

“Social justice should be the underlying goal of all humanity.”
-Alan V. Lowenstein, Institute Founder



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**WRITTEN TESTIMONY OF THE NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE
JUDICIAL CONFERENCE ON JURY SELECTION**

Thank you, Chief Justice Rabner, Judge Grant, distinguished participants and the organizers of this incredibly important Judicial Conference for allowing me the opportunity to testify today.

My name is Ryan Haygood. I am the President & CEO of the New Jersey Institute for Social Justice (the “Institute”). The Institute’s mission is to topple load-bearing walls of structural inequality to empower Black people and other people of color. We use cutting-edge racial justice advocacy to build reparative systems that create wealth, transform justice and harness democratic power – from the ground up – in New Jersey. I’d like to thank my colleagues Andrea McChristian, Yannick Wood, Henal Patel and Brooke Lewis for helping to prepare this testimony.

On the first day of the conference, Professor Eddie Glaude, Jr., challenged us with his description of an America and a New Jersey deeply divided by racism – and the difficult reality that “we built this country true.”

“If we are going to confront it,” he urged us, “We have to be as deliberate in dismantling it as we were in creating it.”

He went on to urge us here in New Jersey not to “pat ourselves on the back as a liberal bastion” because the numbers, the racial inequalities here, are too stark for that.

I’d like to situate my remarks in those numbers – and in those racial inequalities.

As we gather here this afternoon, we are more than 18 months into a COVID-19 pandemic that has devastated New Jersey – with the third highest death

rate in America¹ – and which has disproportionately impacted communities of color.² COVID-19 was the leading cause of death for Black people in New Jersey in 2020.³

This public health crisis has exposed the pre-existing and deeply embedded cracks of structural racism in our foundation.

Cracks that have erupted into earthquakes in Black and other communities of color.

Cracks that manifest in New Jersey as some of the worst racial inequalities in America.

These cracks caused New Jersey’s staggering racial wealth gap, where the individual net wealth for white people is \$106,000 compared to just \$179 for Black people⁴ – less than the cost of groceries for a small family.

These cracks also cause Black infants in New Jersey to experience the highest racial disparity rate in mortality in America,⁵ and cause Black kids to attend school in the sixth most segregated education system in America.⁶

These cracks are part of New Jersey’s DNA dating back to its founding when New Jersey provided each settling family with 150 acres of land – plus 150 more for each enslaved person brought to the colony.⁷ It is for this reason that the Garden State has been called the “slave state of the North.”⁸

We must confront the reality that we live today in the shadow of that beginning and the generations of structural racism that followed.

How does this all relate to why we are here today?

New Jersey’s justice system was shaped by structural racism.

Black kids in New Jersey are locked up at almost 18 times the rate of white kids,⁹ the highest disparity rate in America,¹⁰ even though they commit most offenses at similar rates.¹¹

And incarcerated kids too often end up part of the adult criminal justice system, where a Black adult in New Jersey is 12 times more likely to be in prison than a white adult¹² – the highest disparity in the nation.¹³

Sixty-one percent of our prison population is also Black¹⁴ in a state that is only about 13% Black.¹⁵

And then what do we do with the racism in our criminal justice system? We import it into our democracy and our courtrooms. Not only are incarcerated people denied the vote¹⁶ – but people with criminal convictions for indictable offenses are disqualified from serving on juries for life.¹⁷

We must also confront the fact that our system of jury selection, through the use of peremptory challenges, also perpetuates the structural racism built into our criminal justice system.

Thirty-five years ago, the Supreme Court in *Batson v. Kentucky* confronted the question of peremptory challenges when it ruled that excluding a juror solely on the basis of their race violated the Fourteenth Amendment.¹⁸

Justice Marshall, in his concurring opinion, predicted that “[t]he decision today will not end the racial discrimination that peremptories inject into the jury-selection process.”¹⁹

Justice Marshall was right.

Indeed, as we are having this conversation in New Jersey, a trial is underway that has great import to this conference and to our nation. It began with an incident that occurred in a southern town in Georgia.²⁰ Ahmaud Arbery was jogging down a residential street when he was followed by a group of white men in pickup trucks, one of whom was carrying a shotgun.²¹

They chased and confronted him, believing that he didn’t belong there, and shot him to death.²²

The tragedy did not end there for Ahmaud Arbery, his family or his community. The town near where Ahmaud Arbery was killed has a population that is 55% Black.²³ The county has a population that is 27% Black.²⁴ However, during jury selection for a trial in progress as we speak, 11 out of 12 Black potential jurors were struck from the panel through peremptory challenges made by defense attorneys, leaving a sole Black juror.²⁵

Eleven white jurors in a trial involving three white men accused of killing a Black man, nearly guaranteeing that justice would not follow his killing, with the judge even conceding that intentional discrimination likely infected the jury selection process.²⁶ This makes a mockery of the right to a jury of one’s peers.

This injustice is not limited to Ahmaud Arbery.

It happened during the six times that Curtis Flowers was tried in Mississippi for murder after the same prosecutor struck a total of 41 out of 42 Black potential jurors.²⁷ In a recent study in Mississippi, Black jurors were 4.51 times as likely as white jurors to be removed from a jury by prosecutors through peremptory challenges.²⁸

In another study of North Carolina non-capital felony trials, prosecutors used 60% of their peremptory challenges against Black jurors although they were only 32% of the jury pool.²⁹

In a study of capital cases in Philadelphia from 1981 to 1997, prosecutors used peremptory challenges to remove 51% of Black jurors compared to 26% of similarly situated non-Black jurors.³⁰

This study also observed that Batson had only a modest impact on peremptory trends, with race-based peremptory challenges declining in the lead-up to Batson but then increasing thereafter.³¹

It should be noted that defense attorneys have also employed this practice – using peremptory challenges to exclude white jurors to combat the prosecution’s improper peremptory challenges against Black jurors.³² In the Mississippi study, white jurors were 4.21 times as likely as Black jurors to be removed from a jury by defense peremptory challenges.³³ In the North Carolina study, defense attorneys used 87% of their peremptory challenges against white jurors although they made up 68% of the pool.³⁴ Lastly, in the Philadelphia study, defense attorneys used peremptory challenges to remove 26% of Black jurors and 54% of similarly situated non-Black jurors.³⁵

New Jersey has its own acute problems when it comes to representation in juries, with studies showing underrepresentation of Black jurors in jury pools.³⁶ In a study commissioned by the New Jersey Supreme Court, Black jurors were found to be underrepresented in each of the 14 counties surveyed.³⁷ Black jurors were underrepresented in Mercer County compared to their proportion of the population by 41.3%.³⁸ In Essex County, the county with the highest concentration of Black individuals,³⁹ Black jurors were underrepresented by 20.3%.⁴⁰

Specific statistics about the use of peremptory challenges in New Jersey are limited. While a recent study commissioned by the New Jersey Supreme Court found that the use of peremptory challenges did have an impact on the representation of people of color on New Jersey’s juries, it also found that that “the ability to observe a [statistical] relationship between attorneys’ use of large numbers of peremptory challenges and levels of minority representation was limited.”⁴¹

That said, there is no getting around the fact that peremptory challenges are part of New Jersey’s racialized criminal justice system, which is characterized by some of the worst racial disparities in America.

We cannot look to slight reforms to our current system. Batson has been reformed over the 35 years of its existence and Osorio⁴² plus Andujar⁴³ are the most recent iterations of its proscription of race-based discrimination in jury selection.

As Professor Glaude reminded us, this is a critical moment for us in New Jersey to tell the truth about who we are, and to build a new system, a new foundation, for our criminal justice system.

Those of us in this room today have the unique opportunity to contribute to that process.

To accomplish this, New Jersey must take the following steps.

First, New Jersey must abolish peremptory challenges.

Second, New Jersey must expand “for cause” challenges.

Third, New Jersey must extend the right of jury service to people with indictable offense convictions.

Fourth, New Jersey’s courts must have the flexibility to draw jurors from particular areas within a county or from multiple counties.

Finally, New Jersey must pay jurors a \$15 minimum wage.

(1) New Jersey must abolish peremptory challenges.

As Justice Marshall predicted, Batson did not end the discriminatory use of peremptory challenges.

Attorneys have limited time to go from juror to juror to decipher which jurors are preferred and which jurors should be removed. These time limitations often lead attorneys to make decisions off “hunches” or “inclinations” which may be subject to implicit biases. In Batson, Justice Marshall urged that ending racial discrimination in jury selection “can be accomplished only by eliminating peremptory challenges entirely.”⁴⁴ Let us finally listen to him here in New Jersey.

(2) To meet attorney concerns about eliminating peremptory challenges, New Jersey must expand “for cause” challenges.

Although the New Jersey Supreme Court’s study concluded that judges already make significant amounts of “for cause” challenges,⁴⁵ attorneys have expressed concerns that striking a juror “for cause” remains challenging.

To meet these concerns, courts should be willing to expand striking jurors “for cause” and need to be more rigorous in questioning jurors to uncover biases. In situations where a potential juror makes an equivocal statement about being fair and impartial, the potential juror should be removed. Additional time should be granted to develop testimony that will expose areas where jurors may have implicit biases.

(3) New Jersey must allow people who have indictable offense convictions to serve on juries.

New Jersey bars people with indictable offense convictions from serving on juries for life, impacting an estimated 438,000 to 533,000 of the overall population from serving on juries.⁴⁶ This is about 7-8% of the overall population of the state.⁴⁷

An estimated 219,000 to 269,000 of the Black population in New Jersey is impacted by this bar⁴⁸ – a staggering 23-29% of the Black population.⁴⁹ Thirteen states – including Idaho, Ohio, North Carolina and Indiana – allow people with felony (indictable offense) convictions to serve on juries

after they are off parole and probation.⁵⁰ The American Bar Association endorses this.⁵¹ New Jersey should, too.

New Jersey recently restored voting rights to 83,000 people on probation or parole⁵² – a right that had been denied since 1844.

It is time that we do the same for the right to serve on juries.

- (4) New Jersey courts must have the flexibility to draw jurors from particular areas within a county or from multiple counties to achieve a representative jury pool.

People have the right to be judged by a jury of their peers. To achieve this aim, courts should be granted the option of limiting the juror pool to particular areas of the county to ensure a more racially diverse jury pool. For example, an Essex County court may be able to draw from a Newark jury pool for people in Newark rather than from all of Essex County, which may include areas that do not reflect the racial demographics of Newark. Federal districts already have the option of drawing jurors from “divisions” within the district and not the district as a whole.⁵³ Courts should also acquire race information for potential jurors by requiring them to self-identify during their current jury duty⁵⁴ (or by cooperating with other courts and state agencies that track racial data).

If courts are still unable to create racially representative juries through limiting the juror pool to particular areas of the county or if they have exhausted jurors of color from particular areas, courts should have the option of drawing from jurors from several counties and specific areas within other counties. This will allow courts to create a more racially representative jury pool. Courts can also share racial data between the counties to inform their selection of out-of-county jurors.

- (5) New Jersey must pay jurors a \$15 minimum wage.

New Jersey’s legislators should consider the extent to which jurors who are called for service fail to show up because they will experience financial hardship due to jury duty and pass a law to raise juror pay to at least minimum wage.⁵⁵ Jurors are paid as little as \$5 per day.⁵⁶ If jurors were paid for seven hours of work at a minimum wage of \$15/hour, they would make \$105. Minimum wage may mean the difference between a juror showing up for jury duty or making the financial decision to stay at work for the survival of their families.

New Jersey’s shameful racial wealth disparities make this issue particularly acute for Black and Latino/Latina individuals, almost half of whom have zero net worth.⁵⁷ People of color who are daily wage earners may not have the means to serve on juries. We need to consider this when deciding on what is fair and equitable juror pay. If increasing juror pay is seen to be costly, courts should consider means testing juror pay to make sure that those who actually need the support will receive it.

Conclusion

As Professor Eddie Glaude, Jr., urged us on Wednesday, it is time to tell the full truth, to reconcile and then to repair.

As we do that, we must be as deliberate in dismantling our racialized criminal justice system as New Jersey was in creating it.

Implementing the proposals outlined above is a critical part of the reparative justice that Black people and other people of color in New Jersey deserve.

Thank you.

¹ New Jersey has the third highest COVID-19 death rate per 100,000 of any U.S. state, with Mississippi having the highest. *COVID Data Tracker: United States COVID-19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://covid.cdc.gov/covid-data-tracker/#cases_deathsper100k (last visited Nov. 11, 2021) (select “Deaths” under View column, “Since Jan. 21, 2020” under Time period column, and “Rate Per 100,000” under Metric column, scroll to Data Table for Death Rate by State/Territory, click on “Death Rate per 100,000” to view ranking).

² *Disparities in Deaths Racial and Ethnic Health Disparities*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/disparities-deaths.html> (last visited Nov. 11, 2021).

³ *New Jersey Provisional Death Data Query: Number of Deaths by Leading Cause of Death 2020*, N.J. STATE HEALTH ASSESSMENT DATA, <https://www-doh.state.nj.us/doh-shad/query/builder/provdth/Mort/Count.html> (last visited Sept. 7, 2021) (select 2020 as date of death, choose all age groups and narrow search to Black, non-Hispanic people. For cause of death, select leading causes of death and all causes for all counties in New Jersey. Results should be displayed by: year of death x cause of death, chart: vertical bar).

⁴ LAURA SULLIVAN ET AL., N.J. INST. FOR SOC. JUST., BLACK AND BROWN IN NEW JERSEY: THE GARDEN STATE’S SHAMEFUL RACIAL WEALTH GAP 2 (2020), https://d3n8a8pro7vnm.cloudfront.net/njisj/pages/689/attachments/original/1603320237/Black_and_Brown_in_NJ_Final.pdf?1603320237

⁵ *Complete Health Indicator Report of Infant Mortality Rate*, N.J. STATE HEALTH ASSESSMENT DATA (Sept. 24, 2021), [https://www-doh.state.nj.us/doh-shad/indicator/complete_profile/EPHTInfMort.html?PrinterFriendly=x?ListCategoryFirst=x#:~:text=The%20infant%20mortality%20rate%20\(IMR,after%20New%20Hampshire%20\(3.5\).](https://www-doh.state.nj.us/doh-shad/indicator/complete_profile/EPHTInfMort.html?PrinterFriendly=x?ListCategoryFirst=x#:~:text=The%20infant%20mortality%20rate%20(IMR,after%20New%20Hampshire%20(3.5).)

⁶ GARY ORFIELD ET AL., THE C.R. PROJECT, NEW JERSEY’S SEGREGATED SCHOOLS: TRENDS AND PATHS FORWARD 6 (2017), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/new-jerseys-segregated-schools-trends-and-paths-forward/New-Jersey-report-final-110917.pdf>.

⁷ JAYNE JOHNSON ET AL., N.J. INST. FOR SOC. JUST., ERASING NEW JERSEY’S REDLINES 8 (2020), https://d3n8a8pro7vnm.cloudfront.net/njisj/pages/689/attachments/original/1588358478/Erasing_New_Jersey's_Red_Lines_Final.pdf?1588358478.

⁸ Julia Martin, *Slavery’s Legacy Is Written All Over North Jersey, If You Know Where to Look*, NORTHJERSEY.COM (Feb. 28, 2021, 4:38 AM), <https://www.northjersey.com/story/news/sex/montclair/2021/02/28/american-dream-paramus-nj-part-north-jersey-slavery-legacy/4212248001/>.

⁹ JOSH ROVNER, THE SENT’G PROJECT, BLACK DISPARITIES IN YOUTH INCARCERATION (2021) <https://www.sentencingproject.org/publications/black-disparities-youth-incarceration/>.

¹⁰ *Id.*

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- ¹² *State-by-State Data*, THE SENT'G PROJECT, <https://www.sentencingproject.org/the-facts/#map> (last visited Nov. 11, 2021).
- ¹³ *Id.*
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- ¹⁷ N.J. Stat. Ann. § 2B:20-1(e).
- ¹⁸ *Batson v. Kentucky*, 476 U.S. 79, 84 (1986).
- ¹⁹ *Id.* at 102.
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- ²⁷ Robin Maher, *What's Past is Prologue: The Importance of History in Flowers v. Mississippi*, GEO. WASH. L. REV., (Jul. 10, 2019), <https://www.gwlr.org/whats-past-is-prologue-the-importance-of-history-in-flowers-v-mississippi/>.
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- ³⁰ David C. Baldus, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 J. CONST. L. 1, 155 (2001), <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1415&context=jcl>.
- ³¹ *Id.* at 73.
- ³² DeCamp & DeCamp, *supra* note 28, at 8-9.
- ³³ *Id.* at 20.
- ³⁴ Grosso & O'Brien, *supra* note 29, at 1539.
- ³⁵ Baldus, *supra* note 30, at 156.
- ³⁶ MARY R. ROSE, FINAL REPORT ON NEW JERSEY'S EMPIRICAL STUDY OF JURY SELECTION PRACTICES AND JURY REPRESENTATIVENESS 40 (June 1, 2021), https://www.njcourts.gov/courts/assets/supreme/judicialconference/Mary_Rose_Final_Report.pdf?c=Og.
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- ³⁸ *Id.*
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- ⁴⁴ *Batson*, 476 U.S. 79, at 103.

⁴⁵ ROSE, *supra* note 36, at 76.

⁴⁶ These statistics were obtained from an online resource of supplementary data for a study published by Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distributions of People with Felony Records in the United States, 1948-2010*, DUKE UNIV. PRESS 1, 9 (2017), https://dup.silverchair-cdn.com/dup/Content_public/Journal/demography/54/5/10.1007_s13524-017-0611-1/3/13524_2017_611_moesm1_esm.pdf?Expires=1639691508&Signature=NbgGzBpdjoTrWiUroiHqX1Odei8gHEDvvezKjDSTabB61wfbqB-HB3KOTciHWJ~6iFoHZWvk0icOrNO2oMtXOXf60VliU7Nkvo-CXTy3VTlrzLRO1tbxu26zNOVD05BDviSzwINBwYkYhC9LNqZQ8Kxap3bfuRA48-Ct43VyNmfdPa9dPDrE4TfR2rKqz205H2qABVbvKS8yWccpLlKR1d73DFcEKRK3dx4kDbKCuhQy3YSSWdH6G1dAtGTDfzNgSGz7u~VHH4cUyik-68dgJchLfXXb-dFTVIB6lRAozcVZg1FykXAnAfcllfbmgJCKOaEbKmAqW9aHo3pHWyaZg__&Key-Pair-Id=APKAIE5G5CRDK6RD3PGA.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ James M. Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service*, 36 L. & Pol'y 1, 8 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3226729.

⁵¹ The American Bar Association proposes that those with felony convictions that are actually incarcerated or on court supervision should be prohibited and by implication, those with felony convictions that are not currently incarcerated currently and not on court supervision should be allowed to be jurors. *Trial by Jury*, ABA, https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_juryaddendum/ (last visited Nov. 11, 2021).

⁵² Jessica Corbett, *New Jersey restores voting rights of people on parole and probation*, SALON (Dec. 20, 2019, 7:30 AM), <https://www.salon.com/2019/12/20/new-jersey-restores-voting-rights-of-people-on-parole-and-probation/>

⁵³ Laura G. Dooley, *The Dilution Effect: Federalization, Fair Cross-Sections, and the Concept of Community*, 54 DEPAUL L. REV. 79, 87 (2004), <https://via.library.depaul.edu/cgi/viewcontent.cgi?article=1389&context=law-review>.

⁵⁴ New York's state courts already require jurors to self identify pursuant to Section 528 of their Judiciary Law and juror racial information is compiled into an annual report. See NYCOURTS, 10TH ANNUAL REPORT PURSUANT TO SECTION 528 OF THE JUDICIARY LAW (2020), <https://www.nycourts.gov/legacypdfs/publications/pdfs/2020-Section528-Annual-Report.pdf>.

⁵⁵ Juror pay is established by statute and has not been changed in 20 years. N.J. Stat. Ann. § 22A:1-1.1 (West 2001).

⁵⁶ FREQUENTLY ASKED QUESTIONS ABOUT JUROR SERVICE IN NEW JERSEY 7, <https://www.njcourts.gov/jurors/assets/juryfaq.pdf?c=zQU>.

⁵⁷ Sullivan ET AL., *supra* note 4, at 2.