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Holly E. Engelmann

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# NOTE: GUZMAN V. STATE

Holly E. Engelmann\*

**A** litigant violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by exercising a peremptory challenge based on a juror's gender, ethnicity, or race.<sup>1</sup> Purposeful discrimination, however, is less clear when the proponent of a peremptory strike offers several different factors for the strike, only one of which is not gender or race-neutral.<sup>2</sup> In the recent case of *Guzman v. State*,<sup>3</sup> the Texas Court of Criminal Appeals followed five federal circuit courts in adopting and applying the "mixed motives" doctrine.<sup>4</sup> Under the mixed motives doctrine, "if the opponent of a peremptory strike makes a prima facie showing of discriminatory purpose, the strike's proponent must demonstrate that he would have exercised the peremptory strike even if the improper factor [race or gender-based] had not existed or contributed to the decision to strike the pro-

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\* B.A., 1996, Whittier College; J.D., 2003, Southern Methodist University Dedman School of Law.

1. *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994) (gender); *Hernandez v. New York*, 500 U.S. 352 (1991) (plurality op.) (ethnicity); *Batson v. Kentucky*, 476 U.S. 79 (1986) (race); *see also* *Wamget v. State*, 67 S.W.3d 851 (Tex. Crim. App. 2001) (per curiam) (ethnicity); *Fritz v. Texas*, 946 S.W.2d 844 (Tex. Crim. App. 1997) (gender); TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon 1989) (race). The U.S. Supreme Court has extended its previous opinions discussing the violation of equal protection rights when race is used in the exercise of peremptory challenges in criminal actions to civil litigation. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991). The nature of the case, whether civil or criminal, makes no difference in the analysis of the constitutionality of discriminatory peremptory strikes, since "discrimination on the basis of race in selecting a jury in a civil proceeding harms the excluded juror no less than discrimination in a criminal trial." *Id.* at 619.

2. The U.S. Supreme Court "has not yet addressed 'dual motivation' or 'mixed motives' analysis in the *Batson* context." *Guzman v. State*, 85 S.W.3d 242, 249 (Tex. Crim. App. 2002).

3. *Id.*

4. *Gattis v. Snyder*, 278 F.3d 222, 232-33 (3rd Cir. 2002) (holding that mixed motive analysis was appropriate when one of the reasons that a juror was struck was gender-based); *United States v. Taylor*, 92 F.3d 1313, 1328 (2d Cir. 1996) (holding that dual motivation analysis shifts the burden to the proponent of the strike after the opponent of the strike has met its ultimate burden regarding racial motivation); *Wallace v. Morrison*, 87 F.3d 1271, 1272 (11th Cir. 1996) (per curiam) (holding that dual motivation analysis applies when the prosecutor considers both race and race-neutral factors in exercising a peremptory strike); *Jones v. Plaster*, 57 F.3d 417, 421-22 (4th Cir. 1995) (remanding case to determine if litigant would have struck juror even if the discriminatory reason had not been present); *United States v. Darden*, 70 F.3d 1507, 1531 (8th Cir. 1995) (affirming district court's finding that the prosecutor would have exercised the strike even without a facially discriminatory motive); *Howard v. Senkowski*, 986 F.2d 24, 27-31 (2d Cir. 1993) (remanding case because the dual motivation principle applies to the resolution of *Batson* challenges).

spective juror.”<sup>5</sup> By adopting the mixed motives doctrine, the Court of Criminal Appeals simply followed the analysis laid out in *Batson v. Kentucky*,<sup>6</sup> and reaffirmed in *Purkett v. Elem*,<sup>7</sup> for evaluating claims that a litigant has used peremptory challenges in a manner violating the Equal Protection Clause.<sup>8</sup> The court’s application of the *Batson* analysis to a situation where a litigant’s peremptory strike is not motivated “solely” by a discriminatory purpose is proper.

Benito Guzman was charged with capital murder for intentionally or knowingly causing the death of Luis Guzman.<sup>9</sup> The State did not seek the death penalty; thus, the parties conducted a general *voir dire* of the entire jury.<sup>10</sup> At the end of *voir dire*, Guzman challenged the State’s use of six peremptory strikes because each of the struck venirepersons was either Hispanic or African-American.<sup>11</sup> In response to Guzman’s *Batson* challenge, the State articulated reasons for each of the peremptory strikes.<sup>12</sup> With regard to juror number 17, the State articulated four reasons: (1) he was single, (2) he was male, (3) he had no children, and (4) he fell asleep or shut his eyes for long periods of time.<sup>13</sup> The State’s use of gender as a basis for the strike invoked another *Batson* challenge.<sup>14</sup> The court determined that the State had not exercised its peremptory challenges in a racially discriminatory way, but failed to independently evaluate the State’s gender-neutral explanations for the strike.<sup>15</sup> The trial court explicitly determined that the State’s strike was not racially discriminatory, and Guzman did not challenge that finding.<sup>16</sup> Thus, the only issue on appeal to the Court of Criminal Appeals was whether the State’s mixed motive for striking juror number 17 was gender-neutral as a matter of law.<sup>17</sup>

After hearing all of the evidence at trial, the jury returned a verdict of guilty and Guzman was sentenced to life imprisonment by the court.<sup>18</sup> On appeal, Guzman challenged the adverse ruling on his *Batson* objection, as well as the legal sufficiency of the evidence.<sup>19</sup> The court of appeals found that the evidence was legally sufficient but nonetheless reversed Guzman’s conviction.<sup>20</sup> The court held that Guzman’s *Batson* challenge to juror number 17 should have been sustained because the

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5. *Guzman*, 85 S.W.3d at 253-54.

6. *Batson v. Kentucky*, 476 U.S. 79 (1986).

7. *Purkett v. Elem*, 514 U.S. 765, 767-78 (1995) (per curiam).

8. *Id.* at 245-46.

9. *Id.* at 244; *Guzman v. State*, 20 S.W.3d 237, 238 (Tex. App.—Dallas 2000), *rev'd*, 85 S.W.3d 242 (Tex. Crim. App. 2002).

10. *Guzman*, 85 S.W.3d at 244.

11. *Id.*

12. *Id.*

13. *Id.* at 254.

14. *Id.* at 245.

15. *Id.* at 254-55.

16. *Id.*

17. *Id.*

18. *Id.* at 245.

19. *Id.*

20. *Id.*

State's dual motive for striking that juror was not, as a matter of law, gender-neutral.<sup>21</sup> The Texas Court of Criminal Appeals granted the State's petition for discretionary review to re-examine the "dual motivation" defense to a *Batson* peremptory strike challenge.<sup>22</sup>

The Texas Court of Criminal Appeals reversed and remanded the case to the court of appeals with instructions that it abate the appeal and order the trial court to conduct a hearing to determine: (1) whether the State would have struck juror number 17 regardless of his gender; and (2) whether Guzman met his ultimate burden of proof in showing that the State's strike of juror number 17 was based upon intentional discrimination.<sup>23</sup>

This case has brought some needed clarity to Texas jurisprudence. In 1991, the Texas Supreme Court addressed the issue of whether civil litigants could use peremptory challenges to exclude prospective jurors on account of race in *Powers v. Palacios*.<sup>24</sup> In a *per curiam* decision, the court held that "such an exclusion violates the equal protection rights of the challenged juror."<sup>25</sup> Through *Powers*, the supreme court thereby extended constitutional protection against the impermissible use of peremptory challenges to civil actions as well as criminal cases. Although *Powers* extended constitutional protection against discriminatory uses of peremptory challenges, it did not clarify whether the discrimination had to be the *only* reason or *only a factor*. A literal reading of the court's language would lead one to conclude that constitutional protections are violated when race is *a factor*.<sup>26</sup>

In *Benavides v. American Chrome & Chemicals*,<sup>27</sup> the Corpus Christi Court of Appeals interpreted *Powers* to mean that a peremptory challenge is constitutionally impermissible when race is only a factor, rather than being the sole reason for the exclusion.<sup>28</sup> The Texas Supreme Court denied the writ of error in the *Benavides* case, and expressly disapproved of the court of appeals' language that Texas has created broader protections than other jurisdictions.<sup>29</sup> Most federal courts have not required that race or gender be the only, or sole, motivating factor behind a peremptory strike and have accepted race and gender-neutral reasons.<sup>30</sup> The

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21. *Id.*

22. *Id.*

23. *Id.* at 255.

24. *Powers v. Palacios*, 813 S.W.2d 489 (Tex. 1991) (*per curiam*).

25. *Id.* at 490.

26. *Id.* at 491 (emphasis added).

27. *Benavides v. Am. Chrome & Chems.*, 893 S.W.2d 624 (Tex. App.—Corpus Christi 1994, writ denied).

28. *Id.* at 626.

29. *Am. Chrome & Chems. v. Benavides*, 907 S.W.2d 516, 517 (Tex. 1995) (*per curiam*).

30. See e.g., *United States v. Castorena-Jaime*, 285 F.3d 916, 928 (10th Cir. 2002) (holding that "juror inattentiveness during voir dire is a legitimate, race-neutral basis for a peremptory strike under *Batson*"); *Murray v. Groose*, 106 F.3d 812, 814 (8th Cir. 1997) (holding that "the appropriate question is not whether race was the sole factor motivating a prosecutor's peremptory strike but, rather, whether race caused the prosecutor to make a

Texas Supreme Court did not explain the reasons for its disapproval, thereby causing confusion as to when peremptory strikes are impermissible. Either the Texas Supreme Court interpreted and approved of other jurisdictions' endorsement of a mixed motive analysis, or the court interpreted and approved the jurisdictions that endorsed the proposition that race cannot be a factor at all. Thus, Texas jurisprudence was unclear after *Powers* and *Benavides*. Were peremptory strikes only impermissible if they were *solely* based on discriminatory reasons? Or were strikes impermissible if *any* part of the motivation was discriminatory? The present case answers these questions.

The majority of the Texas Court of Criminal Appeals reaffirmed its prior plurality opinion in *Hill v. State*<sup>31</sup> and held that, "when the motives behind a challenged peremptory strike are 'mixed' and the striking party shows that he would have struck the juror based solely on the neutral reasons, then the strike does not violate the juror's Fourteenth Amendment right to equal protection of the law."<sup>32</sup> Writing for the majority, Judge Cochran recognized: "Although *Batson* involved a race-based peremptory strike, courts analyze *all* allegedly discriminatory strikes according to the steps laid out in *Batson*."<sup>33</sup> First, the party opposing the peremptory strike must make a *prima facie* showing of racial or gender discrimination.<sup>34</sup> Second, the burden shifts to the proponent of the strike who must offer a race or gender-neutral explanation.<sup>35</sup> Third, if the proponent offers a race or gender-neutral explanation, the trial court must decide whether the opponent has proved purposeful racial or gender discrimination.<sup>36</sup> In making this determination, the trial court must explicitly determine that the opponent of the strike has shown, by a preponderance of the evidence, that the prosecutor's strike was based on racial or gender discrimination.<sup>37</sup> The U.S. Supreme Court explained that in a *Batson* hearing the proponent's "explanation need not rise to the level justifying exercise of a challenge for cause" but that the explanation must be clear, reasonably specific, and based on more than an assumption that the juror would be partial to the defendant because of his/her potential bias or shared identity.<sup>38</sup>

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challenged strike"); *United States v. Marin*, 7 F.3d 679, 686 (7th Cir. 1993) (holding that prosecution's education-based explanation for using a peremptory strike against a Hispanic venire person was not an "obvious mask for a race-based challenge," but rather a constitutionally acceptable reason for exercising a peremptory strike); *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991) (holding that statistics showing that race was not the *only* factor, but was a significant factor in the prosecution's decision-making process, was enough to demonstrate a *prima facie* case of discriminatory intent); *see also* cases cited *supra* note 4.

31. *Hill v. State*, 827 S.W.2d 860 (Tex. Crim. App. 1992) (plurality op.) (holding that race may be a factor coexisting with a non-racial reason for a strike, but that race may not be the reason for the strike), *cert. denied*, 506 U.S. 905 (1992).

32. *Guzman*, 85 S.W.3d at 244.

33. *Id.* at 245-46 (emphasis added).

34. *Id.* at 246.

35. *Id.*

36. *Id.*

37. *See id.* at 255.

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

The dissent in *Guzman* would have held that the mixed motives doctrine does not pass constitutional muster.<sup>39</sup> In his dissent, Judge Womack stated: "To excuse such obvious prejudice because the challenged party can also articulate nondiscriminatory reasons for the peremptory strike would erode what little protection *Batson* provides against discrimination in jury selection."<sup>40</sup> The dissent expressed concern that this holding will make it easier for lawyers to eliminate jurors for unconstitutional reasons, thereby eroding the protection *Batson* provides.<sup>41</sup> The dissent further disagreed that the proponent should be given an opportunity to offer a non-discriminatory reason for the peremptory challenge because once a discriminatory factor has been uncovered that factor taints the entire jury selection procedure.<sup>42</sup>

Judge Johnson filed a separate dissent in which she demands a heightened level of scrutiny by the trial court if strikes that are partially motivated by improper discrimination are to be allowed.<sup>43</sup> Judge Johnson's fear is that the majority's holding will encourage lawyers to offer explanations that will facially appear to pass constitutional muster.<sup>44</sup> After being examined by a higher level of scrutiny, however, such an explanation would be found improper.<sup>45</sup>

Although the U.S. Supreme Court has not decided whether racial or gender motivation needs to be the sole basis for a peremptory challenge in order for it to be constitutional, the Court has not ignored the possibility that a mixed motives explanation could overcome a *prima facie* case of purposeful discrimination.<sup>46</sup> In applying *Batson* to mixed motives cases, a few courts<sup>47</sup> have read the U.S. Supreme Court's opinion to mean that the Equal Protection Clause forbids a prosecutor from challenging potential jurors *solely* on account of their race or gender on the assumption that jurors of a particular race or gender will be unable to impartially consider the State's case against a defendant of the same race or gender.<sup>48</sup> The Second Circuit addressed the question of whether the U.S. Supreme Court intended the adverb "solely" to alter its prior equal protection jurisprudence so that the mixed motive analysis specifically invoked in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>49</sup> would be inapplicable to *Batson* challenges.<sup>50</sup> The Second Circuit resolved the issue by concluding that the U.S. Supreme

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39. *Guzman*, 85 S.W.3d at 256.

40. *Id.* at 256 (Womack, J., with whom Meyers, Price, and Johnson J.J., join, dissenting) (quoting *Payton v. Kears*, 495 S.E.2d 205, 210 (S.C. 1998)).

41. *Id.*

42. *Id.*

43. *Id.* at 258 (Johnson, J., dissenting).

44. *Id.*

45. *Id.*

46. *Batson*, 476 U.S. at 82-100.

47. *Darden*, 70 F.3d at 1531; *Howard*, 986 F.2d at 28; see also *Hernandez v. New York*, 500 U.S. 352 (1991) (plurality op.) (O'Connor, J., with whom Scalia, J., joins, concurring).

48. See generally *Batson*, 476 U.S. at 89.

49. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

50. *Howard*, 986 F.2d at 28.

Court intended the mixed motives analysis to be applicable to *Batson* challenges.<sup>51</sup>

In determining the U.S. Supreme Court's intent, the focus on the adverb, "solely," is completely unnecessary. In the last sentence of the *Batson* opinion, Justice Powell states: "If the trial court decides [on remand] that the facts establish, *prima facie*, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed."<sup>52</sup> The *Batson* holding clearly directs the trial court to uphold the defendant's conviction if it determines that the prosecutor's racially neutral explanation was legitimate, clear, and reasonably specific.<sup>53</sup> A *Batson* challenge, therefore, is only conducted when the prosecutor's supposed reasons for striking a juror appear to be inherently suspect, either because of race or gender. Thus, the race or gender factor is implied, and the prosecutor is asked to proffer an additional reason during the *Batson* challenge hearing that is not race or gender related. This is basically a mixed motive hearing. A race or gender factor is assumed and the hearing is conducted in order for the prosecutor to offer a non-discriminatory reason for the peremptory strike.

The dissent in *Guzman* believes that the mixed motives doctrine does not pass constitutional muster and will serve to make it easier for lawyers to eliminate jurors for unconstitutional reasons. These fears are understandable, especially to the cynical, who fear that lawyers will violate their oaths in order to strike jurors based on discriminatory reasons in order to "stack the jury" in their favor.

The Second Circuit addressed this fear by refusing to accept the premise "that prosecutors will readily disregard the obligations of their office and violate the requirements of an oath by swearing false denials of racial motivation."<sup>54</sup> The court rejected this fear by placing confidence in trial judges to determine the true facts of the prosecutors' motives, just as they do when determining the subjective mental states of parties and witnesses.<sup>55</sup> Further, the ultimate determination as to whether a prosecutor used a peremptory strike in an unconstitutional manner can be inferred from all the pertinent circumstances, not just from the prosecutor's acknowledgement.<sup>56</sup> Finally, the court observed: "[N]ot only will a false denial risk detection and serious consequences, but a frank acknowledgment may bolster the prosecutor's credibility in the assertion of other race-neutral factors."<sup>57</sup>

Critics further claim that this ruling diminishes the discriminatory protections of *Batson*. No one can seriously dispute the fact that purposeful

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51. *Id.*

52. *Batson*, 476 U.S. at 100.

53. *Id.* at 98, 100.

54. *Howard*, 986 F.2d at 31.

55. *Id.*; see also *Ex parte State*, 539 So.2d 1074, 1075 (Ala. 1988).

56. *Howard*, 986 F.2d at 31.

57. *Id.*

racial or gender discrimination during jury selection violates a litigant's right to equal protection and unconstitutionally discriminates against the excluded juror. Although a party to a cause does not have a right to a jury composed in whole or in part of persons of his or her own race,<sup>58</sup> the party does have a "right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria."<sup>59</sup> *Batson* clearly stands for the proposition that the Equal Protection Clause forbids litigants from using their peremptory strikes against potential jurors on account of their race. By allowing the proponent of a challenged peremptory strike the opportunity to establish race or gender-neutral reasons, the holding in *Batson* remains unchanged. *Batson* and its progeny have used a three step process for evaluating claims of discriminatory peremptory challenges. The second step, in which the proponent of the challenged strike is given the chance to offer a non-discriminatory explanation for the strike, is basically a chance for the proponent to establish a mixed motive reason. Since *Batson* addresses the mixed motives doctrine indirectly, courts that have used a dual motivation analysis are simply following the U.S. Supreme Court's direction.

Some critics see the mixed motives doctrine as another reason to eliminate peremptory challenges altogether. For example, Justice Marshall stated in his concurring opinion in *Batson*: "The decision today will not end racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."<sup>60</sup> The elimination of peremptory challenges would be most harmful to the jury process. There is no constitutional obligation to allow for peremptory challenges;<sup>61</sup> "[p]eremptory challenges are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury."<sup>62</sup> Although peremptory challenges are not guaranteed by the Constitution,<sup>63</sup> they serve a useful purpose. The primary purpose of a jury is to "prevent the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who are less likely to function or appear as but another arm of the government that has proceeded against him."<sup>64</sup> And the purpose of *voir dire* is to enable the court to select an impartial jury and assist the parties in exercising peremptory challenges.<sup>65</sup>

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58. *Batson*, 476 U.S. at 85 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 305 (1880)).

59. *Id.* at 85-86 (citing *Martin v. Texas*, 200 U.S. 316, 321 (1906), and *Ex parte Virginia*, 100 U.S. 339, 345 (1880)).

60. *Batson*, 476 U.S. at 102-03 (Marshall, J., concurring).

61. *Edmonson*, 500 U.S. at 620.

62. *Id.*

63. *See id.* at 98.

64. *Baldwin v. New York*, 399 U.S. 66, 72 (1970) (plurality op.).

65. *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991).

The Texas Court of Criminal Appeals correctly decided *Guzman*. Five federal circuit courts have held that if the proponent of a challenged peremptory strike is able to offer a reasonable and legitimate non-discriminatory reason for the strike and satisfy the trial judge that the potential juror would have been struck even without the race or gender discriminatory reason, then the strike is constitutional.<sup>66</sup> Although the mixed motives doctrine has not yet been specifically addressed by the U. S. Supreme Court, *Batson* can be read to allow it, and it is reasonable to conclude that the U.S. Supreme Court will apply such an analysis with regard to peremptory strikes.

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66. See cases cited *supra* note 4.