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Electronic questionnaire for the Philip Meyer Journalism Awards

Please answer the following questions, using the numbering of each question on the form. You must include one electronic copy of your answers on a CD.

This MUST be submitted with an entry form (http://www.ire.org/meyeraward/PMJAEntryForm.pdf).

1. Title of story, collection of stories, or series and names of the people who worked on the story.

"Striking Differences"
By Steve McGonigle, Holly Becka, Jennifer LaFleur and Tim Wyatt

2. Date(s) published or aired.

Aug. 21-23, 2005

3. Topic and synopsis of story or series, including major findings.

Racial discrimination in jury selection was a scourge on the Dallas County district attorney's office for decades and was cited recently by the U.S. Supreme Court as it overturned a 1986 death penalty case. *The Dallas Morning News* spent two years gathering and analyzing jury data from felony court trials to see what had changed.

The newspaper found that:

- Dallas County prosecutors excluded black jurors at more than twice the rate they rejected whites.
- Defense attorneys excluded whites at more than three times the rate they

rejected blacks.

• Even when blacks and whites gave similar answers to key questions asked by prosecutors, blacks were excluded at higher rates.

• Blacks ultimately served on juries in numbers that mirror their population primarily because of the dueling prosecution and defense strategies.

4. How the story got started (tip, assignment, etc.)

For more than 30 years, Dallas County jury selection has been a matter of national attention. The Dallas County district attorney's office became notorious in 1973, after disclosures that prosecutors were using a manual advising them to eliminate minorities from juries.

In 1986, *The Dallas Morning News* reported that prosecutors continued to bar almost all blacks from juries. Within weeks, U.S. Supreme Court Justice Thurgood Marshall referred to the newspaper's study and cited the DA's office as an example of continuing discrimination against blacks in jury selection.

In 2003, the Supreme Court declared that the district attorney's office had been "suffused with bias" against blacks, and told lower courts to reconsider the 1986 capital murder conviction of Thomas Joe Miller-El. The Supreme Court's stinging rebuke of local prosecutors prompted us to ask what had changed in the Dallas County's district attorney's office in the 17 years since Mr. Miller-El's conviction

5. Major types of documents used and if FOI requests were needed. Did you have difficulties obtaining any electronic information you used? How did you resolve this? Did you use FOIA for data under state or federal law?

The newspaper spent 18 months filing legal motions to get juror information cards from Dallas County's 15 felony court judges. In Texas, the information can

be released only by court order. Each judge had to sign an order granting us access to records from his or her court. The Dallas County District Attorney opposed the release on privacy grounds but was unsuccessful. He also appealed the first order granting us access and failed. Ultimately, we obtained more than 6,500 juror cards from 108 trials and had a data entry firm digitize the data, including double entry to make sure the data was correct. We also used transcripts and court files.

6. Major types of human sources used.

The newspaper interviewed current and former prosecutors, defense attorneys, judges, jury consultants, social scientists, jury scholars, law professors, jurors and prospective jurors and community activists. In all, more than 100 people were interviewed for this series.

7. Result (if any).

The AP version of the story was carried widely around the country. The stories also were discussed on Ed Gordon's National Public Radio program and on CNN. Several attorneys said the stories were the talk of law offices and at the Dallas County courthouse.

Dallas attorney Mick Mickelson filed a motion seeking to bar the use of peremptory challenges in the trial of one of his clients, who was charged with armed robbery. Mr. Mickelson cited the data compiled by *The Dallas Morning News* as evidence that peremptories could not be exercised in a non-discriminatory fashion.

8. Follow up (if any). Have you run a correction or clarification of the report or has anyone come forward to challenge its accuracy? If so, please explain.

No corrections or clarifications were published. *The Dallas Observer*, an alternative weekly newspaper in Dallas, published an article, based largely on the criticisms of two statisticians who had previously worked for the district attorney, asserting that we had not proved a case of discrimination and had relied on faulty social science research rather than "good old fashioned reporting."

9. Advice to other journalists planning similar projects.

- Be creative. Learn how to blend traditional reporting methods with database reporting.
- When possible, rely on your own skills to conduct your research in-house, rather than relying on the work of experts.
- Don't rely on only databases that already exist. Build your own to suit your needs.
- Don't assume that court records are not obtainable even if they are not covered by open records laws.
- Talk to experts and read research reports. These tools will be used in slightly different ways depending on the topic. Make sure you understand what research has been done. You'll also discover the pitfalls other researchers encountered.
- Grab a guru. Find an expert who can review your findings and give you feedback.
- If you have data entry done, enter everything the first time. We originally opted to not have every field entered to save time and money. But we ended going back and having some things rekeyed. Also, if you have data entry done, be sure they use verification on all important fields. This

means that they double-enter the information and compare it to make sure it's correct.

- Allow time for the subjects of your investigation to poke holes in the analysis. They might point out things you didn't think of.
- After you've done your analysis, rerun everything from the beginning to make sure you can duplicate the results.
- Check your findings against patterns found in other studies.

10. Difficulty, uniqueness of effort, or other special circumstance related to this subject.

Most analyses that have been done on jury selection have been based solely on demographics. Our study went a step further and analyzed how potential jurors responded to questions during *voir dire*. While that step added difficulty and time to the study, it also provided strength and depth we would not have had otherwise. Experts we talked with about the study called it the most in-depth research they had seen on the topic. David Baldus, one of the nation's leading experts on race discrimination in jury selection, said: "In terms of the number of cases that you have in your sample and in terms of the number of control variables you have, there's nothing that equals it in the literature."

11. Length of time taken to report, write and edit the story.

The project took about two years from start to finish, including the time required to obtain the juror records from individual judges. The reporting/writing/editing phase lasted about eight months.

12.

a.) Describe in detail the social science research method(s) used.

We compiled juror demographic information, such as name, age, occupation and race from more than 6,500 juror information cards, and measured socioeconomic level by using 2000 Census median household income for the prospective juror's neighborhood. We also noted whether prosecutors or defense attorneys eliminated a person from the jury pool.

We did some preliminary analyses based on the demographics, but because defense attorneys and prosecutors said they placed great importance on how jurors responded during pre-trial questioning, we had to go a step further. After developing a consistent methodology, we reviewed the jury-selection transcripts from the 59 cases in the group that were appealed. Transcripts are available only in cases in which verdicts are appealed to higher courts.

To make sure we wouldn't have problems with the smaller sample, we ran tests to make sure there were no significant demographic differences between jurors in the 59 cases compared with the 108 cases.

We researched other studies on the subject.

We used binary logistic regression to analyze the data. Logistic regression provides many of the same statistics you get in linear regression. It also estimates the strength of the relationship between variables and controls for other variables that may affect whether a person is allowed to serve — such as education, income or answers to pre-trial questions.

It allows you to keep adding variables to your analysis and study the effect. If other variables, instead of race, accounted for why someone was struck, adding that variable would have reduced the power of black in the statistical "model."

We ran two models: one for strikes by the prosecution and one for strikes by the defense. Our prosecution model found, that in addition to race, variables on jurors' attitudes about criminal justice issues, particularly their views on the role of punishment, also were strong. But when those secondary variables were analyzed individually, we found that even among potential jurors who responded similarly during questioning, prosecutors were more likely to strike blacks than whites.

Among defense attorneys, race was the strongest factor.

b.) How did you verify the results of the method(s) you used?

After running the initial analysis, we duplicated the entire process to verify that what we found was correct. We also compared our findings to the findings of similar academic research. We consulted with six experts in jury analysis. We also conducted dozens of interviews with individuals involved in the issue.

c.) How did the results of those methods inform your reporting and writing?

Our analysis provided that basis by which we were able to state definitively that lawyers were striking certain races at higher rates. If all we had done was provide the overall strike rates, critics could have argued that all of it could be explained away by other factors. Because we looked at every factor in the public records, our findings were much stronger.

d.) Did you seek significant help from social scientists outside your newsroom? Describe their involvement.

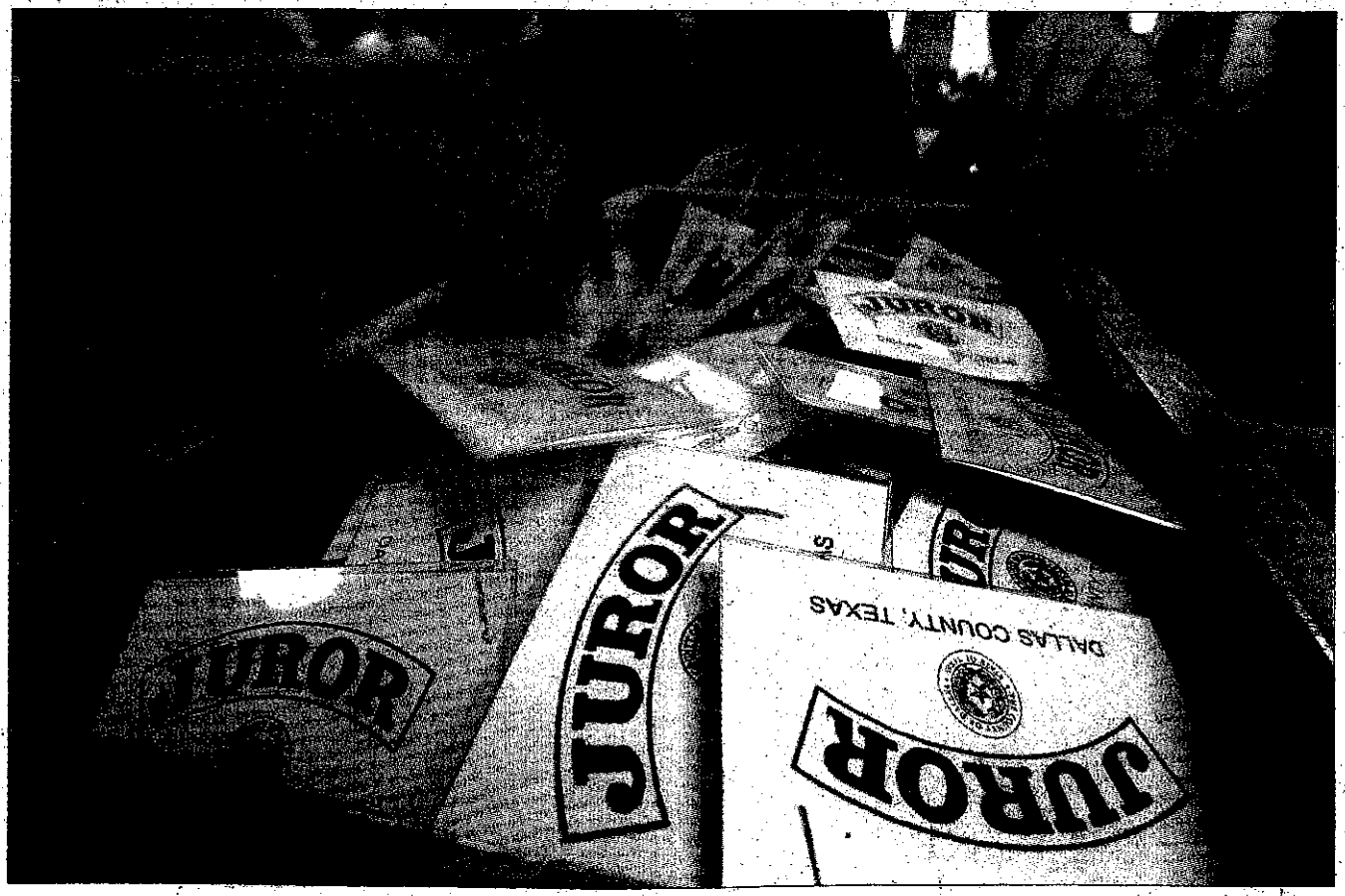
We consulted six experts in jury selection. Based on our analysis, we developed a white paper describing our findings and listing our statistical results. We sent that white paper to all six experts. We also consulted regularly through the entire analysis with two leading specialists on race bias in jury selection: David Baldus, a professor of law, and George Woodworth, a professor of statistics, actuarial science and biostatistics, at the University of Iowa. They have published several research papers, including a 2000 study on peremptory challenges in Philadelphia that was cited in June by a Supreme Court justice as the court overturned a Texas death penalty case because of race bias in jury selection.

The Dallas Morning News

Sunday, August 21, 2005

STRIKING DIFFERENCES

A process of juror elimination



RICHARD MICHAEL PRUITT/Staff Photographer

Prosecutors excluded blacks from juries at more than twice the rate they rejected whites, a study of felony trials showed.

Key Findings

Prosecutors and defense attorneys in Dallas County exclude jurors on the basis of race, despite Supreme Court bans on discrimination in jury selection, a two-year investigation by *The Dallas Morning News* found. Beginning today, *The News* examines the practices of prosecutors, defense attorneys and judges. The key findings:

- Dallas County prosecutors excluded black jurors at more than twice the rate they rejected whites.
- Defense attorneys excluded whites at more than three times the rate they rejected blacks.
- Even when blacks and whites gave similar answers to key questions asked by prosecutors, blacks were excluded at higher rates.
- Blacks ultimately served on juries in numbers that mirror their population primarily because of the dueling prosecution and defense strategies.

Dallas prosecutors say they don't discriminate, but analysis shows they are more likely to reject black jurors

Racial discrimination was once so raw in Dallas County that a black college president who tried to serve on a jury was flung head-first down the courthouse steps while sheriff's deputies watched.

This past March, nearly 70 years later, a young black man had to show a judge his teeth in order to serve.

The all-white jury — that enduring image of Jim Crow justice — is a fading sight around the Frank Crowley Courts Building. But while times, laws and leaders have changed, race still matters.

Prosecutors excluded eligible blacks from juries at more than twice the rate they rejected eligible whites, *The Dallas Morning News* found. In fact, being black was the most important personal trait affecting which jurors prosecutors rejected, according to the newspaper's statistical analysis. Jurors' attitudes toward criminal justice issues also played an important role, but even when blacks and whites answered key questions the same way, blacks were rejected at higher rates.

District Attorney Bill Hill denied that his prosecutors exclude, or strike, jurors on the basis of race.

See **HILL** *Page 16A*

Inside

Stories by **Steve McGonigle, Holly Becka, Jennifer LaFleur** and **Tim Wyatt**

First of three parts

Hill

Continued from Page 1A

"The statistics may show we strike more blacks, but it's not because they're black," he said. "It's because for one reason or another, they [prosecutors] don't think they are going to be fair and impartial."

But the son of Dallas County's most famous district attorney said prosecutors continue to pick juries based on race, albeit in less obvious ways.

"I think it's institutional," said state District Judge Henry Wade Jr., whose father's office was cited repeatedly for race discrimination in jury selection.

Supervisors may no longer preach racial stereotyping, and some try to combat it, Judge Wade said, but it remains a part of the office's culture. "I think informally prosecutors talk and say, you know, 'What can we do to get minorities off the jury panel?' "

The News' study showed that blacks served on Dallas juries in proportion to their population — because prosecutors did not eliminate all blacks and defense attorneys excluded white jurors at three times the rate they rejected blacks.

The dueling tactics of prosecution and defense have produced only an illusion of equal rights, and one that flouts the intent of several U.S. Supreme Court rulings, legal experts said.

"We're talking about the court of law, and there is blatant disregard and violation of the law going on," said law professor David Baldus, a nationally recognized expert on race bias in jury selection. "If one doesn't care about the Constitution, then one won't be fazed by it."

The president of the Dallas Criminal Defense Lawyers Association said the newspaper's findings confirmed his courtroom experiences.

"It's shocking that race continues to play a significant role in the dynamics of the jury system in Dallas County," Peter Barrett said. "Justice should not be motivated by partisanship or race or any other factor which is prohibited by equal protection of the Constitution."

As part of its two-year investigation, *The News* examined 108 non-capital felony cases tried in 2002. Reporters interviewed prosecutors, defense lawyers, jurors, judges and scholars. They reviewed more than 6,500 juror information cards, read transcripts of juror questioning and analyzed lawyers' strike patterns.

Several experts said the newspaper's analysis was the most thorough to document race bias in jury selection, the last vestiges of which the Supreme Court sought to abolish in its 1986 landmark decision, Batson vs. Kentucky.

RICHARD MICHAEL PRUITT/Staff Photograph

District Attorney Bill Hill, who was an assistant to hard-nosed former DA Henry Wade, called the analysis of his office's jury selection practices "unfair and biased. But he agreed that defense attorneys strike a disproportionate number of whites.

That ruling made it illegal to exclude even one black juror because of race and said it could be grounds for a new trial. The court later ruled that race discrimination also violated jurors' constitutional rights.

In June, the high court overturned a 19-year-old death penalty case, declaring former District Attorney Henry Wade's office a symbol of race discrimination in jury selection. It was the third time in two decades the high court had highlighted racism in the Wade administration.

No one disputes race is an issue in the criminal justice system, but none of Mr. Hill's prosecutors said it was a problem in jury selection.

But Phillip Hayes, who was a prosecutor under Mr. Hill for five years, said he learned from supervisors and more experienced peers to be wary of blacks.

"No one ever came out and said it aloud — or put it in writing — but the pervasive side was that many didn't think that African-Americans made good jurors for the state," said Mr. Hayes, who left the district attorney's office last year under disputed circumstances. He is now a defense attorney.

Jeanine Howard, who worked until the 1990s for Mr. Hill's immediate predecessor, said her supervisors taught her to make up excuses that would allow strikes against blacks to stand.

As a defense attorney, she now sees Mr. Hill's staff offering the same explanations.

"Having been on both sides, I know what they're doing," Ms. Howard said. "They know there are techniques you can use."

Juan Sanchez, another former prosecutor-turned-defense attorney, said he saw disturbing patterns. "When I represent black clients,

the black people get struck [from the jury pool]. I think it's more than a coincidence."

In trials examined by *The News*, prosecutors sometimes cited fashions or physical traits associated with black culture, such as gold teeth, to justify their rejection of black jurors.

Mr. Hill said that his prosecutors don't make up excuses to strike jurors and that the newspaper's analysis was "unfair and biased." He agreed, however, with the newspaper's findings that defense attorneys strike a disproportionate number of whites.

A former track star with a country twang, Mr. Hill became district attorney in 1999 after 25 years as a criminal defense lawyer. Early in his career, he spent six years as an assistant to Mr. Wade, the district attorney from 1951 through 1986 best known for the prosecution of Jack Ruby and the abortion-rights case Roe vs. Wade.

Mr. Hill, 63, considers the late Mr. Wade a role model and has a large portrait of him hanging in his office. Still, he and his staff have tried to distance their office from any racial discrimination of the Wade era.

It was under Mr. Wade that the Dallas County district attorney's office was first embarrassed in 1973 by the disclosure of a stereotype-laced training paper on jury selection that instructed prosecutors on how to use their peremptory strikes. "You are not looking for any member of a minority group which may subject him to oppression — they almost always empathize with the accused."

Peremptories are one of three tools lawyers use to reduce jury pools to 12 jurors. In Texas, lawyers on each side can use their peremptory strikes to exclude up to 10 jurors for any reason, as long as it is not based on race or gender. Twelve other states allow lawyers at least 10 peremptories.

Lawyers also can excuse for cause those who cannot fulfill their legal duties, or can reach agreements with opposing counsel to excuse those jurors whom both sides prefer to avoid.

But the peremptory is by far the most controversial jury selection tactic. One Colorado judge has called it "the last best tool of Jim Crow," and two Supreme Court justices have wondered publicly about its abolition.

In 1986, *The News* revealed that Dallas prosecutors were using their peremptory strikes to exclude nearly all blacks from juries. Since then, strike rates of blacks have dropped from almost 90 percent to less than 60 percent. And training papers urging exclusion have been replaced by an official policy of racial equality.

"If I felt like I was dealing with lawyers who were holding on to those biases and prejudices from years ago, quite frankly, I don't think I'd be district attorney, or they wouldn't be working for me," Mr. Hill said.

QUESTIONS & ANSWERS

'It's what you say to me or what you don't say to me ... that matters'

When the Supreme Court this summer overturned the conviction of Thomas Joe Miller-El, it cited "a selection process replete with evidence that the prosecutors were selecting and rejecting potential jurors because of race."

The justices found prosecutors' explanations for striking blacks implausible. They noted the history of race discrimination in Dallas County juries, the reordering of jury panels to try to move blacks to the rear, and the different standards of questioning applied to black jurors and white jurors.

The court highlighted instances during Mr. Miller-El's 1986 trial of prosecutors rejecting blacks even when their answers to jury selection questions were similar to those of whites who were seated as jurors.

Two decades later, *The News* found that felony prosecutors were still using some jury selection tactics condemned by the Supreme Court.

Prosecutors maintain that it's how prospective jurors answer their questions, not race, that determines who gets selected and rejected.

"I don't care who you are," said Rick Jackson, a chief felony prosecutor. "It's what you say to me or what you don't say to me in answering the question that matters in whether or not you get struck."

Prosecutors say certain questions play a fundamental role in their screening of prospective jurors. For instance, Toby Shook, one of Mr. Hill's top assistants, said felony prosecutors don't want jurors who believe that rehabilitation, instead of punishment, is the main goal of sentencing.

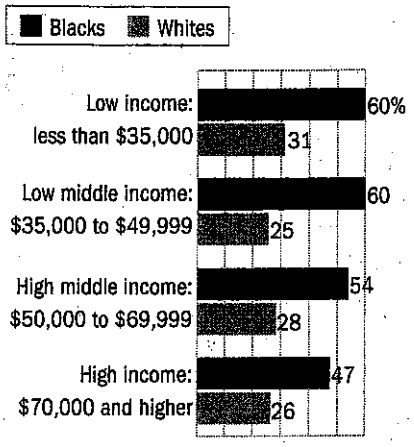
"They are nice people. I want them to be my neighbors. I don't want them on my jury because they are going to give a guy a break, whatever race they are," he said.

Mr. Hill said his prosecutors seek jurors who have had positive encounters with au-

See **RESPONSES** *Page 17A*

STRIKES BY INCOME

Within income groups, prosecutors struck blacks at higher rates than whites.



NOTE: Categories are based on the median household income from the 2000 Census for the block group in which jurors' addresses were located. Analysis is based on 59 of 108 trials from 2002 that were appealed and for which transcripts of voir dire were available.

SOURCE: *Dallas Morning News* research

SERGIO PECANHA/Staff Artist

Responses

Continued from Page 16A

thorities.

"A disproportionate number of minorities are struck by the prosecution not because of the color of their skin, but because their own negative experience with law enforcement, or that of a close friend or family member, may have tainted their view of the system as a whole," he said in a statement.

But the newspaper's analysis found that prosecutors treated the responses of blacks and whites to key questions differently. A review of transcripts of juror questioning, available in 59 of the 108 cases studied by *The News*, showed that:

- Juror views on rehabilitation were the most important factor in determining who was excluded, but prosecutors rejected 79 percent of the blacks who favored rehabilitation over punishment or deterrence, compared with 55 percent of the whites who gave the same answer.
- Prosecutors excluded 78 percent of the blacks who acknowledged that they or someone close to them had had contact with the criminal justice system, compared with only 39 percent of whites.
- About 2 percent of all jurors in the study said they or someone close to them had had a bad experience with police or the courts. Prosecutors rejected every black who gave that answer, compared with 39 percent of the whites.

"If a prosecutor's proffered reason for striking a black panelist applies just as well to a white panelist allowed to serve, that is evidence tending to prove purposeful discrimination," the Supreme Court ruled in its Miller-El decision.

Nineteen years ago in its Batson ruling, the court said purposeful discrimination was proof that a juror had been wrongfully excluded.

The justices also said prosecutors must be able to offer "race-neutral" reasons for excluding jurors. As a result, critics contend, prosecutors today use questions about jurors' contact with the legal system or their views on punishment as a subtle way to exclude blacks.

"I believe that prosecutors ask questions so that they can strike persons who can compromise their ability to win their case," said the Rev. L. Charles Stovall, who leads a group that monitors alleged police brutality and racial profiling.

Judge Wade said that when prosecutors ask jurors whether punishment, deterrence or rehabilitation is the main purpose of sentencing, the question is calculated to try to get blacks off juries.

"That's just a taught question," he said. "A lot of the minorities are going to say rehabilitation, so you strike everybody who says rehabilitation and you're covered under Batson. I think that's the only reason they ask it."

WEIGHING ALL FACTORS

Analysis of prosecutors' decisions considers all available factors

For its analysis, *The News* used logistic regression, a statistical tool that computes the relationship between variables such as a potential juror's race and whether the juror was struck by the prosecution.

While it's not possible to know everything that influenced a prosecutor's strike, the newspaper analyzed all factors in the public record, such as age, race, education, occupation, socioeconomic status and answers to questions that prosecutors say help them spot a good or bad juror.

Even after accounting for all available reasons that a potential juror might be struck, the newspaper's analysis showed that prosecutors rejected black jurors at higher rates than whites.

If the difference in strike rates between blacks and whites could have been explained by some other factor, the strength of race would have been greatly reduced when those factors were added to the analysis. But no factor reduced the importance of race.

Had race played a minor role, the analysis would have found no difference in the strike rates for blacks and whites with similar characteristics. But there were differences. Within each income group, for example, blacks were struck at about twice the rate of whites.

The News asked the nation's leading experts on jury selection to review its findings and give their opinions.

"Proof like this would make a prima facie case of systemic discrimination," Mr. Baldus said.

"I think you can say they are intentionally violating the law," he added.

Mary Rose, an assistant professor of sociology and law at the University of Texas at Austin, agreed

that the study showed a clear pattern of exclusion. But that does not prove prosecutors intentionally discriminated, she said.

"It's hard for me to say that they are in their head going, 'Here comes a black person; no way in hell are they going to be on my jury,' " Ms. Rose said. "I just know the end result. And it doesn't look good."

Mr. Hill consulted two criminologists about *The News*' findings. Both praised the thoroughness of the analysis, but said it did not prove prosecutors were intentionally excluding blacks because of race.

"You see hardworking prosecutors who are trying to get the best jury they can to get a person convicted of a crime," said Robert Taylor, chairman of the Department of Criminal Justice at the University of North Texas.

He theorized that race and socioeconomic status were so intertwined that prosecutors disproportionately struck minority jurors because they are poor and have greater contact with the criminal justice system.

The district attorney hired Mr. Taylor to review his office's operations after a fake-drug scandal in 2001 in which prosecutors sought drug convictions against Hispanics who had been framed by police. Based on his experience, Mr. Taylor said, he was convinced that racism was not an issue in Mr. Hill's office.

DEMEANOR

Prosecutors say they can tell a lot from jurors' behavior

Mr. Hill said *The News*' study failed to account for one important variable that could not be found in court transcripts: a juror's demeanor — how he looked and acted, how he reacted to defense attorneys and prosecutors.

"When we see a juror who looks like they want to wring our neck or spit in our face — things that don't show up [in the record] — we're going to strike that person," he said.

Courts have upheld demeanor as a legitimate reason to exclude a prospective juror. But the disparity in strike rates found by *The News* is too wide to be explained by demeanor alone, said Ms. Rose.

"It would be shocking to me if there were that many African-Americans making faces and not whites, because I've been to jury service, and no one's happy to be there," said Ms. Rose, whose study of peremptory challenges in North Carolina found similar strike patterns.

In the trials examined by *The News*, some judges allowed prosecutors to strike jurors for failing to make eye contact with the lawyer, smiling at the defense attorney or allegedly sleeping.

When attorneys suspect a juror has been rejected because of race, they can request what's known as a Batson hearing. In a review of all Batson transcripts available in cases studied by *The News*, prosecutors cited demeanor only seven times to justify their 51 strikes of minorities.

"It's a feeling you get from people. A guy with tattoos and a bandanna is probably not a guy that likes authority," said Nancy Mulder, a chief felony prosecutor.

On the other hand, she said, someone who has "been attentive ... smiled at me, nodded at things I've said — we're not going to have a problem."

The late Supreme Court Justice Thurgood Marshall worried that strikes for demeanor could become a cover for prosecutors whose perceptions are warped by their prejudices.

"A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically," he wrote in the Batson case.

For at least one member of the high court, those concerns have not diminished with time. In a concurring opinion to the Miller-El decision, Justice Stephen Breyer noted that in Dallas and elsewhere, "The use of race- and gender-based stereotypes in the jury selection process seems better organized and more systematized than ever before."

FUTILE CHALLENGES

Critics say DA's perfect record demonstrates weaknesses of Batson

In the six years Mr. Hill has been in office, none of the thousands of cases brought to trial has been re-

See **CRITICS** *Page 18A*

Critics

Continued from Page 17A

versed on a Batson challenge.

Batson objections were found in only 16 cases reviewed by *The News*. None was sustained by the trial judge, and only five made it to appeals courts.

Prosecutors say that proves they're following the law.

"I think we're doing it right," said Lori Ordiway, chief of the district attorney's appellate section. "There is nothing from which to make a claim."

Critics, however, say the lack of successful appeals merely proves how weak the Batson protections are.

"Very frankly, any attorney worth his salt can make up something to get over a Batson challenge," said Mike Byck, an assistant public defender in Dallas County. "And, literally, they do make it up. We do."

Although the Batson decision was meant to end racial discrimination in jury selection, the Supreme Court's ruling left open the question of what constituted a race-neutral strike.

In subsequent rulings, the high court made enforcing Batson more difficult, essentially declaring that judges should accept all but the most obviously racial reasons for a strike.

As a result, Texas appeals courts have allowed prospective jurors to be rejected for "body English"; gum chewing; wearing a pink hat, snakeskin belt or sunglasses; or having unkempt hair, mustaches or beards.

Ms. Howard, the former prosecutor, said her supervisors in the district attorney's office taught her how to get around Batson.

"Always say they're sleeping," said Ms. Howard, who now specializes in appeals. "I was told that."

The newspaper also found that when defense attorneys question whether race is the reason behind a prosecutor's strike, the lawyers often handle it informally and it is not made part of the trial record. Defense and prosecution also regularly agree off the record, sometimes with the judge's participation, about which jurors to excuse.

The reluctance to make a formal Batson challenge is not just the result of vague legal guidance, but a reflection of how unwilling most lawyers are to accuse colleagues of racism.

"Nobody likes to be accused of something as horrible as that," said Robert Hirschhorn, a nationally known jury consultant who is based in Lewisville and works mostly with the defense.

Prosecutors, judges and many defense attorneys have worked together for years, and collegiality is a hallmark of the Dallas County courthouse.

But Stephen Cooper, a Dallas appellate attorney, denounced such informal measures as an end-run around Batson that precludes the issue of race discrimination ever being raised on appeal.

Mr. Miller-El's attorneys set the foundation for a successful appeal of his death-penalty conviction by making their allegations of race bias in jury selection a part of the trial record.

TRACKING VIOLATIONS

Formal monitoring unnecessary, district attorney says

Mr. Hill said he does not track Batson challenges. If a prosecutor were found to have violated Batson, it would come up in the evaluation process or he would hear about it on the courthouse grapevine, Mr. Hill added.

One such incident caught his attention in March after *The News* requested a transcript of jury selection proceedings.

A felony court prosecutor had acknowledged to state District Judge Faith Johnson that stereotypes guided at least one of her strikes.

In response to a Batson challenge from the defense, Kerri New told the judge that she had rejected a 22-year-old black man because he had missing teeth and looked disheveled.

"It fits him into a socioeconomic stereotype, which the state feels is a group that's detrimental to the state," said Ms. New, who used nine of her strikes to exclude potential black jurors.

The judge had the young man brought back into court and asked him to show his teeth.

She disallowed the prosecutor's strike and put the man on the jury, which later convicted two young black men of robbery.

In May, Ms. New quit the district attorney's office. She declined in an interview to discuss the reasons for her departure but insisted she had mistaken the young man for an older black man seated in front of him.

Mr. Hill acknowledged that he demoted Ms. New, the first time in his six years in office that he has disciplined a prosecutor for a Batson-related issue. He said he disagreed with her philosophy on jurors.

"It doesn't make a difference how much money you have," he said.

The News also found two cases last year in which a judge ruled that another of Mr. Hill's prosecutors had violated Batson.

That prosecutor, Lara Peirce, rejected a black truck driver whom she described as "liberal" because he was wearing a gold chain with what she incorrectly described as a theater mask medallion. She also rejected a black secretary who she wrongly said was skeptical of police.

Ms. Peirce said that she alerted Mr. Hill to the incidents, had valid race-neutral reasons for excluding

the jurors and did not understand why the judge found them unacceptable. "There's no problem with why I struck these people," she said in an interview.

Mr. Hill blamed the Batson rulings on a personality conflict between the state district judge and Ms. Peirce.

The judge, Mary E. Miller, disagreed. "It had absolutely nothing to do with personality conflict, and it had everything to do with following the law," Judge Miller said. "You have to look at whether it [the strike] is race-neutral, but you also have to look behind it and make sure they're not just making something up."

Six months after the second Batson ruling, Mr. Hill commended Ms. Peirce's performance in another case.

The district attorney said he does not necessarily make Batson violations part of employees' personnel files.

"We look at each individual case to determine whether there is some kind of deception or ill motive or something where there's an intentional or perceived intentional violation of Batson," Mr. Hill said. "We get objections sustained every day that we don't think are right."

STEREOTYPES

Does pressure to win cause prosecutors to fall back on them?

Mr. Hill strongly objected to any suggestion that he or his staff engage in racist behavior, and on the surface, his felony prosecutors seem a different breed from the Wade era.

Fourteen of the 93 felony court prosecutors are minorities. All but seven earned their law degrees after the 1986 Batson ruling.

New prosecutors in Mr. Hill's office receive a 45-

See **BLACK** *Page 19A*

Continued from Page 18A

page training paper devoted to jury selection, which instructs them to follow the law. All are instructed to follow a written policy prohibiting jury selection based on race.

"The kids now, they're being raised in a different culture," state District Judge Keith Dean said. "They don't have to consciously reject the lies that some of us were exposed to when we were younger."

State District Judge John Creuzot, one of only two black felony court judges in Dallas County, said he was surprised by *The News'* findings.

"They seem to be doing a very good job, from my perspective, of handling the cases in a fair and impartial manner," he said.

But several legal analysts said they believed that prosecutors unconsciously engage in unfair stereotyping because they are under immense pressure to win and often must rely on superficial information.

"Your job as a prosecutor is to get a conviction, just as your job as a defense attorney is to get an acquittal," said Marc Mauer, assistant director of The Sentencing Project, a reform organization based in Washington, D.C. "In your personal life, you may have very good relationships with African-Americans and other groups, but your number crunching tells you that your goal needs to be to get as many blacks off the jury as you possibly can.

"Racist or not, the end result is certainly a racist one."

There is also an entrenched belief among prosecutors and defense attorneys that racial stereotypes are still valid indicators of what makes a "good" juror, said Mr. Baldus, a death penalty opponent and a professor at the University of Iowa whom many academics regard as the nation's leading researcher on jury selection bias.

"Maybe they aren't aware that they are indulging in these stereotypes when it comes to race," he said. "[But] if it isn't conscious, it's based on perceptions that are highly correlated with race and race alone."

Prosecutors worry that blacks will empathize with defendants because research shows that blacks are more likely to have bad experiences with the legal system, such as racial profiling by police.

Mr. Hayes said that when he worked in Mr. Hill's office, the stereotypical profile of a black juror was someone who supported rehabilitation of criminals, favored lighter prison terms and had a higher rate of bad experiences with law enforcement and the justice system.

"Everybody with experience seemed to have a story of how a jury hung up when a black juror wouldn't put another black person in jail," he said.

Studies show that while black jurors may alter the tenor of deliberations and improve the thoroughness with which evidence is examined, their presence usually does not change a trial's outcome. There is a greater chance that black jurors will be more lenient in sentencing.

However, the amount of influence blacks can have on a verdict depends on their numbers in the jury, scholars say.

"The research shows that if you only have one, two or three blacks [on a jury] or as many as four, they don't have any real influence on the system," Mr. Baldus said.

In the 108 trials examined by *The News*, 101 had four or fewer black members. Ten juries contained no black members. Only one jury had a majority of black members; the defendant in that case was white. Blacks made up 56 percent of the defendants.

All-white juries have tended to be harsher on black defendants, said Phoebe Ellsworth, a professor of law and psychology at the University of Michigan.

"White people worry about being racist when they're reminded of it," she said. "But when it's all white people, it just doesn't occur to them to remember their egalitarian values."

Prosecutor Ada Brown, whose mother is white and father is black, believes it's best to talk to prospective jurors about race rather than have it surface later in deliberations.

"I have an 80-year-old grandfather who thinks everybody brown is of Satan," said Ms. Brown, the only one of 13 felony prosecutors interviewed by *The News* who acknowledged raising race during jury selection.

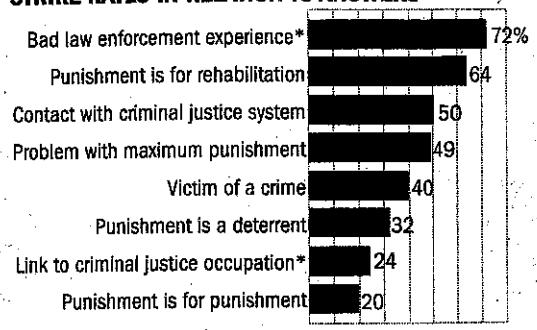
She has black relatives who distrust the state too much to be fair jurors, she added.

"I use those two extremes to try to get people discussing the topic that nobody wants to discuss — and that is, that race sometimes matters," Ms. Brown said.

WHAT PROSECUTORS LOOK FOR

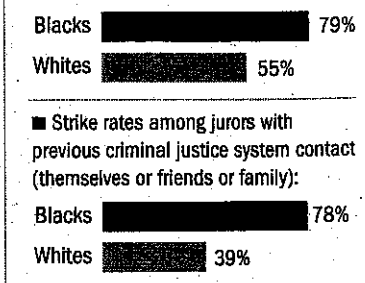
Prosecutors and the defense ask potential jurors questions during the voir dire process. Prosecutors say answers to certain questions are important to their decision about whom to strike.

STRIKE RATES IN RELATION TO ANSWERS



ANALYSIS OF STRIKES

Among potential jurors who answered key questions the same, blacks were excluded at higher rates.



* Juror pool member, family or friend

NOTE: Analysis is based on 59 of 108 trials from 2002 that were appealed and for which transcripts of voir dire were available.

SOURCE: *Dallas Morning News* research

SERGIO PEÇANHA/Staff Artist

CONSIDERING SOLUTIONS

Some judges and scholars say it's time to eliminate peremptory challenges

The Supreme Court has grappled with jury discrimination since the first decade after adoption of the Civil War Amendments to the Constitution, which guaranteed blacks the rights of full citizenship, including jury service.

Batson in 1986 was the first court ruling to put limits on how lawyers could use their discretionary strikes.

But Justice Marshall, the court's first black member, predicted that would not be enough and called for the abolition of peremptory strikes.

He had seen up close the consequences of race discrimination in jury selection. In 1938, as counsel to the NAACP, he came to Dallas to investigate an attack on George Porter, the president of Wiley Junior College who was thrown down the courthouse steps after refusing to be excused from jury service.

"Even if all parties approach the court's mandate with the best of conscious intentions," Justice Marshall wrote almost 50 years after that incident, "that mandate requires them to confront and overcome their own racism on all levels — a challenge I doubt all of them can meet."

Two decades later, writing in the Miller-El case, Justice Breyer recalled Justice Marshall's warning and said it was time "to reconsider Batson's test and the peremptory challenge system as a whole."

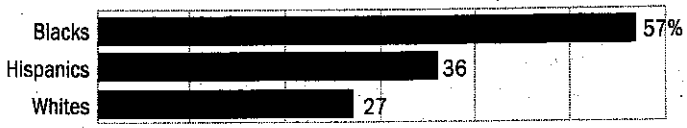
Some judges and legal scholars believe that the only way to eliminate discrimination in jury selection is to do away with peremptory strikes — or at least limit them. Having 10 strikes per side, they say, gives lawyers too much leeway.

Beyond the constitutional debate over peremptory challenges, community leaders say race discrimination in jury selection tells an entire group of people that it's unfit to serve and undermines the foundation of the justice system.

"The end results are that you exclude a category of people," said Hank Lawson, chairman of the South Dallas Weed and Seed Committee, which works with police to prevent crime. "You can't get around that."

A LOOK AT PROSECUTORS' STRIKES

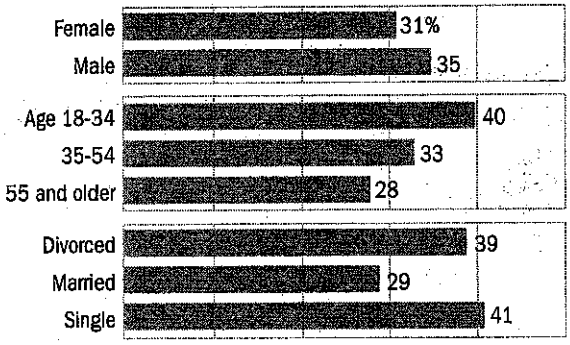
PROSECUTORS EXCLUDE BLACKS AT HIGHER RATES



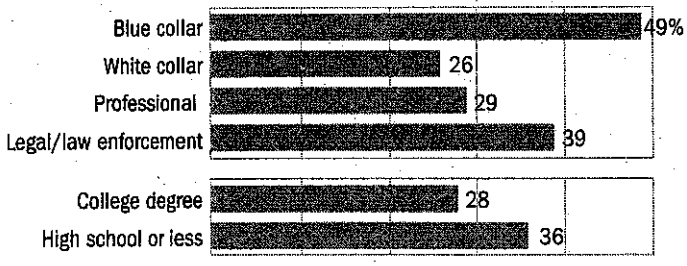
STRIKES BY PERSONAL INFORMATION

In general, prosecutors rejected at higher rates potential jurors who were less educated, single, young or in blue-collar occupations.

Sex, age and marital status



Profession and education



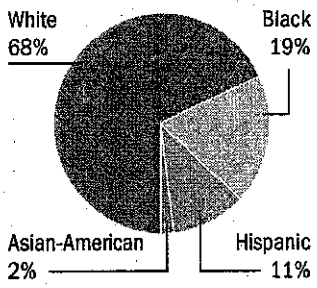
NOTE: Some categories with low response rates are not included. Analysis is based on 59 of 108 trials from 2002 that were appealed and for which transcripts of voir dire were available.

JURY BREAKDOWN BY RACE

How seated juries compare to the Dallas County population.

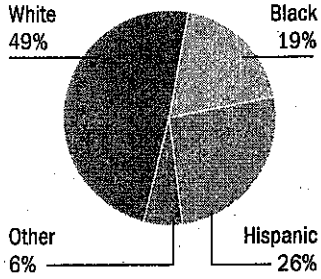
SEATED JURORS BY RACE*

Percentage of 1,303 selected jurors



DALLAS COUNTY 18 OR OLDER

Racial breakdown of county population (of 1,599,868 people)



NOTE: Of the 1,303 selected jurors, three were American Indians, and race information for four others was unavailable. Because those percentages were less than 1%, they are not reflected in the chart. *Hispanics are underrepresented because the number of Hispanics in the pool of potential jurors was only 11 percent.

SOURCES: *Dallas Morning News* research; U.S. Census Bureau

TOM SETZER/Staff Artist

"We're talking about the court of law, and there is blatant disregard and violation of the law going on. If one doesn't care about the Constitution, then one won't be fazed by it."

David Baldus, University of Iowa law professor, expert on race bias in jury selection

"The statistics may show we strike more blacks, but it's not because they're black. It's because for one reason or another, they [prosecutors] don't think they are going to be fair and impartial."

Bill Hill, Dallas County district attorney

UNDERSTANDING THE JURY SELECTION PROCESS

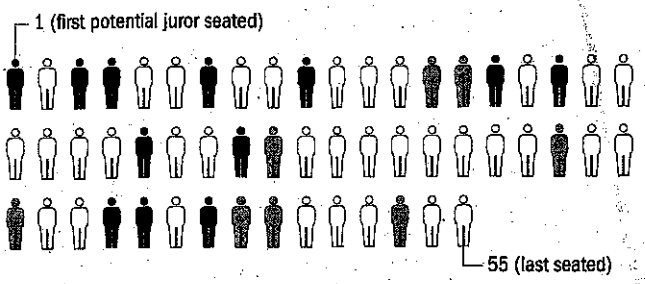
Jury selection in the drug possession felony court trial of Kenneth D. Tanniehill in 2002. Mr. Tanniehill was found not guilty of drug possession charges. The jurors are shown in their assigned seating order.

White Black Hispanic

1 VOIR DIRE

The half-day jury selection process is called voir dire. During the process, the prosecutor and the defense attorney can ask questions of the pool of potential jurors, known as the venire.

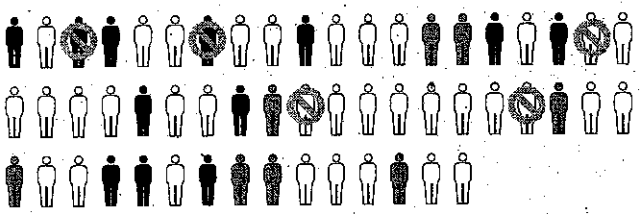
In this case, 55 adults were in the venire



2 EXCUSED AND REMOVED FOR CAUSE

Some jurors were sent home for stating that under certain conditions, they couldn't follow the law. Some jurors are excused for other reasons, such as medical conditions.

5 out, 50 remain

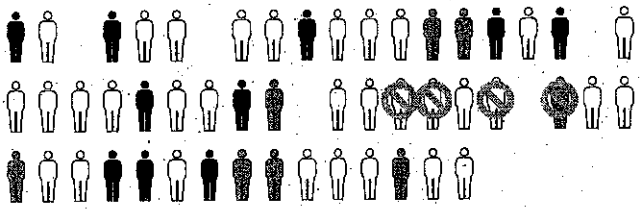


3 whites and 2 blacks out

3 AGREED EXCUSALS

Some jurors are sent home after the prosecutor and defense attorney compare notes and "agree" to excuse them.

4 out, 46 remain



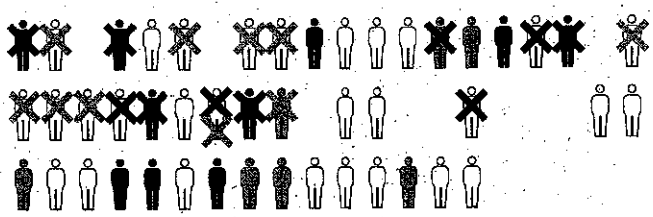
3 whites and 1 Hispanic out

4 PEREMPTORY STRIKES

The prosecutor and the defense attorney can reject 10 jurors each for any reason other than race or gender. The newspaper's study found racial disparities in the strike patterns of both sides. In this case, the prosecutor struck 71% of eligible blacks and 15% of eligible whites. The defense struck 45% of eligible whites and no eligible blacks. Strike rates are based on eligible jurors, people who were either selected or removed by peremptory challenge; those who are not reached are not factored into the strike rate.

19 out, 27 remain

✕ Strikes by the prosecution ✕ Strikes by the defense



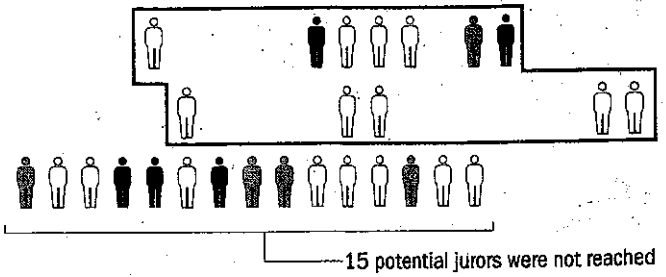
Defense struck 9 whites and 1 Hispanic. Prosecution struck 5 blacks, 1 Hispanic and 4 whites. Both sides struck one potential juror.

5 SEATED JURY

The first 12 people who remain are seated as jurors. Sometimes a 13th, or alternate, juror also is seated. Those remaining after the jury has been selected are sent home. In this case, 15 potential jurors were left over after the jury was seated.

12 seated, 15 sent home

First 12 are selected for the jury



SOURCE: Dallas Morning News research

Secret database used in weeding out jurors

Some call ratings unfair, but state backs use of details on prior service

If you've ever acquitted a defendant while serving on a Dallas County jury, the district attorney's office considers you a "bad" juror and is not likely to seat you again.

Prosecutors consult a confidential, taxpayer-funded database as they decide which people to accept or reject for service.

Appeals courts and the Texas attorney general have upheld prosecutors' right to do so and ruled that defense lawyers and the public — including former jurors — have no right to see the database.

District Attorney Bill Hill denied a request by *The Dallas Morning News* for access to the database and refused to allow the newspaper even to photograph an investigator using it.

So what is known about the database is based on prosecutors' descriptions.

Prosecutors rate jurors as "good," "bad" or "fair" based on whether they voted to convict or gave a stiff sentence. For decades, names, addresses and ratings were the only information on jurors included in the database.

In recent years, the database has been expanded to include prosecutors' brief comments about what jurors said of the trial and during jury selection. The expanded database also includes the names of people who were rejected during jury selection.

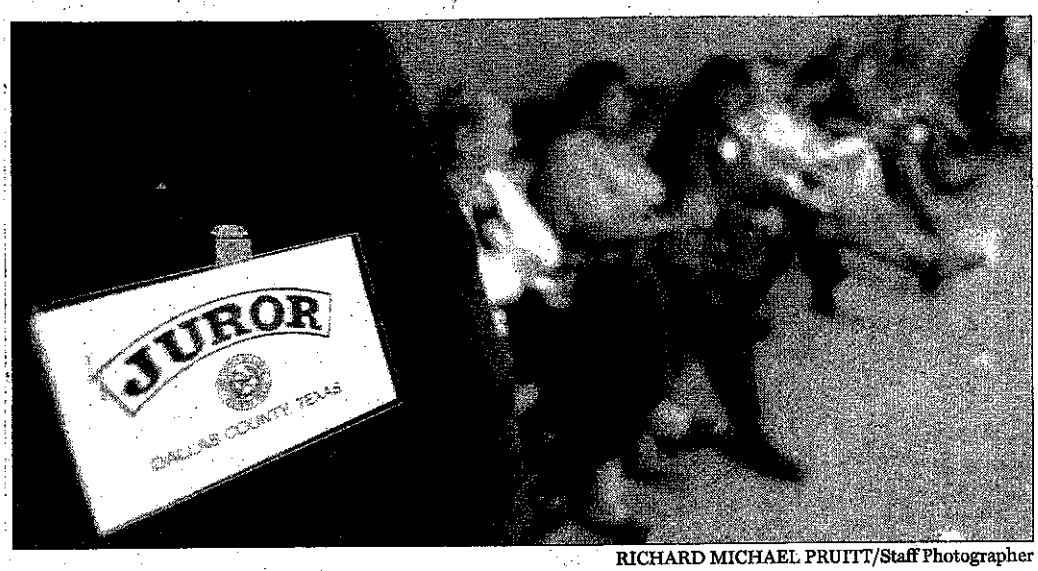
The database's origins date to the 1940s, when former Dallas County District Attorney Henry Wade was a young prosecutor and kept notes on jurors in cases he tried. In the early 1950s, the list was expanded to include all criminal case jurors, and in the 1970s, it was computerized. The database now contains 1 million to 2 million names, Mr. Hill said.

Originally, prosecutors said, the goal was to red-flag "nuts" to be avoided as jurors.

Today, there is no office policy requiring prosecutors to eliminate jurors based on the database. Several prosecutors said they don't automatically try to strike jurors flagged as "bad," because they also consider the circumstances of the previous trial.

Others said they routinely exclude people who have been identified as "bad."

"If it's a felony [case], and they found someone not guilty, that's usually enough information that you'd be able



RICHARD MICHAEL PRUITT/Staff Photographer

Prosecutors, who rate jurors based on whether they voted to convict or gave a stiff sentence in previous service, defend the database as a useful tool. Defense attorneys say it ignores the possibilities of a wrongful charge or a weak state case.

to exercise a strike right then and there," said one of Mr. Hill's top assistants, Toby Shook, who supervises felony prosecutors in several courts.

But prosecutor Livia Liu said she rarely relies on the database "because I don't think it's fair or an accurate gauge."

Defense lawyers complain the system ignores the possibilities of a wrongful charge or a weak state case and could be susceptible to racial profiling.

"Why does that make them a bad juror because they followed the law?" asked defense lawyer Kevin Brooks.

Judges instruct jurors to weigh the facts, to convict only if the state proves its case beyond a reasonable doubt, and to remember that defendants are presumed innocent until proven guilty.

Defense lawyer Anthony Lyons said the ratings are unfair because no one has access to secret jury deliberations.

"They could have been the most pro-state juror who held out for four days and decided to cave in," he said.

Prosecutors argue that the database is a useful tool.

"We're here to make sure the community gets a fair trial," said Rick Jackson, a prosecutor for 15 years. "The people we're red-flagging are the people that aren't going to be fair to us, fair to the community."

The accuracy of the database depends on prosecutors' honesty, but because prosecutors usually pair up to try cases, Mr. Shook said, there is always someone to catch a lie. And anyone caught doing that, he added, would be fired.

The 5th District Court of Appeals in Dallas has routinely supported prosecutors' right to use the database. But the court has also cautioned that it doesn't condone the use of a rating list without criteria or explanations.

"The use of this type of list too easily allows the possibility by an unscrupulous prosecutor wishing to circumvent" laws against race-based jury selection, the court ruled in 1999.

Defense lawyer Russell Wilson II has already lost one request for access to the database under the state's open-records laws, but plans to try again. He believes the database might reveal certain trends, such as whether "there are segments of the community being struck at higher rates."

Besides, he added, "If your DA thinks you're a bad juror, then you ought to know."

'Your teeth are not missing?' 'They're all there. Thank you.'

When the judge looked, she found no reason to keep the man off the jury

Jury duty sounded like fun to the 22-year-old Dallas man.

"I thought it would be pretty cool," he said. "It would be something new. I'd never done it before."

After arriving at the Frank Crowley Courts Building, the boyish young man with a shy manner was told to report to state District Judge Faith Johnson's court. The case involved two black men who were charged with robbing an elderly Hispanic man.

J, who asked that his identity not be revealed, was one of 20 blacks on the panel of 65 prospective jurors. In answer to a group question, he said he believed the primary purpose of sentencing should be punishment. He said he was never asked a direct question.

But when Assistant District Attorney Kerri New presented her list of potential jurors whom she wanted to strike, J's name was on it. So were the names of eight other blacks.

Defense attorney Clark Birdsall accused Ms. New of striking blacks for racial reasons, without asking some of them a single question, and requested a Batson hearing.

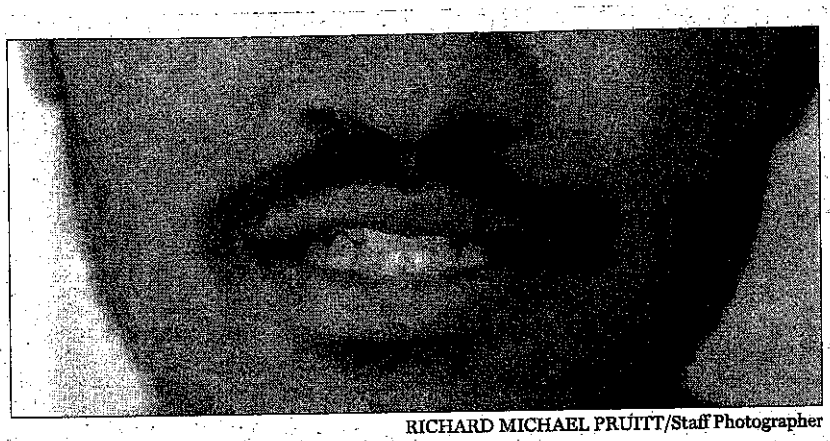
"Some of these jurors, I don't think, said a cotton-picking thing," he said.

In response, Ms. New said four people had doubts about assessing a life sentence. Another was "a bad juror on a murder case." One had a misdemeanor conviction. One sported a "liberal lifestyle." One had a "disturbing" attitude.

She said she struck J because he was missing his front teeth, which she called an indication of a "socioeconomic stereotype" unfavorable to the state.

"Judge, it may not be popular," Ms. New said, "but it's the truth. We have a lot of problems with people who come down here and want to view the police as bad people because of where they live. That is allowed. It is a race-neutral reason."

Mr. Birdsall was outraged. "I can't believe my ears," he said. He likened Ms. New's rationale to "knitting a parachute out of thin air."



RICHARD MICHAEL PRUITT/Staff Photographer

A prosecutor said she wanted this man removed because he was missing his front teeth. The judge denied the strike, and the prosecutor later said she had mistaken the juror for an older black man in front of him.

Judge Johnson had J brought back into the courtroom and called him to her bench. She said she noticed he had some college credits. He said he was the manager of a small family business. Then she asked whether his front teeth were missing.

"Missing?" he replied. "No. I got my tongue pierced."

"But your teeth are not missing?" the judge persisted.

"They're all there. Thank you," J replied.

"Open your mouth; let me see," the judge instructed.

The judge had seen enough. The state's strike was denied, and J was seated on the jury. Later, he voted with the 11 other jurors to convict the two defendants. He said some jurors at first had doubted their guilt, but he never did.

In an interview with *The Dallas Morning News*, J said he thought the request to see his teeth was "weird," but it didn't bother him. When he was told Ms. New's reasons for striking him, he suggested that maybe she had seen that his teeth were crooked and had gotten confused.

"Maybe it was just something she assumed," he said. "I do live in Oak Cliff. But I'm not poor or anything."

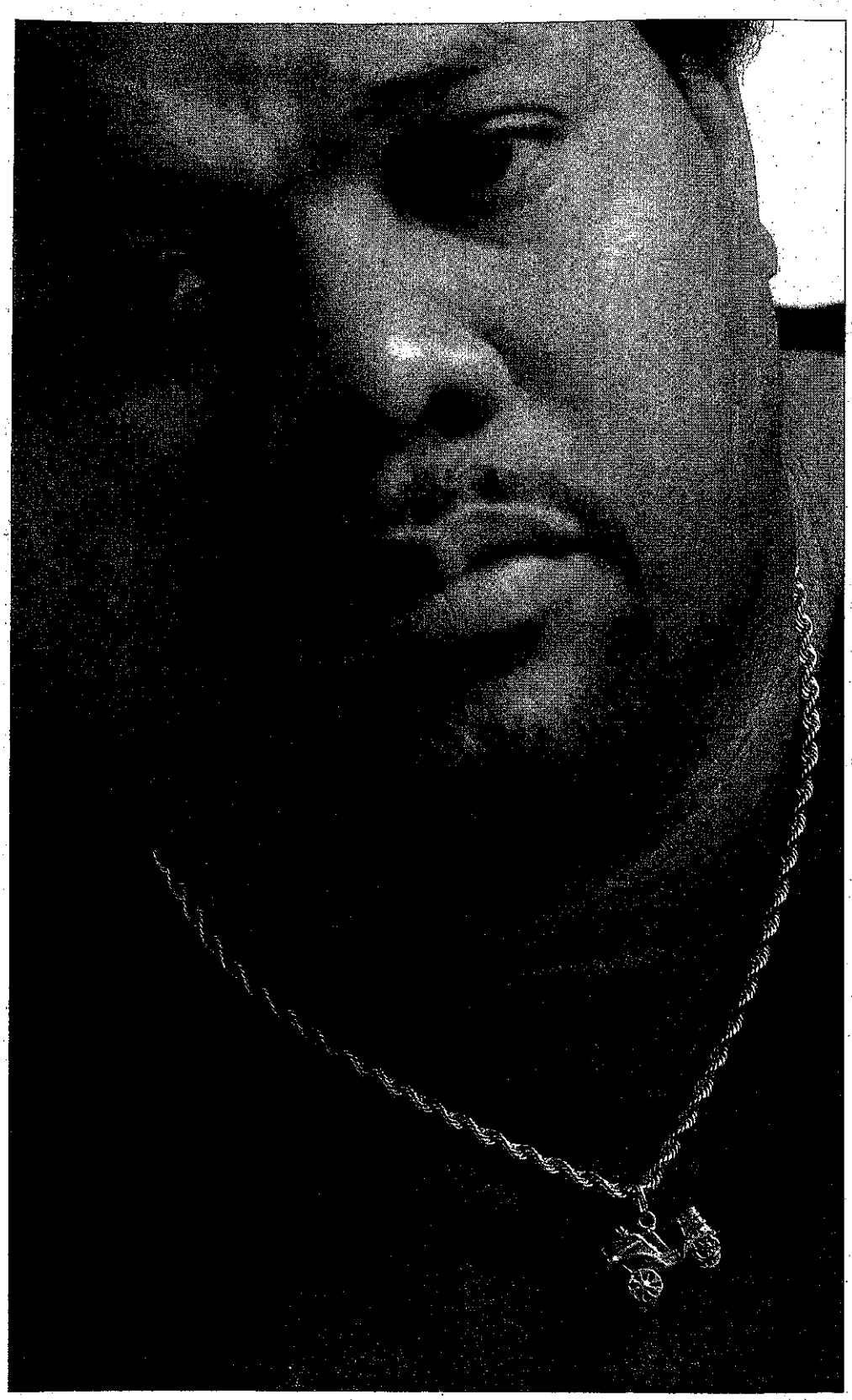
Ms. New, who had once helped train young Dallas County prosecutors, told Judge Johnson she had confused J with an older black man seated in front of him. She apologized and insisted she would never strike someone because of race.

In a later interview, Ms. New repeated that it was a case of mistaken identity.

"He had no regard for himself," she said of the older man. "If that person had walked in any courtroom in that state — white or black — any prosecutor would have struck him."

In early May, after several inquiries by the newspaper, Ms. New was demoted and quit the district attorney's office.

The case of the 'liberal' medallion



RICHARD MICHAEL PRUITT/Staff Photographer

A prosecutor described Steve Ward's antique car necklace as "a very prominent theater mask." She said theater fans don't make good jurors for the state; the judge said the justification masked "the true reason why the state was striking Mr. Ward."

Prosecutor called gold necklace valid reason for rejecting juror, but judge didn't agree and let him serve

Steve Ward wasn't asked a single question during two hours of jury selection in a Dallas felony court last year.

But prosecutor Lara Peirce noticed the gold chain around his neck. And when it came time to identify the 10 jurors she was allowed to reject, Mr. Ward's name was on the list.

Ms. Peirce told the court that Mr. Ward was wearing a gold chain that showed "a very prominent theater mask." Fans of the theater tend to be liberal, she said, and not good jurors for the prosecution.

But when questioning of the pool of 60 Dallas County residents concluded, defense attorney Russell Wilson II requested a hearing on why the state wanted to send Mr. Ward and three other eligible blacks home.

State District Judge Mary E. Miller ultimately ruled that prosecutors had given "race-neutral" reasons for striking three of the prospective black jurors, but the reason for Mr. Ward's removal didn't pass muster.

She ruled that the strike was based on race and called the prosecution's justification "overreaching and overbroad."

"And it is masking the true reason why the state was striking Mr. Ward," the judge told Ms. Peirce.

Mr. Ward, a 41-year-old Garland truck driver, became the first juror — and the only black one — seated for the weeklong trial of an ex-con charged with pointing a gun at a police officer. He voted with the other 11 jurors to convict the defendant on a lesser charge of aggravated assault with a deadly weapon, a second-degree felony.

In fact, until contacted by *The Dallas Morning News* this year, Mr. Ward didn't know that the judge had ruled he was originally removed from the jury because of his race — and even then, he quietly shrugged off the controversy.

"That don't bother me," Mr. Ward said. "But the ones who pay the biggest price for that kind of thinking are the ones on trial."

For the record, Mr. Ward says he's not a big fan of the theater, and he doesn't own a gold theater mask medallion.

The morning he showed up for jury duty, he was wearing a 20-year-old gold rope chain with a fingernail-size antique car dangling from it.

"I was sitting right in front, and I didn't think it [the chain] was that obvious. I guess they couldn't think of another reason to get rid of me, because I didn't say anything and they didn't ask me anything," Mr. Ward said.

"I guess there's still racism out there, like in politics and in the courtrooms," he added, "but I don't let it bother me."

Ada Brown, one of four black prosecutors handling felony jury trials in Dallas County, said she believes prosecutors strive for diverse juries because "your verdicts look truer when they come from a cross-section of the community."

RICHARD MICHAEL PRUITT/Staff Photographer

Prosecutor tackles race issue head-on

Black member of DA's staff considers it crucial to recognize biases among potential jurors

Prosecutor Ada Brown believes she has a unique ability to discuss race in jury selection.

"If you belong to the race, you can talk about it," said Ms. Brown, one of four black prosecutors who handle felony jury trials in Dallas County. "That's why it's important to have minority prosecutors. I can deal with issues that only members of our club can talk about."

When a defendant is a minority, Ms. Brown uses her family and self-deprecating wit to look for biases that jurors might otherwise suppress.

"As a black person, I want my verdicts to be based on the law and evidence. I don't want anybody convicted because of, in any part, race," she said.

Ms. Brown said she believed that prosecutors try to seat diverse juries because "your verdicts look truer when they come from a cross-section of the community," but she said race does play a role in jury selection because jurors think about it.

She was unaware, though, of the tactics revealed by *The Dallas Morning News'* investigation, such as prosecutors striking jurors for having gold teeth or because they appeared to be poor.

"I have found frequently the poorest people in society see things most black and white," she said. "My grandmother is my hero, and I would hate to think that just because she's not well educated and not wealthy that she can't judge evidence."

As for gold teeth, Ms. Brown said: "That's an identifier of black culture. That'd be like saying 'I'm striking him because he had an Afro, but not because he's black.' "

Eric Mountin, a senior felony prosecutor who supervises Ms. Brown in the organized-crime division, lauds her uncommon approach to jury selection.

"White prosecutors are afraid to even address the issue because they think they won't handle it appropriately or it might backfire," he said. "Ada confronts it straightforward."

Ms. Brown said a few incidents in her happy, middle-class Oklahoma upbringing made her realize that racism still exists.

After she won a high school homecoming pageant in 1992, she said, the traditional winner's walk was canceled and reinstated the next year, when a white student won.

Ms. Brown earned top honors as valedictorian, but a white student's photo ran instead in the yearbook, she said. A boyfriend driving a BMW from his father's dealership was stopped blocks from her house and wrongly accused of stealing the car.

"If stuff like that didn't happen," Ms. Brown said, "then maybe you could come into the DA's office and believe that race didn't matter."

How the analysis was done

For this analysis of jury selection, *The Dallas Morning News* systematically selected 108 of the 381 felony trials in Dallas County during the first 10 months of 2002. The newspaper considered only trials that reached a verdict. It omitted death penalty trials because the jury selection process is different from other trials.

The News compiled juror demographic information such as name, age, occupation and race from more than 6,500 juror information cards, and measured socioeconomic level by using the median household income of the potential juror's neighborhood. *The News* also noted whether prosecutors or defense attorneys had eliminated a person from the jury pool.

Because defense attorneys and prosecutors said they placed great importance on how jurors responded to pretrial questions, *The News* reviewed the jury selection transcripts from the 59 cases in the group that were appealed. (Transcripts are available only in cases in which verdicts are appealed to higher courts.) The newspaper found no significant demographic differences between jurors in the 59 cases and the 108 cases.

The analysis of the database used a statistical tool called logistic regression, which computes the relationship between variables, such as a person's race and whether he was eliminated, or "struck," by the prosecution or the defense. It also estimates the strength of the relationship between variables and controls for other variables that may affect whether a person is allowed to serve — such as education, income or answers to pretrial questions.

The analysis considered every factor available in the public record. Statistically, race played an important role in deciding whether someone was struck from the jury. No factor that was added to the analysis changed that importance.

The News also produced descriptive data about patterns in jury selection based on factors that were significant in the regression analysis — for instance, the percentages of eligible blacks or whites eliminated from serving, known as "strike rates."

Because they were not captured in the public record, factors such as jurors' body language or lawyers' intent could not be included in the analysis. But experts say that the statistical link between race and jury selection found by the newspaper was so strong that "demeanor" could explain the gap only if it were closely tied to behaviors that are particular to blacks or whites.

The findings were similar to work done by scholars around the country, and *The News* tapped their expertise in designing its research.

Two key experts consulted were David Baldus, a professor of law, and George Woodworth, a professor of statistics, actuarial science and biostatistics, both at the University of Iowa.

FROM THE EDITOR

Taking a long, fair look at jury selection process

For more than 30 years, Dallas County jury selection has been a matter of national importance. The series of articles that begins today represents our best effort to bring that story up to date.

The Dallas County district attorney's office became notorious in 1973, after disclosures that prosecutors were using a manual advising them to eliminate minorities from juries.

In 1986, *The Dallas Morning News* reported that prosecutors continued to bar almost all blacks from juries. Within weeks, Justice Thurgood Marshall referred to our study and cited the office as an example of continuing discrimination against blacks in jury selection.

In 2003, the Supreme Court declared that the district attorney's office had been "suffused with bias" against blacks, and told lower courts to reconsider the 1986 capital murder conviction of Thomas Joe Miller-El.

The Supreme Court's stinging rebuke of local prosecutors prompted us to ask how things had changed in Dallas County in the 17 years since Mr. Miller-El's conviction.

It took two years to research the question in depth.

Gaining access to the court records required an order from each of Dallas County's 15 felony court judges. District Attorney Bill Hill opposed our requests, arguing that the information should remain secret to protect jurors' privacy.

Over many months, one judge after another ruled for openness.

"For decades, minority citizens, who have equally feared and laughed at jury service, have stayed away from our courthouse under the assumptions that they would be struck because of their race," state District Judge John Creuzot wrote as he became the first judge to grant us access to records in his court. "The right of all citizens of Dallas County, and especially minority citizens, to know if past discriminatory practices in jury selection ... have been erased clearly outweigh[s] the protections of confidentiality."

The district attorney's office appealed Judge Creuzot's decision to the Texas Court of Criminal Appeals, and lost.

Having obtained the information, we wanted to find the fairest ways of looking at it. That took months of close collaboration among our own statistical experts and criminologists, sociologists and statisticians at universities across the country.

We settled on a series of analyses aimed at comparing what prosecutors and defense lawyers did with what they said they had done.

Statistics, however, can never tell the whole story. So we interviewed jurors, judges, prosecutors, defense attorneys, jury consultants and scholars.

The result is a story of black and white, with many shades of gray. Telling that story fairly and completely will require several pages over the next three days. That's a big investment for us, and for our readers.

But no constitutional guarantee is more fundamental than the right to a fair trial, and nowhere has that been more controversial than in Dallas County. We believe this series does the topic justice.

George Rodrigue is managing editor of The Dallas Morning News.

About This Series

Racial discrimination in jury selection was a scourge on the Dallas County district attorney's office for decades and was cited recently by the U.S. Supreme Court as it overturned a 1986 death penalty case. *The Dallas Morning News* spent two years gathering and analyzing jury data from felony trials to see what had changed.

■ **Today:** Prosecutors reject eligible black jurors at more than twice the rate that they exclude whites.

□ **Monday:** Defense attorneys reject white jurors at more than three times the rate that they exclude blacks.

□ **Tuesday:** Judges, whose job it is to uphold the jury selection law, say they don't see a pattern of discrimination.

On DallasNews.com

Shuffle your jury pool, take the quiz on allowable juror strikes, and read background materials, including a glossary of terms, trial transcripts and *The News'* 1986 investigation into jury stacking. Read this series along with Web-exclusive extras on DallasNews.com/jury, or e-mail the reporters at jury@dallasnews.com.

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STRIKING DIFFERENCES

Jurors' race a focal point for defense

RICHARD MICHAEL PRUITT/Staff Photographer

Jury services clerk Donna Barrance shuffles juror sheets at the request of a defense attorney. Either side can turn to the tactic to change the seating order of potential jurors, but some judges say it is discriminatory.

Stories by **Tim Wyatt, Jennifer LaFleur, Steve McGonigle** and **Holly Becka**

Second of three parts

If sides don't like seating order, they use a uniquely Texan tool: a jury shuffle

They file through the tall double doors of Dallas County's criminal courts each Monday by the hundreds, taking their assigned seats to await a call to serve.

But just as some of the prospective jurors settle into the hardwood pews of the court's gallery, a bailiff herds them back out into the hallway, without explanation. An hour or so later, the bailiff leads them back in and seats them again — but this time, in a different order.

Unwittingly, the would-be jurors have just done the Texas shuffle.

This little-known bit of legal gamesmanship — unique in the nation — has been on Texas law books for more than a century.

See **SOME** *Page 10A*

Key Findings

- Defense attorneys excluded white jurors at more than three times the rate they rejected blacks.
- Dallas County prosecutors excluded black jurors at more than twice the rate they rejected whites.
- Even when blacks and whites gave similar answers to key questions asked by prosecutors, blacks were excluded at higher rates.
- Blacks ultimately served on juries in numbers that mirror their population, primarily because of the dueling prosecution and defense strategies.

Inside

■ Defense lawyer regards jury shuffle as key to success. **12A**

On the Web

Shuffle a jury, read trial transcripts and take a look at *The News'* 1986 investigation into jury stacking at DallasNews.com/jury.

Some

Continued from Page 1A

It is based on a quick survey of the faces in the crowd and occurs before a single legal term has been uttered in open court.

It happens because a prosecutor or defense attorney decides there are too many black women clustered in the back, too many soccer moms huddled in the middle, too many white men clumped together in front.

The shuffle allows lawyers on both sides an unchecked pass to judge prospective jurors primarily based on their skin color or gender, even though the U.S. Supreme Court has outlawed such discrimination in jury selection in a series of rulings since 1986.

In June, the high court cited the Texas shuffle as one of the discriminatory tools used by prosecutors in a 19-year-old Dallas County death penalty case it overturned.

Cliff Stricklin, a Dallas lawyer who was a state district judge until January, said shuffles are inappropriate, offensive and a vestige of discrimination that conflicts with the law of the land.

"It's never anything but a racial reason," said Mr. Stricklin, who supervised more than 130 jury trials in his four-year stint on the felony bench. "There is no purpose for a shuffle but a sight, racial reason based on a person's color and nothing else."

'The strike zone'

The shuffle takes aim at the seating order of prospective jurors — important because of something called "the strike zone," which refers to the first 32 members of a 50- to 70-person jury pool. Theoretically, the majority of the 12 jurors selected will be in the strike zone after each side uses the 10 peremptory strikes it's allotted to excuse would-be jurors without cause.

When you're called for jury duty in Dallas County, your summons has a randomly generated number on it. On the day jurors report, they are grouped according to their random number and seated in the order they were assigned.

That's when prosecutors and defense attorneys get their first look.

"If numbers 50 through 60 are African-Americans, then obviously you are going to do a shuffle because they are that far back," said defense attorney Kevin Brooks. "The likelihood of any of them being on a jury is pretty slim" without a shuffle.

So when a pool of prospective jurors comes into the courtroom for voir dire, as juror questioning is called, Texas trial attorneys have the one-time option of rearranging their seating charts, as long as they do so before asking any questions.

As the prospective jurors wait outside, a court employee literally shuffles the juror information slips like a deck of playing cards. And like a gambler in a poker game, one of the attorneys will typically cut the deck. When the jurors go back in, they sit the in the new, shuffled order.

By all accounts, defense lawyers request shuffles more often than prosecutors, especially when a black defendant faces the possibility of an all-white jury. They do so, they say, in hopes of seating a diverse jury and to counteract bias against blacks that they see in the prosecution's peremptory strikes.

Scottie Allen, a Dallas criminal defense attorney, said he requests shuffles in 90 percent of his cases, most of which involve black defendants.

"Minorities are much more — in my experience — inclined to grant probation and question sometimes the tactics and policies employed by the police department," Mr. Allen said.

Defense lawyer Kenneth Weatherspoon estimates that he shuffles about one out of every eight trials in which he's picking a jury, and every time a random seating chart has black people near the back.

"You generally gain a few" blacks by shuffling, Mr. Weatherspoon said. "Most of the time, it benefits you. I think it makes a difference."

But he doesn't see any conflict with the law that bars race discrimination in the rest of jury selection.

"A shuffle only goes to the order that they are brought into court," Mr. Weatherspoon said. "It just changes the dynamic of the target pool, but doesn't change the dynamics of who you specifically strike."

In early May, defense attorney Ed Gray asked a judge for a new jury pool in the trial of a young black man, saying the racial makeup of prospective jurors didn't reflect the county's population. When the judge refused, Mr. Gray asked for a shuffle and acknowledged to the judge that he wanted the jury pool shuffled based solely on race.

Rick Jackson, one of the prosecutors, said that maneuver was blatantly biased.

"To me, it's hypocritical because they turn around and accuse us of exactly what they are doing," he said.

Court files rarely reveal who requests jury shuffles, since the move must occur before lawyers and judges begin questioning jurors on the record. But lawyers on both sides agree the tactic is mainly a tool of the defense.

'Sight strike'

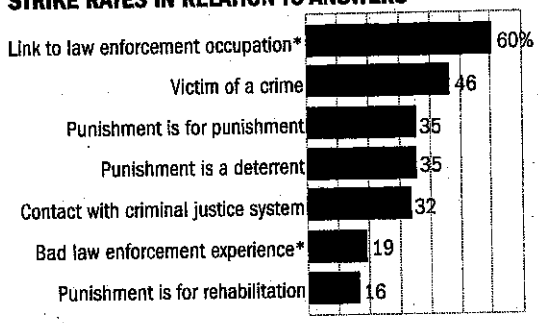
"It's a legal way to do a sight strike," said felony prosecutor John Kull, using the term for eliminating a juror based on his or her appearance.

The law does not require lawyers to give a reason for requesting a shuffle, and that, said Eric

WHAT DEFENSE ATTORNEYS LOOK FOR

Prosecutors and the defense ask potential jurors questions during the voir dire process. Defense attorneys say answers to certain questions are important to their decisions about whom to strike.

STRIKE RATES IN RELATION TO ANSWERS



ANALYSIS OF STRIKES

Among potential jurors who answered key questions the same, whites were excluded at higher rates.

■ Strike rates among jurors who said they were crime victims:

■ Strike rates among jurors who are in, or have a close friend or relative in, a criminal justice-related occupation:

*Juror pool member, family or friend

NOTE: Analysis is based on 59 of 108 trials from 2002 that were appealed and for which transcripts of voir dire were available.

SOURCE: *Dallas Morning News* research

SERGIO PEÇANHA/Staff Artist

Mountin, another senior prosecutor, gives defense attorneys a free pass to discriminate, which he finds "offensive."

"But somehow it's less offensive to whoever is looking because it's on behalf of the defendant," said Mr. Mountin, a former FBI agent.

He said there's a general misconception about the legal entitlement to a jury of your peers; the law doesn't mean racial quotas are applied to the panel's makeup.

"The law doesn't provide for that, and I don't think it should," he said. "If that's the case, then that means we need to have black courts and white courts and, if we've reached that point, we have bigger problems."

Mr. Mountin said defendants should expect "a fair and impartial jury who's going to listen to the facts of the case and base their verdict on the evidence."

Despite their condemnation of shuffles, prosecutors use that tactic when it suits their needs, especially when the case is racially charged.

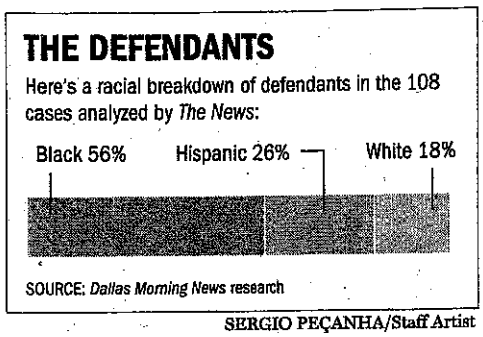
That's what happened in March, when prosecutor Andy Beach requested a jury shuffle in the trial of a 28-year-old white man with alleged skinhead affiliations.

Prosecutors accused Jesse Chaddock of attacking a white man during a bar fight as the man tried to stick up for a black friend. The beating left David Cunniff, a Lakewood contractor, partially paralyzed.

Mr. Beach said he asked for the shuffle after "eyeballing" a 60-person panel in which most of the potential jurors who were Hispanic or black were seated in the back.

"We don't want to seat a juror because of the color of their skin," the prosecutor said later. "But it seemed to me that a lot of the Hispanics and African-Americans were outside the range" of being selected.

"We get accused from time to time of not including enough minorities on juries," he said. "But in this case, our interest was to find 12 who would bring [society's] interest into the case."



SERGIO PEÇANHA/Staff Artist

The jury ended up with nine whites, two blacks and one Hispanic; a black man served as jury foreman.

The panel convicted the defendant and sentenced him to 19 years in prison.

110-year-old law

The irony of the shuffle is that its origins are in efforts to prevent stacking juries.

Initially, legal scholars say, the shuffle was written into state law in 1895 to prevent rural or urban bias from creeping into the jury box at a time when pastures and farmland separated city and country folk, politically and economically, in large counties like Dallas.

The shuffle later became a safeguard against clerks who would seat minority jurors at the rear of the courtroom, making it virtually impossible for them to be considered for jury service, said Charles Baird, a former judge on the Texas Court of Criminal Appeals.

"They kind of would have a back-of-the-bus ideology, and then all the blacks who would show up for jury service would be given numbers that were beyond the jury pool," said Judge Baird, who teaches at South Texas College of Law in Houston and still occasionally sits as a judge.

With the tactic being rendered pointless by statistically random computerized lists of potential jurors, a Texas Supreme Court task force on legal reforms recommended in 1997 that the Legislature eliminate the shuffle from state law. But no legislator has ever introduced a bill to do that.

"Here we have this random jury panel and they get to manipulate it by making a shuffle?" said state District Judge Lana McDaniel.

The shuffle's popularity has waned somewhat over the years in Dallas, but it's still used each week there are jury trials in the county's 15 felony district courts.

Last year, shuffles were requested in 33 of the more than 480 jury trials, according to a review of cases by *The Dallas Morning News*.

Because shuffles occur before any juror questioning, it's impossible to know whether they had any effect on the final seated jury. But in shuffles from 2004 examined by the newspaper, 31 more black prospective jurors moved to the front rows of the panels — within the strike zone — and 33 whites moved to the back rows.

By the time these juries were picked, only one of the shuffled juries ended up with six or more blacks. The rest of the time, the shuffled jury looked about the same as other Dallas County juries: on average, eight whites, two blacks and one Hispanic, plus a 12th juror from any of the racial groups.

Mixed opinions

While virtually unknown to the public, the shuffle draws strong opinions in legal circles on whether the tactic is a failsafe measure to bring diversity to predominantly white jury pools, or race discrimination scantily clad as legal strategy.

In overturning the 1986 Dallas County conviction of Thomas Joe Miller-El in June, the Supreme Court noted that two of the prosecution-requested shuffles could only be "efforts to delay consideration of black jury panelists."

Trial judges' opinions are mixed. Some tolerate the shuffle because it's state law, despite their suspicions of bias. Others want to see the strategy removed from state statutes or demand that lawyers give them race-neutral reasons for shuffles suspected of being based on race.

"I've had people ask for a shuffle and I've said: 'Why? Do you have any race-neutral reasons for that?' " said state District Judge Keith Dean. "And the response, the first reaction is, 'The law doesn't require that.' "

Judge Dean said he expects that rules banning race bias in jury selection eventually will be applied to shuffles.

"The only thing you can see when a juror is seated is the color of their skin," he said.

On occasion, Judge McDaniel said, she has declined to grant shuffles to defense attorneys when she believed their reasons, although unstated, were based on race.

"That is the most ridiculous law," she said. "I've never understood it. I never understood it when I was a prosecutor."

Legal scholars write off the jury shuffle as pointless or outdated, but a stark reminder of how deeply racial stereotypes have been embedded in the justice system.

When Tom Munsterman hears "jury shuffle," he thinks Texas because it is the only state he knows of where the strategy is used.

"It's never been allowed north of the Red River," said Mr. Munsterman, director of the Center for Jury Studies in Arlington, Va. "I don't think anyone else has ever copied it, and I never heard of anyone trying to get rid of it."

Rival lawyers reject whites at higher rates

Nothing matters more than race to Dallas County defense lawyers when they play the high-stakes game of seating a sympathetic jury for their clients.

In fact, defense lawyers were more than three times as likely to reject whites as they were to reject blacks, according to an analysis of jury data by *The Dallas Morning News*.

But in following long-held, yet unproven, stereotypes that black jurors are softer on crime, defense lawyers are trampling a U.S. Supreme Court ban on race bias in jury selection.

"Most defense attorneys, if they're honest, will admit that they want to get rid of the whites because the prosecution is getting rid of the blacks," said David Baldus, one of the nationally recognized experts on race in jury selection who reviewed the newspaper's findings.

See **FOES** *Page 11A*

Foes

Continued from Page 1A

"It's a kind of discrimination that no one is really objecting to very much because everybody is doing it."

While defense lawyers say their jury selection tactics are motivated by a desire for a more diverse panel, they only occasionally challenge prosecutors who eliminate black prospective jurors, the newspaper also found.

'SUFFUSED WITH BIAS'

Defense attorneys prefer almost any black juror over a white one

Blacks serve on Dallas County juries in numbers that approximate their proportion of the population, but primarily because defense strikes against whites effectively cancel prosecutors' strikes against blacks, the newspaper's analysis showed.

Defense lawyers used only 6 percent of their peremptory, or discretionary, strikes against blacks. By contrast, they used 82 percent of their strikes against whites — eliminating more than a third of white eligible jurors.

Nothing was as significant as race in determining why defense lawyers rejected prospective jurors, according to the statistical analysis of factors in the jury selection process.

Nearly 20 years ago, *The News* revealed that prosecutors were excluding almost all blacks from jury service. The Supreme Court later ruled in a 1986 Dallas County murder case that the district attorney's office was "suffused with bias" at the time.

To determine whether there had been any change, *The News* spent two years collecting and analyzing data from 108 felony trials conducted in 2002 in Dallas County courts.

The analysis showed that defense attorneys were more likely to strike potential jurors who had been crime victims or who worked in law enforcement or had friends or family in law enforcement. But even when blacks and whites had similar backgrounds or relationships, defense attorneys rejected white prospective jurors more often.

Where prosecutors were more likely to strike those who are single, the defense was more likely to strike those who are married. Prosecutors strike people in blue-collar jobs at higher rates; the defense strikes people in white-collar jobs at higher rates.

Next to preferring almost any black person over a white person, the analysis showed, the defense works to seat those who readily admit that they consider rehabilitation the most important aspect of punishment.

Like prosecutors, defense lawyers say that if they choose members of one race over another, it's based on something other than skin color.

JR Cook said that if he prefers blacks over whites, it's only to put some people on the jury who may have an understanding of his client's perspective.

"When was the last time you got rousted for being white?" the defense lawyer asked. "I'm not saying it's right. It's called reality."

For the judges who oversee jury voir dire — the group interview of prospective jurors by both sides — defense attorney strike patterns are no surprise.

"If there is a white male over the age of 35 wearing a suit, that guy's got zero chance of getting on the jury," state District Judge Robert Francis said. "The defense is striking him, and they're not going to ask him any questions."

Defense lawyers sometimes won't strike black prospective jurors even if the potential jurors acknowledge a bias that could hurt the defendant, judges and prosecutors noted.

"A black juror who is dressed in a coat and tie, who works for Bank of America, who graduated from Harvard, who lives in Preston Hollow — he's going to hang your client — but they leave him because he's black," said prosecutor Eric Mountin. "Instead, they get rid of some no-account white guy who probably has more in common with their client than this banker."

STRIKING WHITES

Supreme Court rulings also ban defense attorneys from race bias

In 1992, six years after the Supreme Court barred prosecutors from discriminating against even one potential juror on the basis of race, the high court ruled in an Ohio case that race bias by defense lawyers also violated jurors' rights.

Peter Barrett, president of the Dallas Criminal Defense Lawyers Association, strongly criticized prosecutors for rejecting black prospective jurors at a higher rate than whites. But, he argued, the newspaper's findings that defense lawyers rejected whites at a higher rate than blacks don't necessarily prove that defense attorneys are guilty of discrimination.

"You need to remember that jury selection is not picking jurors so much as eliminating jurors," said Mr. Barrett, who has practiced criminal law for 11 years. "And I tend not to eliminate people of color as often."

Mr. Barrett said he tries to have a cross-section of the community on a jury panel that includes men and women, Hispanics, blacks and whites.

"I don't perceive myself as striking more whites, but maybe I do — subconsciously," he said. "But I don't consciously agree with using stereotypes and profiles. I want people who can understand the issues — and that tends to be educated people."

Defense lawyer Kenneth Weatherspoon said he believes his colleagues "probably strike whites at a higher rate," but added that race plays the greatest role "where you see a white juror who lives in an all-white area" and has little contact with people of color.

Timothy Bray, an assistant professor of criminology at the University of Texas at Dallas, said that race bias by both sides, as shown by the strike rates, could in a "weird" way be proof that the system is working.

The pool of prospective jurors is not supposed to reflect the defendant's population; it should be a fair cross-section of the community, he said.

"These strike rates look alarming, but remember, the defense and the prosecutors have different goals in mind. To that end, one might imagine that the defense attorney has a little more of a stake in the race of

the jurors. He has someone sitting next to him that is of a certain race," Mr. Bray said. "The dynamics of the defense is completely different from dynamics of the prosecution."

Although the Supreme Court banned all lawyers from using race or gender in their juror selections, prosecutors complain that their courtroom adversaries aren't held to the same standard.

"We, of all parties involved in the case, have to follow the rules," said Rick Jackson, a chief felony prosecutor. "Quite frankly, the defense bar does not. That's a fact of life. Their job is solely to see that their client gets the best defense."

But defense lawyer Cheryl Wattley said the high court's application of the same anti-discrimination rules to the defense clouded the original intent of curbing race bias against black jurors.

"What you have done is taken a ruling that was supposed to ensure minorities the opportunity to serve on the jury and then put a burden on a defendant to explain a strike of every Caucasian," she said.

CIRCUMVENTING BATSON

Vague legal guidelines make race-based strikes hard to prove

Under procedures established by the Supreme Court in its 1986 landmark ruling on race bias in jury selection, Batson vs. Kentucky, if either side suspects racially motivated strikes, it can request a formal review by the court.

But defense lawyers requested Batson hearings in only 16 of the cases reviewed by *The News*. Prosecutors raised Batson objections in just two of those cases. Trial judges rejected them all.

Of the cases appealed to higher courts, only five mentioned Batson, and none was overturned.

Defense lawyers readily admit that race bias is nearly impossible to prove.

"If you can't get out of a Batson challenge, you can't get out of your own way," said assistant public defender Mike Byck. "Just like a prosecutor can think of a reason [to overcome a Batson challenge], so can I."

Mr. Byck said lawyers will cite gestures, looks or body language that are impossible to disprove in a Batson challenge.

On occasion, however, Dallas County prosecutors have managed to successfully challenge defense lawyers for using discriminatory strikes.

In 2002, prosecutor John Kull convinced a judge that defense attorney Scott Becker removed a black juror for racial reasons in the trial of a white man accused of assaulting a black man in a road rage incident.

State District Judge Karen Greene ruled in Mr. Kull's favor and seated the 65-year-old black woman on the jury after Mr. Becker acknowledged that he hadn't asked her any questions — and had marked her for exclusion when she walked into the courtroom for jury selection.

Frequently, lawyers for both sides will avoid formal challenges of racial bias in favor of informal discussions. That can help prevent someone from being accused of racism in jury selection and creates an air of collegiality and trust between opponents, said state District Judge Keith Dean.

These informal hearings do not preclude an on-the-record challenge of a juror strike, Judge Dean said, but can make one unnecessary if the two sides have developed some degree of trust with each other.

"Ideally, everyone operates in good faith," he said.

Defense lawyers admit privately that they often forgo formal Batson objections because they usually don't work and they don't want to risk the repercussions of suggesting a prosecutor is racist.

But it's that courtroom chumminess that Houston appellate attorney Brian Wice finds so objectionable.

"One of the things you need to figure out early on is who you're working for," said Mr. Wice, who also handles appeals on Dallas cases. "Are you working for the court? Or do you represent that guy in the jumpsuit who had a bologna sandwich for lunch?"

Most important, he said, off-the-record hearings eliminate the possibility of race bias being raised on appeal.

"I think it's unconscionable," Mr. Wice said. "If you don't have a half-minute, two minutes, 10 minutes or 30 minutes to spend on your client [in a formal Batson challenge], shame on you."

AGREED EXCUSALS

Informal agreements between defense and prosecution hurt blacks

Another informal practice used by both sides in Dallas County courts that also eliminates potential jurors from service is known as the "agreed excusal."

These excusals occur just before both sides must begin using their limited number of peremptory strikes — 10 each for the defense and prosecution.

So-called "agreeds" are prospective jurors who

give ambiguous answers during questioning or are otherwise considered unpredictable — but have not specifically said anything to indicate they cannot follow the law, which would allow for an automatic dismissal by the trial judge.

So defense lawyers and prosecutors — sometimes along with the judge — will discuss and agree that such prospective jurors should be removed.

Doing this, both sides agree, keeps them from "burning" valuable peremptory strikes on a person neither side wants.

But these mutual agreements have a greater impact on black jurors. In *The News'* analysis of juror records from the 108 cases, the number of blacks excused by agreement nearly equaled the number of blacks excused for not being able to follow the law. Together, these two groups represent about one in three black prospective jurors excused from jury service, the analysis showed.

Only about one in five white prospective jurors was eliminated for those two reasons.

Some legal experts say that eliminating agreed excusals could put more blacks on juries.

"What you are in essence doing [is] giving the prosecutor more strikes," said Robert Hirschhorn, a lawyer and nationally known jury consultant from Lewisville. He called agreed excusals "a dangerous practice."

"You need to remember that jury selection is not picking jurors so much as eliminating jurors. And I tend not to eliminate people of color as often."

Peter Barrett, president, Dallas Criminal Defense Lawyers Association

Mr. Hirschhorn, who advises primarily defense attorneys, said that the relationship between the prosecution and defense in Dallas is much more congenial than in other big cities, and that "familiarity tends to promote a get-along attitude and not rocking the boat and not making waves."

Agreed excusals also lower the odds of any error in jury selection resulting in a conviction being overturned because most appeals are based only on the court record.

"There is nothing to complain about," Mr. Hirschhorn said. "There is no real issue on appeal."

But the president of the local defense lawyers association said agreed excusals are not the problem.

"It's a way to ensure that someone you don't want on the jury doesn't get there," Mr. Barrett said. "I don't think it favors either side."

The real problem, he said, is that the law barring race bias in jury selection has been rendered ineffective by trial and appeals court judges who for years have accepted virtually any reason to remove a juror, no matter how outrageous and racially suspect the excuse might sound.

"I've never had a juror put back on a jury" because of race bias, Mr. Barrett said. "The legal remedy for this is intellectually dishonest."

Indeed, the Dallas appeals court has not overturned a conviction based on race bias in jury selection in more than 12 years, and defense attorneys say they are justified in their cynicism that discrimination can ever be eliminated from the process.

Larry Mitchell, an appeals lawyer from Dallas, said he never thought the law against race bias would succeed among lawyers.

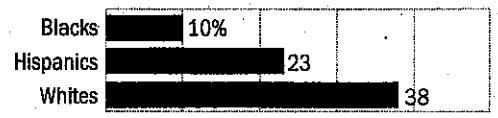
"I didn't think it was a good idea to try to do your social work in a jury room," he said. "Lawyers are going to try to win their cases the best they can. They're going to pick the best jury they can."

Peter Lesser, another longtime criminal defense lawyer, said race would remain a big factor in jury selection for both sides until society decides it's no longer relevant.

"Anybody who tells you society is race-neutral is lying, or they're very naive," he said. "Race is involved in everything we do in this country."

A LOOK AT DEFENSE STRIKES

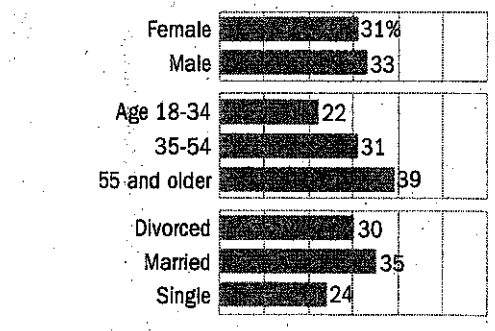
DEFENSE EXCLUDES WHITES AT HIGHER RATES



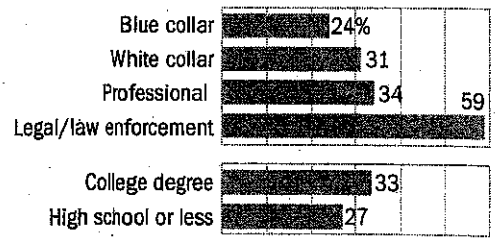
STRIKES BY PERSONAL INFORMATION

Defense attorneys were more likely to strike potential jurors who were married, 55 and older or in legal or law enforcement occupations.

Sex, age and marital status



Profession and education



SOURCE: *Dallas Morning News* research

SERGIO PEÇANHA, TOM SETZER/Staff Artists

Defense lawyer regards shuffle as key to success

He requests it often, but blacks seldom move up in jury pool

When it comes to jury shuffles, Scottie Allen is a true believer.

His ability to rearrange a panel of prospective jurors, the Dallas defense lawyer contends, is one of the secrets to his trial success.

"Shuffles absolutely make a difference," Mr. Allen said.

A handsome, impeccably dressed man with a broad smile, the 45-year-old lawyer cultivates an image around the courthouse as a charming rogue. He has appeared on a list of the state's top criminal attorneys and has been disciplined twice by the State Bar of Texas for failing to communicate adequately with clients.

His predominantly black client list has included former Dallas City Council member Al Lipscomb and former radio personality Gary Curtis "Babyfase" Faison.

The mere mention of the flamboyant Mr. Allen is enough to make some judges and prosecutors grimace or break into a smile and shake their head.

"He's real dynamic in front of juries," said veteran prosecutor Toby Shook. "They like him."

Mr. Allen alone accounted for almost one-fourth of all jury shuffles in Dallas County felony courts last year, records show. Half of those cases ended in acquittals, mistrials or dismissals.

While he said he refuses to give judges a reason for his requests because state law doesn't require him to, Mr. Allen was not shy about his motives in an interview.

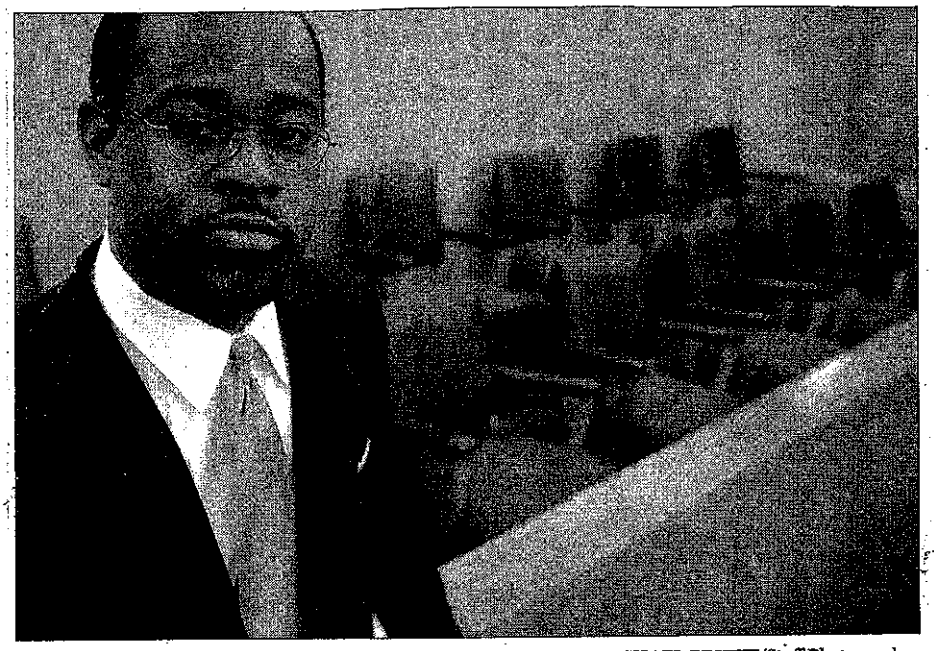
The reality, he said, is that juries are selected on the basis of race, and he makes no apology for representing what he considers the best interest of his black clients.

"We want to shuffle that panel to ensure that our clients have a greater chance of having minorities participate in deciding first whether they are guilty or innocent or what the appropriate punishment ought to be in the event that they are found guilty," he said.

To Mr. Allen, a shuffle is worthwhile if just one black juror gets moved to the front.

"It's been my experience that when you have minority jurors, they are generally much more skeptical, if you will, of police conduct than other jurors. If you have at least one person back there who is strong and adamant, then sometimes that can sway the entire panel," he said. "That's the underlying philosophy there."

More often than not, he said, minorities are seated so far toward the end of the panel of prospective jurors that it is unlikely they will be among the first 12 selected. Shuffling increases the



"Shuffles absolutely make a difference," said Scottie Allen, who accounted for almost a fourth of all jury shuffles in Dallas County felony courts last year.

RICHARD MICHAEL PRUITT/Staff Photographer

odds that minorities will be moved forward in the new seating order, he said.

However, the record suggests that Mr. Allen's beliefs are rooted more in myth than reality.

Of the eight juries he requested shuffled in 2004, Mr. Allen never succeeded in getting more than two additional blacks moved to the front of the panel of prospective jurors. In two instances, the number of black potential jurors at the front of the pool decreased.

The largest number of blacks seated on any of Mr. Allen's shuffled cases — four — returned a guilty verdict and sentenced his client to life in prison. Two of his juries were all white; they returned one not guilty verdict and deadlocked on another.

While race may be the main reason, it should not be the only one to prompt a shuffle, Mr. Allen believes. The apparent socioeconomic status of jurors also enters into the calculus, he said.

"I think any lawyer who requests a shuffle purely on the basis of race is doing their client a disservice, because African-Americans and Hispanics find African-American and Hispanic defendants guilty as quickly as any Caucasian would," he said.

STRIKING DIFFERENCES

Judges rarely detect jury selection bias

Most don't push the issue unless lawyers raise it first

Stories by **Holly Becka, Steve McGonigle, Tim Wyatt** and **Jennifer LaFleur**
Last of three parts

Judges are the guardians of justice, yet in their courtrooms, laws meant to stop racial discrimination against jurors are seldom invoked.

Most Dallas County judges rarely object — or even notice — when prosecutors reject disproportionate numbers of blacks from juries and defense lawyers do the same with whites.

But a two-year *Dallas Morning News* investigation determined that race is an unspoken yet overwhelming factor in deciding who sits on juries. The newspaper found that:

■ Many Dallas County felony judges take a hands-off approach, saying it is up to prosecutors and defense attorneys to raise discrimination claims against each other.

But because lawyers don't often make such claims, judges rarely review their reasons for targeting certain jurors.

See **SOME** *Page 10A*

INSIDE

ON THE WEB

Shuffle a jury, see what constitutes a fair strike and read a glossary of terms, trial transcripts and *The News'* 1986 investigation into jury stacking at DallasNews.com/jury.

Some

Continued from Page 1A

■ If questions of bias arise, attorneys routinely handle them informally — without the judges' objection — which means there is no record that can be used in a later appeal.

■ Because the U.S. Supreme Court and other appeals courts have been vague about what constitutes bias, there is wide variation in reasons that judges will accept for removing jurors. For instance, some Dallas judges will not let prosecutors remove jurors because they have gold teeth and jewelry; at least one will.

"I really feel that there's not a judge in this courthouse that would not restore a juror who had been stricken for racial reasons," said state District Judge John Nelms, a 13-year veteran of the felony bench.

"But there's not many judges that can always detect if that is the reason."

Whether done by the prosecution or the defense, racial discrimination in jury selection is illegal; the Supreme Court has said so in numerous decisions dating to 1880.

A 1986 landmark decision, Batson vs. Kentucky, made it illegal to exclude even one prospective juror based on race. It also provided a way for lawyers who suspect racial bias to challenge their adversaries' peremptory — or discretionary — strikes. A judge holds a hearing to determine whether a lawyer's reason for removing a juror is "race neutral." If the judge determines the reason is not "race neutral," the juror is seated.

But lawyers know how the courthouse works. They have learned, over time, what reasons a judge will accept. And the clever ones know to offer reasons that won't raise suspicion.

"If they have any experience, they're going to be smart enough to figure out how to cover their tracks," said Adam Seidel, a Dallas criminal defense and appellate lawyer. "It really boils down to whether the lawyer is willing to compromise their ethics and strike based on race."

JUDICIAL ACCEPTANCE

Lawyers complain that judges accept almost any explanation for strikes

Defense lawyer Juan Sanchez said he's long been frustrated about some judges' unwillingness to press prosecutors about their rejections of minorities.

"It's almost fruitless sometimes because a lot of the judges accept the DA's explanation — it's almost like it could be any explanation," said Mr. Sanchez, a former prosecutor. "I think their thinking is, 'How can we disprove that's not the real reason?' "

The News found that jurors had been excluded for their demeanor — looking bored or angry, for instance — and appearance, excuses that many legal scholars and jury researchers say can be thinly veiled covers for race. In such cases, the newspaper found, prosecutors usually also cited a secondary reason to exclude the juror.

"For a judge to tolerate that, that's just unbelievable. It's unacceptable," said George Kendall, a former staff attorney with the NAACP Legal Defense and Education Fund who has represented Texas death row inmates.

Often judges and the lawyers appearing in their courts have known each other for years. And all of the judges came to the bench after years working as either a prosecutor or a defense attorney.

Short of stopping blatant discrimination, several judges said they were reluctant to intervene in jury selection because that would be crossing a line into advocacy.

"Unless someone brings it to my attention in the form of a motion, I'm not going to engage in a discussion with them," said state District Judge John Creuzot, the presiding felony court judge. "It's generally not the judge's position to raise objections to things during the trial. That doesn't mean I can't. But generally speaking, that's not our position."

Some of Dallas County's female judges and those newest to the felony bench are among the most vigilant about preventing jury bias. And they have made it clear that they will not tolerate jury discrimination in their courts.

UPHOLDING BATSON

Some judges draw clear lines as to which excuses are race neutral

State District Judge Lana McDaniel, for example, determined that a prosecutor had violated at least the spirit of Batson during a 1999 murder trial. The defense lawyer had accused the prosecutor of failing to remove a white juror in order to stop a black juror, the next in line, from being seated. In a heated hearing, Judge McDaniel pointedly questioned the prosecutor.

"I was just so offended by what had happened," Judge McDaniel said.

The district attorney's office defended the prosecutor at the time, saying she had not violated Batson. But another prosecutor later told the judge that the lawyer had admitted wanting to keep the black juror off the panel.

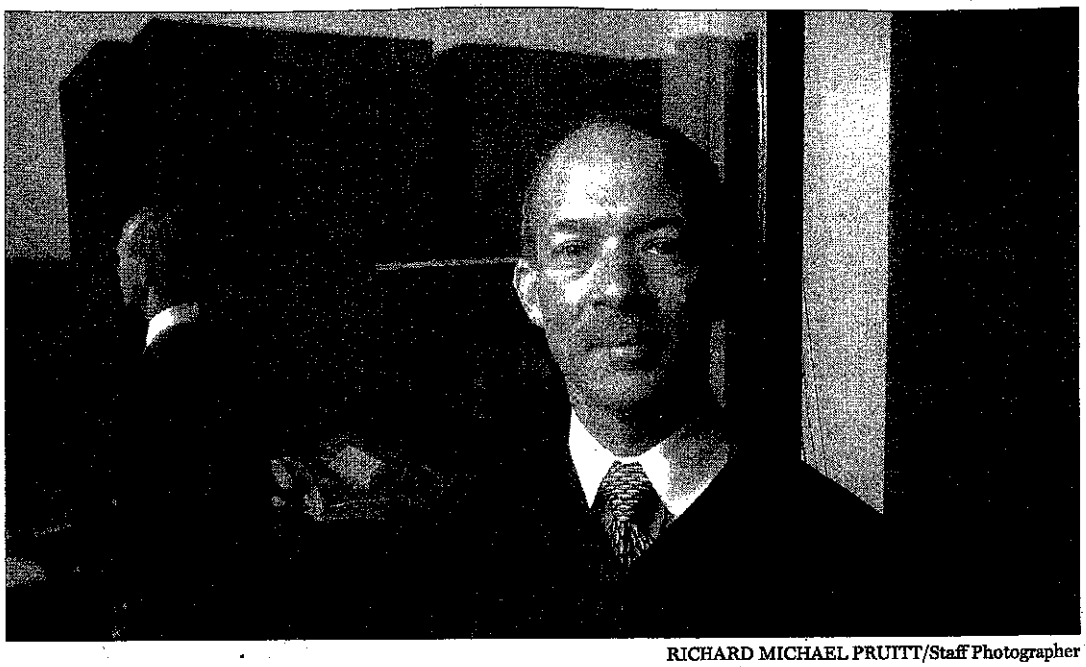
District Attorney Bill Hill said recently that while he publicly supported his prosecutor, he privately told his employees that he didn't approve of such actions. "Although it didn't amount to a Batson violation, I thought it got real close to it. The spirit of it bothered me."

Since that 1999 incident, Judge McDaniel said: "I've just had really good prosecutors. ... Lawyers know I'm not going to put up with that."

On occasion, the judge also has privately warned lawyers that she was suspicious of their motives for excluding jurors. In those instances, Judge McDaniel didn't wait for a Batson challenge before telling a lawyer to rethink his strikes. She made her point by threatening to admonish the lawyer on the record.

In the last year, state District Judge Mary E. Miller twice ruled against prosecutors' discretionary removals and once against a defense lawyer's. In one case, a prosecutor wanted to remove a black juror because of his gold chain and pendant. The prosecutor didn't ask the juror any questions.

"I'm not going to accept any reason given," said Judge Miller, who was elected to the felony bench in November 2002 after 15 years as a prosecutor. "It is



RICHARD MICHAEL PRUITT/Staff Photographer

"I look at who's on the jury," state District Judge John Creuzot said. "And it has appeared to me that who's on the jury is fairly representative of the community."

Key Findings

- Dallas County prosecutors excluded black jurors at more than twice the rate they rejected whites.
- Defense attorneys excluded whites at more than three times the rate they rejected blacks.
- Even when blacks and whites gave similar answers to key questions asked by prosecutors, blacks were excluded at higher rates.
- Blacks ultimately served on juries in numbers that mirror their population, primarily because of the dueling prosecution and defense strategies.

part of my job to make sure that they know what the law is if I see something being violated."

Eight years after he left the bench, former state District Judge Larry Baraka is still cited around the courthouse as one of the judges who most aggressively enforced Batson.

Mr. Baraka, now a defense lawyer, summed up his philosophy: The Constitution trumps the vague guidance offered by appeals courts on Batson.

"So in my court, you better damn well have a reason why you are striking this person," Mr. Baraka said.

The fact is, allegations of racial bias in jury selection don't even come up for a formal discussion in most trials. In a sample of cases from 2002 reviewed by *The News*, only 16 hearings about allegations of jury bias were found. None of the judges in those cases ruled that discrimination occurred.

Several judges said the numbers are low because discrimination is not happening.

But an analysis by *The News* of jury selection in a sample of 108 felony trials found that Dallas County prosecutors were twice as likely to exclude blacks from juries as they were to cut whites. Defense lawyers, in turn, removed whites at more than three times the rate they struck blacks.

State District Judges Miller, Don Adams, Vickers Cunningham and Susan Hawk were not on the bench during the time frame of the cases analyzed by *The News*.

When *The News* shared its findings with judges, several were stunned.

"I look at who's on the jury," said Judge Creuzot, who was instrumental in helping the newspaper gain access to juror records. "And it has appeared to me that who's on the jury is fairly representative of the community."

He said he would act if he noticed a pattern of discrimination. "If I look up [and] in three weeks I've got all white jurors on every case, I'm not going to sit there and just say nothing," Judge Creuzot said.

Several judges said they believed that lawyers

strike jurors perceived to be "liberal" or "conservative." All of them said they hadn't noticed a pattern of racial exclusion in their courts.

The only judge who said he believed lawyers still try to discriminate is state District Judge Henry Wade Jr., son of the legendary Dallas district attorney whose tenure from 1951 through 1986 became synonymous with racially charged jury selection.

Judge Wade said that while he believed the district attorney's office works to "de-institutionalize" discrimination, it remains an institutional problem. "They don't teach it like they used to in some DAs' administrations," but he added, "I think it's still there."

In a Batson hearing, the judge is looking for "sham" or "pretext" reasons, as the excuses for racial strikes have been legally termed.

"There's a lot of pretext strikes, I can tell you," Judge Wade said. "That's part of what a judge has to do, is find out if that [reason cited by a lawyer] is true."

Discrepancies in enforcing Batson occur because the judges bring to the bench varying backgrounds and life experiences. What might raise a red flag to one judge might go unnoticed by another.

"The law is subjective because humans are subjective," said former state District Judge Cliff Stricklin, now a Dallas attorney. "This is not a machine. This whole system works or doesn't work based upon how well people perform in it."

Each case comes down to a judgment call by the trial judge, and no one wants to accuse anyone else — particularly someone they know and respect — of being racist.

There's a "stigmatization that's associated with overt racism; it's just not accepted any longer," said David Baldus, a nationally recognized expert on jury selection and a law professor at the University of Iowa. "That is what greatly inhibits the enforcement of Batson."

AN INFORMAL PRACTICE

Off-the-record talks keep charges of racism out of the trial transcript

Many Dallas judges let lawyers have informal Batson hearings — where the opposing attorneys compare notes about their strikes — that are not part of the trial record.

But handling a challenge informally eliminates any chance that allegations of biased jury selection can be raised during an appeal. Some legal scholars and appellate attorneys were appalled to learn of the

Appeals courts seldom reverse for bias claims

Continued from Page 10A

practice.

"I believe the judge, as an umpire, at some level has to be concerned with the integrity of the process," said Brian Wice, a defense appellate specialist from Houston who has worked on Dallas cases.

State District Judge Keith Dean defended the informal discussions, saying they are an effective way to enforce Batson because the lawyers often know and trust each other.

"The courthouse, it's a small community. ... If you live in a big city, you cut people off in traffic; if you live in a small town, you don't," he said. "We know each other and we're going to see each other tomorrow."

Some trial judges complain that the U.S. Supreme Court and Texas appellate courts have given them little useful guidance for policing racial bias in jury selection.

In the Batson decision, the Supreme Court set a standard for proving bias that was left open to interpretation. Since then, appellate courts have declared as "race neutral" — and therefore allowable — a wide range of excuses for removing prospective jurors, including "grooming," "a 1970s hairdo," "long, unkempt hair and a goatee," a "nose ring," being "very pretty" and being "obese."

Charles Baird, a former judge on the Texas Court of Criminal Appeals, said a series of decisions from his old court and the U.S. Supreme Court have rendered Batson nearly meaningless.

Mr. Baird said he believes the majority of the blame lies with the U.S. Supreme Court.

"That's one thing [Batson's failures] that you've got to place squarely at their feet," he said. "If they don't have the wherewithal to follow their own rule of law and precedence, then nobody else is going to follow it. They lead by example."

DIFFICULT TO ENFORCE

Vague legal guidance makes policing Batson a tough task

In June, Supreme Court Justice Stephen Breyer acknowledged that the case of a Texas death row inmate illustrated the difficulty in applying Batson. The court reversed Thomas Joe Miller-El's 1986 conviction, ruling that the jury selection process by Dallas prosecutors was replete with discrimination.

"Batson asks judges to engage in the awkward, sometimes hopeless, task of second-guessing a prosecutor's instinctive judgment — the underlying basis for which may be invisible even to the prosecutor exercising the challenge," Justice Breyer wrote in a concurring opinion.

"It may be impossible for trial courts to discern if a 'seat-of-the-pants' peremptory challenge reflects a 'seat-of-the-pants' racial stereotype," he said, calling for a re-examination of Batson.

The Supreme Court has placed the burden of proving racial bias on the challenger. The nation's highest court and various Texas appellate courts have also declared:

- A prosecutor's reason for removing a juror is race neutral unless "discriminatory intent is inherent in the prosecutor's explanation."
- A defendant must prove that the state's explanations "were a sham or pretext."
- Appellate courts considering claims of bias raised by defendants must "examine the record in the light most favorable to the trial judge's ruling."

The appeals courts rarely reverse convictions based on Batson violations.

Since 1989, the Dallas appellate court has reversed only 23 convictions for Batson violations, and 20 of those occurred before 1993, according to statistics compiled from the court's Web site.

The Court of Criminal Appeals in Austin, the state's highest criminal appeals court, issued 14 decisions in Dallas County cases between 1988 and 2002 involving Batson issues, according to opinions posted to the legal database Lexis. Three of the cases were reversed.

"The court of appeals [in Austin] has watered down Batson to the extent that it's almost nonexistent," said Dallas defense lawyer Kenneth Weatherspoon. "That's the real problem."

Legal scholars say the numbers probably are low because appellate justices, who rely on written transcripts to reconstruct what happened in the courtroom, tend to defer to the trial judges.

"One of the reasons why the court of appeals are very, very deferential to the judge's trial rulings [is] because a lot of it has to do with body language and inflection of voices and looks and things like this," said Fred Moss, a criminal law professor at Southern Methodist University and a former federal prosecutor. "It's hard to make a very solid Batson objection stick on appeal because it's hard to establish."

Linda Thomas, chief justice of the Dallas appeals court, rejected the idea that poor guidance from appellate courts has tied judges' hands.

"I think that we still very carefully scrutinize those," she said. "But again, not being in the courtroom at the time this is going on makes the job more difficult."

Some critics say trial judges and appellate justices are inclined to accept prosecutors' reasons for their strikes because many of them used to be prosecutors.

"I think there is a kind of general deference that is accorded the prosecutors," said Dallas defense lawyer Cheryl Wattley, a former federal prosecutor.

Judge Nelms, who has 42 years of legal experience as judge, prosecutor and defense lawyer, said Batson is ineffective. Yet he was the only judge interviewed who tracks the number of minority jurors struck and asks lawyers on the record if they have a Batson challenge.

"I do it so we can have a hearing," Judge Nelms said. "Maybe a half-dozen times over the years they [were] unable to satisfy me for their reasons, and normally, that's because of [their] negligence."

But every lawyer knows not to mention race. And that, says Judge Nelms, is why judges have a tough time enforcing Batson.

"In the absence of some overt statement or something like a confession from a prosecutor, like, 'I'm sorry, I just don't like blacks,'" he asked, "what are you going to do?"

GOLD EARRINGS AND SUNGLASSES

Below is a list of some reasons eligible jurors were rejected for service, which appeals courts have upheld as "race neutral." The reasons are included in "Batson Basics," a reference guide given to new Dallas County prosecutors. The guide is distributed as part of the 2004 Prosecutor Trial Skills Course offered by the Texas District and County Attorneys Association.

- Agreed with O.J. Simpson verdict
- Favorite TV show was *Judge Judy*
- Distrust of newspapers
- Limited reading material: mystery, romance novels and the Bible
- No religious preference; participated in church activities
- Misspelled name of religion
- Watched gospel TV programs
- Single; unmarried with seven children
- Worried about child care
- Liberal; friends "smoked weed"
- Poor opinion of prostitutes, those in the illegal drug trade
- Had a 1970s hairdo, or long hair and a goatee
- Wore earrings (male) or a nose ring
- Wore sunglasses; T-shirt
- Malcolm X hat; pink hat
- Snakeskin belt; "Bad Boys Club" jacket
- Body language; poor facial expression
- Chewing gum
- Obese; very attractive
- Didn't speak; very vocal
- Angry; expressionless
- Laughed at prosecutor's question
- Smiled at or flirted with defendant
- Inattentive, unresponsive or asleep
- Worked for a labor union
- Teachers; postal workers; courthouse employees
- Psychologists; consumer advocates

Below are reasons upheld as "race neutral" by Dallas County felony judges. An asterisk means one judge ruled the excuse race-neutral while another considered it a pretext for race bias.

- Considers rehabilitation most important part of punishment
- Had gold teeth
- Had no teeth*
- Unkempt or disheveled
- Wore earrings or a ponytail (man)
- Jewelry*
- Wore sunglasses or hat in court
- Unhappy or had a bad attitude
- Sleeping or inattentive
- Smiled at defense attorney
- Gave defense lawyer "a look"
- Too liberal
- Job too menial; housekeeper
- Court reporter; attorney
- Teacher; truck driver
- Worked in financial industry
- Worked in prison system
- Family member in security business
- Unemployed or not employed long enough
- A seventh-grade education
- Foreign-born*
- Reads only professional journals
- Has narrow interests
- Gave bad first impression*
- Liked the prosecutor
- Looked bored or angry
- Inattentive
- Didn't fill in name on juror card
- Hesitated in answering question

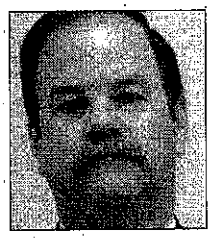
WHAT WILL FLY, WHAT WON'T

Among felony court judges, there's wide variation in the reasons they'll allow lawyers to give for removing prospective jurors. Some examples:

Judge **Mary E. Miller** won't accept sleeping or inattention as a reason unless someone else, such as a bailiff, backs up the lawyer's claim.

Judge **Henry Wade Jr.** won't allow removals based solely on how a juror looks.

Judge **Keith Dean** won't allow lawyers to remove someone just because he rolled his eyes at the lawyers.



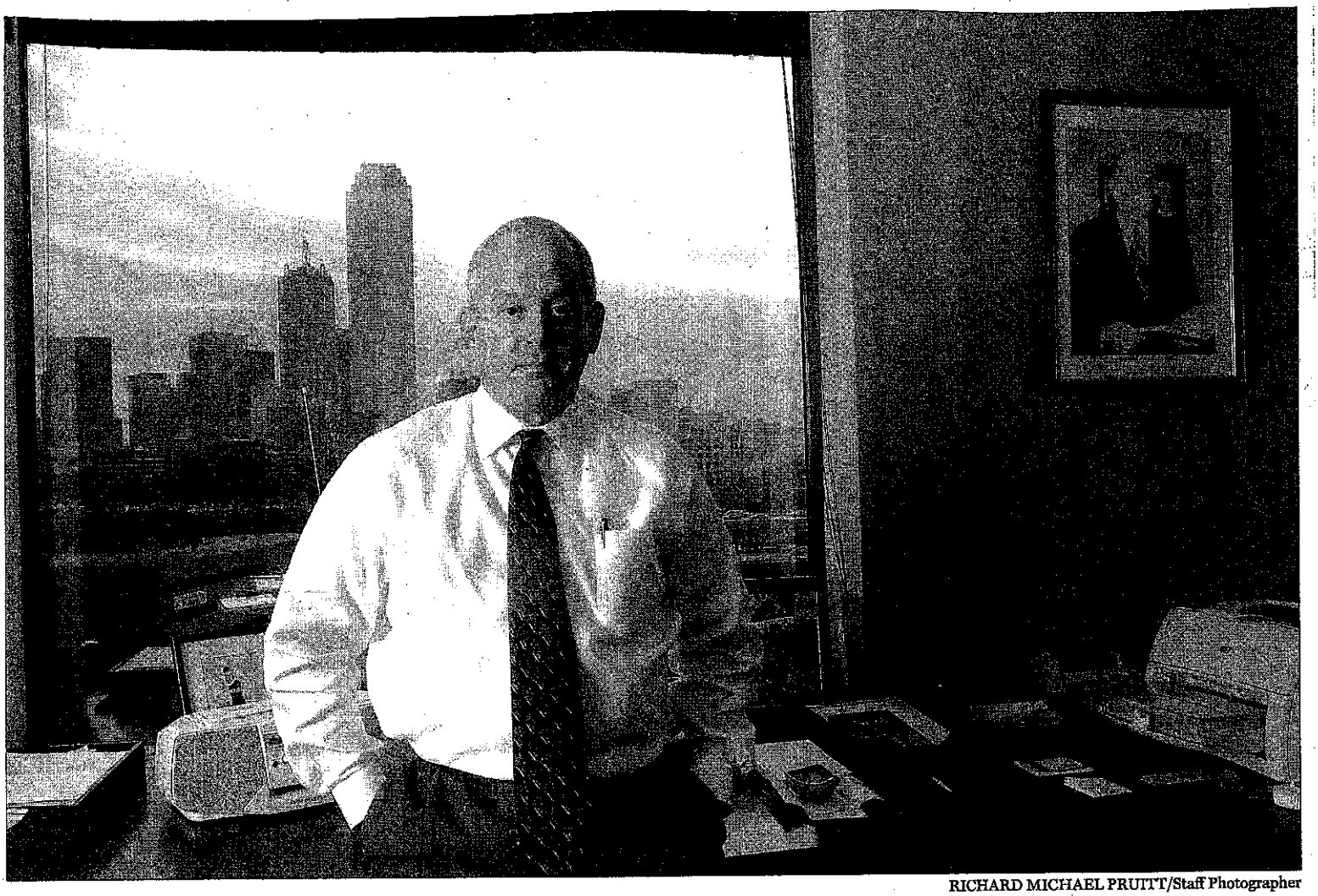
Judge **Vickers Cunningham** won't allow lawyers to exclude men for wearing earrings, or to remove people for gold jewelry or gold teeth. He will let them cut people with ostentatious tattoos and multiple body piercings. "Dennis Rodman is not going to make my jury," he said.

Judge **Robert Francis** will let lawyers cut jurors who wear T-shirts containing slurs about the police, or T-shirts promoting drug use.

Judge **John Nelms** has let prosecutors remove a black juror for gold teeth and jewelry. "That sounds like somebody who's streetwise, who hangs out in the bars and dives," he explained. But the judge drew the line at removing a juror with cornrows, saying that's a popular hairstyle.

"That's how they did it back then everywhere."

State District Judge Henry Wade Jr.,
referring to jury selection bias during his father's 36-year tenure as district attorney



RICHARD MICHAEL PRUITT/Staff Photographer

State District Judge Henry Wade Jr., who has a photograph of his father, the longtime Dallas County district attorney, prominently displayed in his office, says judges must monitor lawyers closely to guard against unequal treatment of jurors.

Famed DA's son still sees race bias

But judge says drive to win, not hatred, now guides jury selection

The portrait of former District Attorney Henry Wade hangs prominently in his son's judicial office, its fading image suggesting that the rough-and-tumble era of Dallas County justice is a thing of the past.

But the son of the man whose term in office is synonymous with race-based jury selection thinks otherwise. Jurors are still selected by the color of their skin, he said.

The difference is that the bias comes from a desire to win convictions, not hatred, said state District Judge Henry Wade Jr.

"They just hear through the grapevine [from colleagues] ... that if you want a good jury, you've got to get a lot of upper-middle class white people; you don't want black people, you don't want preachers ... you don't want schoolteachers because they're all too liberal," Judge Wade said, noting what he believes is the prevailing wisdom among prosecutors.

Judge Wade was the only jurist interviewed by *The Dallas Morning News* who said he thinks that lawyers still pick jurors based on race, a belief that mirrors the findings of the newspaper's two-year investigation.

"If he thinks we're doing that, he's not doing his sworn duty as a judge to keep that from happening," said District Attorney Bill Hill.

Judge Wade said that he does guard against race bias during jury selection and that all judges should watch lawyers closely and take copious notes to prevent the unequal treatment of jurors.

Doing that prompted him last year to refuse to allow a prosecutor to reject a prospective black female juror. When the prosecutor wanted to strike the woman, allegedly for sleeping in court, Judge Wade curtly responded, "Nope, that was the person next to her," said Bill Cox, the defense attorney on the case.

In his seventh year on the felony bench, Judge Wade is a no-nonsense former U.S. Air Force pilot and a former prosecutor in Dallas and Central Texas.

He shares some of the blunt-speaking traits of his father — a savvy, charismatic politician who never lost a jury trial and is most widely known for prosecuting Jack Ruby and the landmark abortion-rights case Roe vs. Wade. But the judge is more reserved than his glad-handing father.

And while he rejects the race-based actions of his father's 36-year term — when prosecutors followed a stereotype-ridden manual in rejecting black jurors — he doesn't apologize for them.

"That's how they did it back then everywhere," Judge Wade said, adding that his father's office "just memorialized it."

Disputed practice

Peremptory challenges survive calls for reform, decades of controversy

Prejudice is what peremptory challenges are meant to combat.

But Justice Thurgood Marshall knew that history told a different story when he warned in 1986 that the U.S. Supreme Court's attempt to ban lawyers from using discretionary strikes to exclude jurors because of race was destined to fail.

The high court's Batson vs. Kentucky ruling, he predicted, "will not end the racial discrimination that peremptories inject into the jury selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."

In June, Justice Stephen Breyer agreed that Batson was flawed and urged his colleagues on the court to consider reforms.

Writing about a 19-year-old Dallas County death penalty case that the court overturned because of race bias in jury selection, Justice Breyer said, "a jury system without peremptories is no longer unthinkable."

He echoed a host of legal commentators and jury experts who contend that the three-step process established in the Batson decision to investigate claims of bias in jury selection is too easy to circumvent.

"[T]he use of race- and gender-based stereotypes in the jury selection process seems better organized and more systematized than ever before," Justice Breyer noted.

In Dallas County, for example, although blacks appear on juries, prosecutors rejected them at twice the rate they excluded whites, an analysis of court data by *The Dallas Morning News* showed. Race was found to be among the most important factors in determining whom prosecutors selected and rejected.

"We're a long way, frankly, from solving the problem," said George Kendall, a New York civil rights lawyer who filed a brief in the same Dallas County case that Justice Breyer used to highlight his concerns about peremptories.

Trial lawyers maintain that the ability to exclude prospective jurors for even a suspicion of bias, which peremptories allow, is crucial to the guarantee of a fair trial.

"The peremptory strike is the great equalizer," said Robert Hirschhorn, a nationally known jury consultant based in Lewisville.

Richard Wintory, vice president of the National District Attorneys Association, agreed. "Batson and its progeny have struck the right balance," he said.

Texas is one of nine states allowing each side in a criminal trial 10 peremptory challenges. Only four states allow more.

Previous attempts to change that status quo in Texas have failed.

In 1995, Texas Supreme Court Justice Raul Gonzalez wrote that peremptory challenges were dead and said the law should be changed to reflect that. Neither he nor his colleagues addressed the subject of reform again.

A task force appointed by the court's chief justice spent a year in the late 1990s studying potential jury reforms but made no recommendation on peremptories.

Legal lobby

Frank Newton, a former State Bar of Texas president who headed the task force, said civil and criminal trial lawyers rejected extensive research showing that they do a poor job of identifying bias in jurors.

"Even though it is more a talisman than it is reality, it nonetheless is a talisman that matters," he said of the peremptory strike.

That's no small matter when considering the size and power of the legal lobby.

"Lawyers have grown comfortable with it and are afraid to give up a tool that makes them feel better,"

said Michael Saks, a professor of law and psychology at Arizona State University. "And they have enough influence over what the rules are that they are going to keep things the way they are."

Charles Baird, a former judge on the Texas Court of Criminal Appeals, acknowledged that eliminating peremptory challenges would end jury discrimination. But he said it was unlikely to happen in Texas.

The peremptory "is too accepted of a practice," he said. "I think prosecutors would fight it, and they have a strong lobby. And actually I don't think that criminal defense lawyers would be in favor of it, either."

State Sen. Royce West, D-Dallas, a former prosecutor and criminal defense attorney, predicted that there would be no support in the Legislature to reduce or eliminate peremptory challenges.

"I hadn't seen or heard of any compelling reason to do it," he said.

The history of the peremptory challenge is older than America itself.

Scholars trace its use to medieval England. Provided only to a defendant, peremptories were a check on the king's power to seat a partial jury.

The English common-law version became American statutory law after the Revolution. Although not afforded the status of constitutional law, the peremptory was included in the criminal codes of every state and the federal government. States did not provide peremptory challenges to prosecutors until after Reconstruction.

The Supreme Court enshrined the peremptory challenge in an 1893 decision as "one of the most important of the rights secured to the accused."

But after the high court ruled in 1935 that blacks could not be excluded from juries by law or practice, prosecutors began routinely using their peremptory strikes to remove them, said Doug Colbert, a University of Maryland law professor.

Controversy about peremptories and racial bias has raged ever since. Academics denounce their inherent unfairness. Judges hate the wrangling and time delays they can cause. Lawyers acknowledge they are still used for discriminatory reasons.

Tom Munsterman, director of the Center for Jury Studies in Arlington, Va., said he was assisting a legal conference in Georgia three years ago where participants were asked whether they believed race was the primary reason for the use of peremptories.

"I think 94 percent said yes," Mr. Munsterman said. "I was just downtrodden, and everybody looked at me like, 'Tom, get real.'"

There have been proposals to fight bias by reducing the number of peremptory challenges allowed each side. Mary Rose, an assistant professor of sociology and law at the University of Texas at Austin, said that would prevent lawyers from using peremptories to eliminate all blacks from a jury pool.

But only Maryland has done so, and then only to save time.

Batson called 'charade'

Constance Baker Motley, for one, got tired of waiting for change to come.

Nine years ago, the senior federal judge in New York declared that peremptory challenges were unconstitutional and refused to allow them in her court. A former colleague of Justice Marshall's at the NAACP Legal Defense and Education Fund, Judge Motley said her old friend's assessment of the Batson decision was correct.

"It is now time to put an end to this charade," Judge Motley wrote in a 1996 decision. "We have now had enough judicial experience with the Batson test to know that it does not truly unmask racial discrimination."

Prosecutors, defense call pressure to speed questioning, trials a contributing factor

Dallas County prosecutors and defense attorneys alike blame a shortage of time for the race-based stereotyping that occurs during jury selection.

Justice is in a hurry, and judges don't want to waste their time or that of jurors and lawyers on lengthy voir dire, as the juror questioning phase of selection is known.

In addition, county commissioners pressure judges to speed trials along and cut jail costs of those awaiting trial.

With limited time and opportunity to question potential jurors, "you have no choice but to stereotype some" jurors, said Peter Lesser, a longtime Dallas defense lawyer.

"Remember, most of these judges are trying to get these voir dires done in 45 minutes," Mr. Lesser said. "So as a lawyer, you have to fight with the judge."

Robert Hirschhorn, a nationally known jury consultant from Lewisville, said he's heard judges regularly grumble, "We've got to get our jury [picked] sooner or later."

"You know what, except in the extraordinary circumstances, jury selection typically takes a day," Mr. Hirschhorn said. "So when you talk about depriving somebody of their liberty, what's a day? If they are looking at five years, 10 years, 99 years in

prison, what's a day in the big scheme of things?"

Longtime Dallas prosecutor Eric Mountin, chief of the organized crime division, said he understood the desire not to spend an inordinate time on jury selection — to a point.

"Dallas experienced some unfortunately unpleasant experiences in the law enforcement community over the last couple of years, and that has shaped some people's perceptions, rightfully or wrongfully," Mr. Mountin said. "The only way you're going to be able to bring that perception out is in an opportunity to answer those questions."

A little extra time up front can save time in the long run, he said, adding that having a hung jury is a greater waste of everyone's time.

Some felony judges are saving time by using questionnaires in lieu of lengthy questioning of prospective jurors — a tactic that some believe also encourages more honest answers.

Judge Henry Wade Jr. and Judge John Nelms — two veterans of the bench in Dallas — said they would favor a system in which judges alone question prospective jurors, as happens in federal court.

David Baldus, a University of Iowa law professor and recognized expert on jury selection, suggested setting up a computerized system to track lawyers' strikes. Each court could then instantly research individual lawyers' strikes to determine trends in how they are using their peremptory challenges. That would allow a judge to better gauge a lawyer's motives.

State District Judge John Creuzot agreed it would be good to monitor strikes but doubted the county had the resources to do it.

'I just felt like I was lynched'

Man convicted of armed robbery says he never had chance with white jury after 5 blacks rejected

Emanual Fields' guilt was decided in a Dallas courtroom years ago, but the 26-year-old from Pleasant Grove cannot let go of how he ended up with an all-white jury.

"I just felt like I was lynched," Mr. Fields said during a prison interview in May. "I tried to speak up for myself, but they wasn't hearing it."

Serving three concurrent 60-year prison terms for armed robbery, Mr. Fields believes that he didn't receive a fair trial because of racial discrimination during jury selection.

In October 2002, after three hours of juror interviews, the prosecution used half of its 10 allowed peremptory strikes to exclude the five eligible black jurors.

Defense attorney Kevin Brooks objected, alleging that prosecutors rejected the black jurors because of race, in violation of U.S. Supreme Court rulings.

But state District Judge John Nelms upheld the prosecution's justifications for the strikes as "racially neutral."

According to a transcript of the proceedings:

- Three of the black prospective jurors had a relative who was either serving a jail term or who had recently been in jail.
- A fourth black juror allegedly slept during part of the juror interview process.
- The fifth black juror, a bus driver, was cut for having gold teeth and wearing "a big gold necklace."

Prosecutor Marc Moffitt noted that case law was clear on his right to strike a prospective juror for wearing gold chains. "It didn't have to do with race. It had to do with the big gold chain," he told the judge.

"You're telling the court that had [the juror] been a white person or Asian wearing — if he had gold teeth and a gold necklace — that he would have been a goner?" Judge Nelms asked.

"Correct," Mr. Moffitt answered. He added that the same juror was unacceptable because he didn't answer a group question posed by the defense.

An appeals lawyer examining the trial transcript months later noticed that three white jurors who also had relatives with criminal records were allowed on the jury while the black jurors were not.

But the argument that jurors in Mr. Fields' case had been subjected to "disparate treatment" — one of the Supreme Court tests for race bias in jury selection — failed to sway two state appeals courts.

Frustrated with Texas courts, Mr. Fields wrote his own appeal to the Supreme Court, asking it to review what happened at trial. But in June, the high court declined to hear the case.

During jury selection, Mr. Fields made an impassioned plea for a racially diverse jury, according to the transcript.

"Excuse me, your honor," Mr. Fields addressed the judge. "I just wanted to ask you that I feel that it's unfair that I have no African-Americans on my jury panel."

Judge Nelms told Mr. Fields he regretted that no black jurors ended up on the panel.

"You know, it's the luck of the draw. It's like playing a card game," the judge said, according to the transcript. "You get aces or you get low cards."

When Mr. Fields interrupted a second time to complain of an unfair trial, while the jury was being seated, the judge cautioned him to play by the rules of the court.

"Yes, sir," Mr. Fields answered. "I just want you all to play by the rules, too, sir."

In his prison interview, Mr. Fields again questioned rejecting a juror solely for wearing gold jewelry.

"He was a person with his own mind," Mr. Fields said of the juror. "What did any of this have to do with his appearance?"

COURT RULINGS

The major Supreme Court decisions on racial discrimination in jury selection:

Strauder vs. West Virginia (1880) – Ruling in the case of a black man convicted of murder, the court struck down a state law limiting eligibility for jury service to white males, saying it violated the equal protection clause of the Constitution.

Norris vs. Alabama (1935) – The court reversed the conviction of one of the nine black teenage defendants in the "Scottsboro Boys" interracial rape case, ruling that the exclusion of blacks from jury rolls violated the equal protection clause.

Hill vs. Texas (1942) – Ruling in the prosecution of a black man in Dallas, the high court ruled that Dallas County court officials had illegally excluded blacks from serving on grand juries.

Swain vs. Alabama (1965) – The court upheld the right to use peremptory challenges in jury selection but said such strikes could not be based on race. To win a bias claim against prosecutors, however, a defendant had to show "systematic exclusion."

Batson vs. Kentucky (1986) – The court modified the scope of peremptory challenges by requiring prosecutors to give "race-neutral" reasons for striking minority jurors. It established a three-step process to investigate bias claims.

Powers vs. Ohio (1991) – The court expanded its ban on race bias in jury selection to include prospective jurors, saying they had "the right not to be excluded ... on account of race."

Georgia vs. McCollum (1992) – The court expanded its ruling in Batson to prohibit defense attorneys from exercising peremptory strikes based on race.