

## JURY SELECTION FOR THE DEFENDANT

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"A man who practices law in the criminal courts should be able to tell something about a man by looking at his face. A large part of his work is sizing up judges, jurors, and witnesses at the first glance."

- Clarence Darrow

### I. INTRODUCTION

Sizing up the venire who may become part of the jury that decides a case is critical for both criminal and civil practitioners. Many trial lawyers consider voir dire to be the most essential part of the trial because that is when the attorney makes a first impression and is given the first opportunity to explain the client's case to the prospective jury.

Voir dire literally means "to say the truth;" however, the more modern definition given to the term is "a preliminary examination under oath made of one presented as a juror or witness where his competency, interest, etc. is inquired into."<sup>1</sup> Voir dire may be used for a number of diverse purposes. Two commonly recognized purposes are 1) to test the legal qualifications of the panel members to serve as jurors through challenges for cause, and 2) to enable counsel to elicit facts so that peremptory challenges can be exercised wisely.<sup>2</sup> These

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<sup>1</sup> BLACK'S LAW DICTIONARY 1412 (5th ed. 1979).

<sup>2</sup> See *Implement Dealers Mut. Ins. Co. v. Castleberry*, 368 S.W.2d 249, 254 (Tex. Civ. App.--Beaumont 1963, writ ref'd n.r.e.); 4 MCDONALD, TEXAS CIVIL PRACTICE § 21.15, at 60 (1992).

purposes may be accomplished by observing the jurors, reviewing their backgrounds, and by eliciting from them other pertinent information.

Defending a large corporation or institution sometimes can be extremely challenging. Many potential jurors have been conditioned to think of business as big, bad and greedy. Indeed, there have been a few studies which suggest that plaintiffs have been awarded significantly bigger verdicts against corporate defendants, doctors, or other “deep pockets” than against individual defendants in cases involving personal injuries.<sup>3</sup> However, the methodology employed in studies of this type have been strongly criticized,<sup>4</sup> and the mock jury studies which served as a basis for the criticism apparently showed no difference in the range of jury verdicts against large and small entities.

Nevertheless, consider the usual situation you face when defending a large corporation or institution: (1) no sympathy; (2) no presumption of credibility; and (3) little or no margin for error. One step in overcoming these problems is to humanize the corporate or institutional defendant in the jury’s eyes. How can you level the playing field when your client’s adversary is either a much smaller company or an individual?

*Voir dire* is usually your first opportunity to do so. However, because many judges will not permit the lawyers to conduct an extensive *voir dire*, in those courts your first opportunity is opening statement. But regardless of whether it is in *voir dire* or opening, it is

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<sup>3</sup> See, e.g., Patricia Danzon, *Report on Awards for Noneconomic Loss*, in Florida Medical Malpractice Policy Guidebook 132 (Henry G. Manne ed., 1985); Audrey Chin & Mark A. Peterson, The Rand Corporation, *Deep Pockets, Empty Pockets: Who Wins In Cook County Jury Trials* (1985); Mark A. Peterson, The Rand Corporation, *Compensation of Injuries: Civil Jury Verdicts in Cook County* (1984); James K. Hammitt, Stephen Carroll and Daniel Relles, *Tort Standards and Jury Decisions*, 14 J. LEGAL STUD. 751 (1985).

<sup>4</sup> Professor Neil Vidmar, *Imperial Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217 (1993).

imperative to take the opportunity to humanize the corporation. The statistics teach, and it is certainly my experience, that many jurors make up their minds very early in the case.<sup>5</sup>

## II. PANEL SELECTION

### A. Method

In Texas state district courts, juries consist of 12 people, and in county court, juries consist of six people. At common law, the traditional number of jurors in federal court was 12. However, although FED. R. CIV. P. 48 does not prescribe an exact number of jurors, it does state that the court shall seat a jury of not fewer than six and not more than 12 members, and that all jurors (including alternates) shall participate in the verdict unless excused by the court pursuant to FED. R. CIV. P. 47(c). Six-person juries have been upheld as not violative of the Seventh Amendment.<sup>6</sup>

Jurors are presently chosen in state court from the names of persons on the current voter registration lists for precincts in the county, and from persons on a current list to be furnished by the Department of Public Safety identifying citizens of the county who hold a valid Texas driver's license and citizens who hold a valid personal identification card or certificate issued by the Department.<sup>7</sup>

Under federal law, the method of selecting federal jury panels is left to the discretion of each judicial district.<sup>8</sup> Nevertheless, a district's plan must receive the imprimatur of the judicial council for the circuit in which the district is located. The geographical reach of the

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<sup>5</sup> See generally, Dr. Hans Zeisel and Harry Kalven, Jr., *The American Jury*.

<sup>6</sup> *Colgrove v. Battin*, 413 U.S. 149, 152-60, 93 S.Ct. 2448, 2450-54 (1973).

<sup>7</sup> TEX. GOV'T. CODE ANN. § 62.001 (Vernon Supp. 1998).

<sup>8</sup> 28 U.S.C. § 1863(a) (West 1994).

federal courts is broader than their state counterparts for purposes of jury empanelment. For example, in the Southern District of Texas veniremen living in the Bryan/College Station area are frequently called to serve in Houston.

B. Qualifications or Exemptions of Jurors

To be eligible for jury service in state courts, a person: 1) must be a citizen of the state and county<sup>9</sup>; 2) must be over eighteen (18) years of age<sup>10</sup>; 3) must be qualified to vote (though failure to register does not disqualify a person for jury service)<sup>11</sup>; 4) must be of sound mind and good moral character<sup>12</sup>; must be able to read and write<sup>13</sup>; must not have served as a juror six days within the preceding six months in the district court or three months in the county court<sup>14</sup>; and must not have been convicted of a felony or be under indictment or other legal accusation of misdemeanor theft or felony.<sup>15</sup>

Persons who are legally blind or deaf are not disqualified to serve as jurors in state court unless the court determines that the disability renders the prospective juror unfit to act in a

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<sup>9</sup> TEX. GOV'T. CODE ANN. § 62.102(2).

<sup>10</sup> TEX. GOV'T. CODE ANN. § 62.102(1).

<sup>11</sup> TEX. GOV'T. CODE ANN. §§ 62.102(3), 62.1031.

<sup>12</sup> TEX. GOV'T. CODE ANN. § 62.102(4).

<sup>13</sup> TEX. GOV'T. CODE ANN. §§ 62.102(5), 62.103(a).

<sup>14</sup> TEX. GOV'T. CODE ANN. §§ 62.102(6), 62.103(b).

<sup>15</sup> TEX. GOV'T. CODE ANN. § 62.102(7)(8).

particular case.<sup>16</sup> Furthermore, a deaf person on a jury panel is entitled to have the proceeding interpreted by a court appointed interpreter.<sup>17</sup>

A juror in a federal district court must satisfy the following minimum qualifications:

1. Be a U.S. citizen;
2. Have the ability to speak English, and to "read, write and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;"
3. Lack any mental or physical infirmity that would prevent them from rendering satisfactory jury service; and
4. Lack a conviction or pending charge for either a state or federal felony offense.<sup>18</sup>

Persons who cannot satisfy these minimum standards may not serve as jurors.

Certain classes of persons may be excused from jury duty in state court. For example, the courts exempt persons with custody of a child younger than 10; full time student; primary caretaker for person unable to care for himself; persons who have served on a grand or petit jury within the last two years; persons over 65 years of age; and officers and employees of the state legislature.<sup>19</sup>

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<sup>16</sup> TEX. GOV'T. CODE ANN. §§ 62.104, 62.1041.

<sup>17</sup> TEX. CIV. PRAC. & REM. CODE § 21.002 (Vernon 1997).

<sup>18</sup> 28 U.S.C § 1865(b)(1)-(5).

<sup>19</sup> TEX. GOV'T. CODE ANN. § 62.106; *see also* 28 U.S.C. § 1862 for exemptions from federal jury service.

### III. DISQUALIFYING POTENTIAL JURORS

#### A. Challenges for Cause

1. After a panel of jurors has been brought to the courtroom, the voir dire process actually begins. The judge usually begins by explaining the judicial process in general and the voir dire process in particular. Although the process may vary from court to court, typically the judge introduces the parties and the attorneys to determine if any prospective juror knows any of them and, if so, whether that knowledge prevents them from being a fair and impartial juror. The court then permits the attorney for the plaintiff and the defendant to conduct the examination of the venire.

Attorneys have two methods to "strike" prospective jurors: 1) for cause, and 2) by peremptory challenge. A party has an unlimited number of challenges for cause, but is limited to six peremptory strikes in state district court, three in county court, and three in federal district court.<sup>20</sup> TEX. R. CIV. P. 228 defines a challenge for cause as "an objection made to a juror, alleging some fact which by law disqualifies him to serve in the case or in any case, or which in the opinion of the court, renders him an unfit person to sit on the jury. . . ." TEX. GOV'T. CODE ANN. § 62.105 sets forth a number of statutory reasons for juror disqualifications such as:

1. one who has a direct or indirect pecuniary interest in the subject matter of the controversy;
2. one who is related to a party, including any person who, though not named as a formal party, is directly interested in the action (the relation being by consanguinity within the third degree);

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<sup>20</sup> TEX. R. CIV. P. 233; 28 U.S.C. § 1870.

3. one who has served as a juror at a former trial of the same case or of an action involving the same factual issues;

4. one who is actually expected to testify as a witness;

5. one who has a bias or prejudice in favor of or against a party, or the type of case involved;

TEX. R. CIV. P. 227 requires that the statutory reasons for disqualifying prospective jurors in state court be asserted orally through a challenge for cause.

In addition to the disqualifications set forth in TEX. GOV'T. CODE ANN. § 62.105, an attorney may elicit testimony from a prospective juror during voir dire examination which indicates a bias or prejudice on the part of the prospective juror that makes him or her unfit to sit on the jury in the case. Bias is more than an inclination toward one side, and prejudice means the prejudgment of a case before any evidence is presented and embraces bias.<sup>21</sup> To disqualify a juror on a challenge for cause, it must appear that the juror's state of mind leads to the natural inference that the juror can not or will not act with impartiality.<sup>22</sup> If a prospective juror responds to an inquiry indicating that he or she is biased or prejudiced toward an issue or a party in the lawsuit and cannot act impartially in rendering a verdict, the attorney can orally request that the court strike that person "for cause." If a prospective juror admits bias or prejudice, he or she is disqualified from serving on the jury as a matter of law.<sup>23</sup>

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<sup>21</sup> *Compton v. Henrie*, 364 S.W.2d 179, 182 (Tex. 1963).

<sup>22</sup> *Gant v. Dumas Glass and Mirror, Inc.*, 935 S.W.2d 202, 207 (Tex. App.—Amarillo 1996, no writ); 5 Dorsaneo, TEXAS LITIGATION GUIDE CIVIL TRIAL PROCEDURES § 120.02[3][d] (1992).

<sup>23</sup> *Dorsaneo, supra* at 120-16; *Sullemon v. U.S. Fidelity & Guar. Co.*, 734 S.W.2d 10, 14-15 (Tex. App.—Dallas 1987, no writ); *see also* H. Lee Godfrey, Comment, *Civil Voir Dire in Texas: Winning the Appeal Based on Bias or Prejudice*, 31 S. TEX. L. REV. 409 (1990).

When a juror is disqualified as a matter of law, all discretion is removed from the trial judge and the judge must remove the juror<sup>24</sup>, even if the juror testifies later that he can put aside the bias or prejudice. However, when the evidence does not clearly establish bias or prejudice, it is a question of fact for the trial court.<sup>25</sup> The court has wide discretion in determining which jurors will be struck for cause<sup>26</sup>, and such discretion is exercised by the court after the oral examination of the prospective juror by the opposing attorneys.<sup>27</sup>

2. In federal district court, the judge usually conducts most of the voir dire examination. Indeed, the parties do not have the right to conduct *any* examination of prospective jurors.<sup>28</sup> Nevertheless, Rule 47(a) does permit the court to allow questioning "as it deems proper," and there appears to be a trend in federal courts to accord each party a small amount of time to examine the jury panel.<sup>29</sup> In courts where the judge is the sole interrogator of the jury panel, attorneys are usually allowed to submit proposed voir dire questions.<sup>30</sup> Obviously, where the judge does not permit direct questioning by counsel, these proposed questions should be drafted with considerable forethought.

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<sup>24</sup> *Compton*, 364 S.W.2d at 181-82; *Sullemon v. U.S. Fidelity & Guar. Co.*, 734 S.W.2d 10, 14 (Tex. App.—Dallas 1987, no writ). See also *Molina v. Pigott*, 929 S.W.2d 538, 541 (Tex. App.—Corpus Christi 1996, writ denied) ("Once basis or prejudice is established, a potential juror is disqualified as a matter of law."); see also TEX. GOV'T. CODE ANN. § 65.105(4).

<sup>25</sup> *Swap Shop v. Fortune*, 365 S.W.2d 151, 154 (Tex. 1963); *Molina*, 929 S.W.2d at 541; *Glenn v. Abrams/Williams Bros.*, 836 S.W.2d 779, 782 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1992, writ denied); *Perdue*, *A Practical Approach to Jury Bias*, 54 TEX. B. J. at 936 (Oct. 1991).

<sup>26</sup> TEX. R. CIV. P. 228.

<sup>27</sup> *Id.*

<sup>28</sup> FED. R. CIV. P. 47(a).

<sup>29</sup> *McMillion*, *Advocating Voir Dire Reform*, ABA J. at 114 (Nov. 1991).

<sup>30</sup> See, e.g., Local Rules of the United States District Court for the Southern District of Texas App. B, in TEXAS RULES OF COURT: FEDERAL (West 1998).

Challenges for cause in federal district court, as in state court, are made orally and the court has discretion regarding such challenges.<sup>31</sup> Examples of persons who would be disqualified from serving and, therefore, should be struck for cause include:

- (a) Any panelist who fails to meet the minimum requirements for jury service under the Jury Selection and Service Act;
- (b) Any panelist with a financial interest in the trial's outcome<sup>32</sup>; and
- (c) A panelist in a personal injury case who suffered an injury very similar to the kind of which the plaintiff complains.<sup>33</sup>

In the event that a party believes that a challenge for cause was improperly denied, that party may eventually raise that as a point on appeal. Therefore, for purposes of a complete record, it is imperative that a court reporter always record the voir dire examination, including the questioning of prospective jurors by the attorneys at the bench.

#### IV. **PEREMPTORY CHALLENGES**

In addition to the challenges for cause permitted by the Texas Rules of Civil Procedure and the Federal Rules of Civil Procedure, parties are also permitted a number of peremptory challenges -- "strikes" for which a party need not show a reason. "The exercise of peremptory challenges is, however, subject to abuse when parties attempt to use the challenges not as a method of selecting an impartial juror, but as a means of eliminating certain jurors and

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<sup>31</sup> 28 U.S.C. § 1870.

<sup>32</sup> See Gladhill v. General Motors Corp., 743 F.2d 1049, 1050-51 (4th Cir. 1984)

<sup>33</sup> See Consolidated Gas & Equip. Co. v. Carver, 257 F.2d 111, 115-16 (10th Cir. 1958).

impaneling those who are potentially more partial toward their cause."<sup>34</sup> Therefore, a strike may not be made solely on the basis of a juror's race or gender.<sup>35</sup>

Peremptory strikes are made at the conclusion of voir dire and after challenges for cause have been made and ruled upon by the court. TEX. R. CIV. P. 232 states that peremptory strikes are only made in the event that twenty-four (24) names remain on the list in district court or twelve (12) names remain on the list in county court. TEX. R. CIV. P. 233 allows each party to a civil action six peremptory strikes in district court and three strikes in county court. In multiple party cases, the judge determines whether any of the litigants aligned on the same side of the docket are antagonistic.<sup>36</sup> If so, the court may "equalize" the number of peremptory challenges, so that the plaintiff and defendants have a comparable number of peremptory strikes.

A. Equalizing Peremptory Strikes in Multi-Party Litigation

Prior to the exercise of peremptory strikes, any party to a multiple party suit may make a motion to equalize the number of peremptory strikes allowed.<sup>37</sup> The court must then ascertain whether litigants on the same side are, in fact, "antagonistic" to each other. Antagonism may be established by the pleadings, but the principal question is whether there is antagonism based upon a fact issue which the jury will decide. If liability is based on the same ultimate facts, there is no factual antagonism between the parties.<sup>38</sup> However, if each defendant in a multiple

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<sup>34</sup> John S. Lapham, *Gender-Based Peremptory Challenges Under United States v. DeGross*, 43 WASH. U. J. URB. & CONTEMP. L. 465 (1993).

<sup>35</sup> See TEX. R. CIV. P. 232 and 233; FED. R. CIV. P. 47(b).

<sup>36</sup> See TEX. R. CIV. P. 233.

<sup>37</sup> TEX. R. CIV. P. 233.

<sup>38</sup> *Garcia v. Central Power & Light Co.*, 704 S.W.2d 734, 737 (Tex. 1986); *Texas Commerce Bank, Reagan Through Texas Commerce Bank Nat'l. Ass'n. v. Lebcu Constructors*, 865 S.W.2d 68, 77 (Tex. App.—Corpus Christi 1993, no writ).

defendant case is charged with different acts of negligence,<sup>39</sup> or if each defendant alleges that the fault of another defendant is the sole cause of the plaintiff's damage,<sup>40</sup> or if there is a settlement agreement between ostensibly opposing parties,<sup>41</sup> the court may find "antagonism" exists and realign the parties and apportion the number of peremptory strikes between them.

After a determination of antagonism, the court is required to equalize the peremptory strikes between sides if a litigant makes such a motion.<sup>42</sup> If no antagonism exists between parties on the same side, each side must receive the same number of strikes.<sup>43</sup> The equalization of peremptory strikes is to be made in accordance with the ends of justice and in the sound discretion of the trial court.<sup>44</sup> The court has considerable discretion in this area and, for example, may equalize peremptory challenges by increasing the number allotted to a sole party or decreasing the number allotted to the multiple parties on the other side.<sup>45</sup> Basically, the equalization of peremptory strikes must be fair.<sup>46</sup>

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<sup>39</sup> *Tamburello v. Welch*, 392 S.W.2d 114, 116 (Tex. 1965); *Baker Marine Corp. v. Herrera*, 704 S.W.2d 58, 59-60 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

<sup>40</sup> *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 918 (Tex. 1979); *Lopez v. City Towing Assocs., Inc.*, 754 S.W.2d 254, 258 (Tex. App.—San Antonio 1988, writ denied).

<sup>41</sup> *Webster v. Lipsey*, 787 S.W.2d 631, 638-39 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1990, writ denied); *Council v. Bankers Comm. Life Ins. Co.*, 558 S.W.2d 487, 488-89 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.).

<sup>42</sup> TEX. R. CIV. P. 233; *Diamond Shamrock Corp. v. Wendt*, 718 S.W.2d 766, 768 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

<sup>43</sup> *Garcia*, 704 S.W.2d at 736; *Lopez*, 754 S.W.2d at 258.

<sup>44</sup> TEX. R. CIV. P. 233; *American Cyanamid Co. v. Frankson*, 732 S.W.2d 648, 660-61 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.) (op. on rehrg.); see 4 MCDONALD, TEXAS CIVIL PRACTICE § 21.24, at 77-82 (1992).

<sup>45</sup> *Patterson*, 592 S.W.2d at 920; see, e.g., *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 5 (Tex. 1986).

<sup>46</sup> See *Williams v. Texas City Refining, Inc.*, 617 S.W.2d 823, 826-27 (Tex. Civ. App.—Houston [14<sup>th</sup> Dist.] 1981, writ ref'd. n.r.e.).

Parties entitled to separate peremptory challenges may confer before exercising their strikes.<sup>47</sup> However, an unqualified agreement for dismissal in exchange for challenges between the parties is prohibited and an agreement to dismiss a party for its peremptory strikes constitutes reversible error.<sup>48</sup>

In federal district courts, the number of peremptory strikes is governed by 28 U.S.C. § 1870. Each party is entitled to three peremptory strikes. In the event that there are multiple litigants, a motion to equalize may be made.<sup>49</sup> Federal courts have discretion in aligning the parties, but their decision-making power is not unlimited.<sup>50</sup>

B. Restrictions on the Use of Peremptory Strikes: The Batson Test and the J.E.B. Test

After the allocation of peremptory challenges, each litigant must make its peremptory strikes in accordance with the standard enunciated in *Batson v. Kentucky*,<sup>51</sup> and *J.E.B. v. Alabama ex rel T.B.*<sup>52</sup> The *Batson* standard prohibits a racially motivated peremptory strike while the *J.E.B.* standard prohibits a gender motivated peremptory strike.

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<sup>47</sup> *Sisco v. Hereford*, 694 S.W.2d 3, 8 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.); *Brown & Root, Inc. v. Gragg*, 444 S.W.2d 656, 660 (Tex. Civ. App.--Houston [1st Dist.] 1969, writ ref'd n.r.e.).

<sup>48</sup> *General Motors Corp. v. Hebert*, 501 S.W.2d 950, 957 (Tex. Civ. App.--Houston [1st Dist.] 1973, writ ref'd n.r.e.).

<sup>49</sup> *United States v. Vaccaro*, 816 F.2d 443, 456 (9th Cir.), *cert denied*, 484 U.S. 928 (1987).

<sup>50</sup> *See, e.g., Goldstein v. Kelleher*, 728 F.2d 32, 37 (1st Cir.), *cert denied*, 469 U.S. 852 (1984) (appellate court found magistrate abused his discretion by giving two defendants three strikes each where the interests of both were "indistinguishable").

<sup>51</sup> 476 U.S. 79, 106 S. Ct. 1712 (1986).

<sup>52</sup> 511 U.S. 127, 114 S. Ct. 1419 (1994).

*Batson* was a criminal case in which the United States Supreme Court held that it is unconstitutional to reject jurors on the basis of race. Similarly, in *Powers v. Ohio*,<sup>53</sup> the Court ruled that a white defendant may not be excluded from a criminal case jury on account of her race. The Court extended *Batson* to apply to civil cases in *Edmonson v. Leesville Concrete Co., Inc.*,<sup>54</sup> and the Texas Supreme Court adopted that standard in *Powers v. Palacios*.<sup>55</sup>

*Batson* and its progeny set forth a three-step process for asserting race-based violations: 1) defendant makes a prima facie case that the prosecutor has exercised peremptory strikes on the basis of race; 2) the burden then shifts to prosecutor to state a "race-neutral" explanation for striking the juror; and 3) the court then decides whether the defendant has shown purposeful discrimination.<sup>56</sup> Most courts have found that a *Batson* challenge must be made before the jury is sworn and the rest of the panel is discharged.<sup>57</sup> Either the plaintiff or the defendant may assert a *Batson* challenge.

Race-neutral explanations that have been upheld as non-violative of the *Batson* standard include (1) prior service on another criminal jury panel in which the defendant was acquitted<sup>58</sup>; (2) family members who have served time for drug offenses or undergone drug

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<sup>53</sup> 499 U.S. 400, 111 S. Ct. 1364 (1991).

<sup>54</sup> 500 U.S. 614, 111 S. Ct. 2077 (1991).

<sup>55</sup> 813 S.W.2d 489, 490-91 (Tex. 1991).

<sup>56</sup> Goldberg, *Batson and the Straight Fact Test*, ABA J. at 82 (August 1992); Egan, *Supreme Court Signals an End to Discriminatory Use of Peremptories: Now that Racially Discriminatory Peremptory Challenges Have Been Prohibited in Civil Proceedings, Will the Next Step be Gender-Based Strikes*, 60 DEF. COUN. J. 264 (April 1993).

<sup>57</sup> See, e.g., *Ford v. Georgia*, 498 U.S. 411, 111 S. Ct. 850, 857 (1991); *Morning v. Zapata Protein (USA), Inc.*, 128 F.3d 213, 216 (4<sup>th</sup> Cir. 1997); *McCroly v. Henderson*, 82 F.3d 1243, 1249 (2d Cir. 1996).

<sup>58</sup> *U.S. v. Scott*, 26 F.3d 1458, 1465-66 (8<sup>th</sup> Cir.), cert. denied, 513 U.S. 1019 (1994).

