J., dissenting).[10]

The Supreme Court will likely decide this term one of the objections suggested by the former Chief Justice — whether parties may constitutionally strike jurors because of their gender.[11] The Texas Court of Criminal Appeals, in dicta, has broadly condemned all "group bias," including that stemming "from gender, religion, ethnic or any other cognizable group."[12] In other words, the possibilities for expanding *Batson* are wide open. Lawyers should be aggressive in asserting that their opponent is challenging jurors based on some impermissible group bias, and careful to make the necessary specific and timely objections.

### Footnotes

1. *See Swain v. Alabama,* 380 U.S. 202 (1965); *Strauder v. West Virginia,* 100 U.S. 303 (1880).

2. *Swain v. Alabama* provides a graphic illustration of how difficult it was to meet this burden. There, the evidence showed that *no* black had served on a jury in Talladega, Alabama since 1950. Despite this seemingly telling fact, the Court held that the defendant had not established systematic exclusion, because he failed to show that the prosecution "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 . . . with the result that no Negroes ever serve on petit juries." *Swain v. Alabama,* 380 U.S. at 223. By requiring proof of discrimination over a long period of time, the Court made it virtually impossible to make out a prima facie case.

3. Id. at 95(emphasis in original).

4. *Curry v. Bowman,* __ S.W. 2d __, __ No. 71,606 (Tex. Crim. App. December 8, 1993), slip op. 5.

5. *E.g., Easter v. State,* 740 S.W.2d 107, lO9 (Tex. App.—Amarillo 1987, no pet.); *Kline v. State,* 737 S.W.2d 895, 899 (Tex. App.—Houston [lst Dist.] 1987, pet. ref'd); *Catley v. State,* 726 S.W.2d 595, 597 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd).

6. *E.g., Mead v. State,* 819 S.W.2d 869, 870 (Tex. Crim. App. 1991); *Salazar v. State,* 818 S.W.2d 405, 408 (Tex. Crim. App. 1991); *United States v. Mixon,* 977 F. 2d 921, 922 (5th Cir. 1992).

7. *Hill v. State,* 827 S.W. 2d 860, 863 (Tex. Crim. App. 1992).

8. *Batson v. Kentucky,* 476 U.S. at 96.

9. *E.g., Barnes v. State,* 855 S.W. 2d 173, 174 (Tex. App. —Houston [l4th Dist.] 1993, pet. ref'd); *Gerber v. State,* 845 S.W. 2d 460, 465 (Tex. App. — Houston [lst Dist.] 1993, pet. ref'd); *Dutton v. State,* 836 S.W. 2d 221, 225 (Tex. App. — Houston [14th Dist.] 1992).

10. Chief Justice Burger also suggests that the defendants in these cases would have to establish standing. *Id.* at 125 n.4.

11. *J.E.B. v. T.B.,* 606 So.2d 156 (Ala. Civ. App. 1992), *cert. granted,* 113 S. Ct. 2330 (1993).

12. *Curry v. Bowman,* __S.W. 2d __, __No. 71,606 (Tex. Crim. App. December 8, 1993), slip op. 4■.