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November 5, 2021

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments on Jury Selection Process (Pre-Judicial Conference)
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037

**Re: Comments Regarding Proposed Changes to the Jury Selection Process
in New Jersey**

Dear Judge Grant:

On behalf of the American Civil Liberties Union of New Jersey ("ACLU-NJ"), I thank you for the invitation to provide comments on changes to New Jersey's jury selection procedures currently under consideration by the Judicial Conference on Jury Selection. The ACLU-NJ is committed to two foundational principles at the heart of jury selection: the elimination of unconstitutional bias in selecting jurors and fair trials for all litigants. We support the development of the most heterogeneous jury panels possible and are committed to upending the overlooked conscious and unconscious juror biases that too often lead to unfair and unjust results within the justice system.

As a preliminary matter, we view the following recommendations holistically; that is, to be effectual, they must operate as an interdependent legal ecosystem. Each recommendation thus informs the other. Rendered independently, they will likely not achieve the desired levels of success.

DISCUSSION

To find our way to equity and fairness, we must consider the frame of the problems inherent in our current system of jury selection. That is, we must think carefully about the role of juries in our justice system: what we ask them to do, how we ask them to do it, and how they fulfill that role.

Serving on a jury is a civic duty borne from a constitutional mandate that plays a pivotal role in making public value decisions. Juries thus serve an educational function by introducing people to the inner workings of the justice system and is one of two ways—voting being the other—that every American can directly participate in their own governance. As a fairly constituted decisional body made of representative individuals, the jury is meant to produce verdicts

reflecting the values of the community from which it emerges, and the facts produced through the legal cauldron of a trial. The role of the jury and the individual juror in the administration of justice should thus be constantly bolstered and reified and never adulterated. We should be singularly focused on generating the widest pools of dissimilar people possible to guarantee this constitutional entitlement and to ease the process through which jurors are able to conduct the important work of realizing democracy.

The following recommendations propose reforms to the use of peremptories and remedies around other aspects of jury selection. The end goal should be to have juries comprised of diverse individuals who are representative of their communities, aware of their own implicit and explicit biases, and able to uplift all aspects of jury service; individuals that are then able to nurture and motivate an informed and civically involved populace.¹

I. PEREMPTORY CHALLENGES ARE INEFFECTIVE, INEFFICIENT, AND INVITE BIAS INTO JURY SELECTION

The Committee should curb the excesses of the use of peremptories while creating a stronger framework for the selection of juries that can render fairer verdicts. Although peremptory challenges are a fundamental part of our adversarial legal system that bring a modicum of parity and control to attorneys (and a feeling of fairness for litigants when jury verdicts are reached), the use of the challenges remain subject to both fervent criticism and praise. Indeed, Thurgood Marshall’s trenchant observation that the *Batson* decision would fail to “end the racial discrimination that peremptories inject into the jury-selection process . . . [a] goal [that] can be accomplished only by eliminating peremptory challenges entirely,”² has yet to be disproven.³

Although *Batson v. Kentucky* is grounded in equal protection principles informed by the U.S. Constitution, *Batson*’s federal constitutional underpinnings, “establish . . . the floor of minimum protection”⁴, while New Jersey’s peremptory challenge jurisprudence, as set out in *State v. Gilmore*, is based on our state constitutional right to “trial by an impartial jury drawn from a cross section of the community.”⁵ *Gilmore* thus aims higher, baking principles of diversity directly into New Jersey’s peremptory challenge jurisprudence.

¹ See John Gastil et al., *Civic Awakening in the Jury Room: A Test of the Connection between Jury Deliberation and Political Participation*, 64 J. POL. 585 (2002).

² *Batson v. Kentucky*, 476 U.S. 79, 102-03 (1986).

³ Whether used by the prosecution or defense, the result too often remains the same: Black jurors are struck in disproportionate numbers. See Richard Fausset and Giulia Heyward, “In Jury Selection for Ahmaud Arbery’s Killing, a Nearly All White Jury is Selected,” (Nov. 3, 2021), available at <https://www.nytimes.com/2021/11/03/us/ahmaud-arbery-killing-trial-jury-selection-race.html>.

⁴ *State v. Gilmore*, 103 N.J. 508, 522-23 (1986).

⁵ *Id.* at 523.

Put simply, neither the *Batson* test nor the more fulsome *Gilmore* test accomplish their goals. Both fail to create meaningful remedies, and instead generate collateral litigation taxing judicial resources while exhausting the pool of willing jurors. Both tests undermine the basic premise of the peremptory challenge, which is not disclosing a “reason” for a juror’s removal, by converting them instead into a somewhat watered-down version of a cause challenge. Further, control over the juror’s inclusion or exclusion on the jury is transferred from lawyer to judge, thus weakening one of the most important factors needed to instill confidence in establishing an impartial jury.⁶

Most importantly, the seminal issue sparking Justice Marshall’s distrust in *Batson* remains; namely, that the lawyer defending the peremptory challenge can easily circumvent any *Batson* resistance, thus making it exceedingly rare that a juror is prevented from being removed once the challenge is lodged.⁷ Put simply, using peremptory challenges to achieve fairness by creating “favorable imbalance” or an equal opportunity to distort the jury pool is not in line with the constitutional mandate to create a representative cross section; it is the courtroom version of gerrymandering.

⁶ See Caren Myers Morrison, Negotiating Peremptory Challenges, 104 J. Crim. L. & Criminology 1, 11–12 (2014) (“The most convincing justifications for the [peremptory] challenge rest on notions of party autonomy and participation—the theory that, by giving the litigants the chance to select their own juries, they are more likely to see the result reached by that jury as fair.”)

⁷ Several studies have shown that peremptory challenges are still used in an expressly discriminatory fashion. See Anne M. Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, 9 Ne. U. L. Rev. 299, 339 (2017) (prosecution eliminated 12% of Whites and 35% of Blacks; defense eliminated 35% of Whites and 3% of Blacks); Anne M. Eisenberg et. al., *If It Walks Like Systematic Exclusion and Quacks Like Systematic Exclusion: Follow-Up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2014*, 68 S.C. L. Rev. 373, 388–89 (2017) (noting in follow-up study that the prosecution struck 35% of strike-eligible black potential jurors, accounting for removing 15% of black venire members; that approximately 32% of black venire members were removed for opposition to the death penalty; and that the combined effects of these two stages prevented a total of 47% of black venire members from serving, compared to those stages preventing a combined 16% of the white venire pool from serving); Witney DeCamp & Elise DeCamp, *It’s Still About Race: Peremptory Challenge Use on Black Prospective Jurors*, 57 J. of Rsch. in Crime and Delinq. 3, 3 (2020) (“Black venire members are 4.51 times as likely to be excluded from a jury due to peremptory challenges from the prosecution in comparison to White venire members. Conversely, White venire members are 4.21 times as likely to be excluded through peremptory challenges by the defense in comparison to Black venire members” but in the end, there were fewer Black jurors who were actually seated, contributing to less diverse juries); Catherine M. Grasso & Barbara O’Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 Iowa L. Rev. 1531, 1539 (2012) (“[p]rosecutors used 60% of their strikes against black jurors, who constituted only 32% of the venire. In comparison, defense attorneys used 87% of their strikes against white jurors, who made up 68% of the venire.”).

In a utopian world, elimination of peremptories would be ideal. Removing them completely from the jury selection process would streamline trials and stop the depletion of the jury pool by requiring so many to show up only to get turned away based on a hunch or barely disguised racial motivation. A peremptory-free selection process would also produce a leaner, more agile use of prospective jurors and blunt the perception from jurors themselves that they are being treated like pawns in the legal process rather than willing participants. This effort is not without precedent: in August 2021, Arizona’s Supreme Court eliminated peremptory challenges, a reality that goes into effect on January 1, 2022, and will serve as a bellwether of the efficacy and possibility of a peremptory free world.⁸

We are not, however, in a utopian world, and so the ACLU-NJ’s recommendation is to significantly reduce the number of peremptories used in New Jersey to bring it closer to the national average. *See* Guide to the Judicial Conference on Jury Selection, Attachment G. Should reductions be deemed a solution, the continued use of peremptory challenges should be made subject to stringent controls addressing their discriminatory impact⁹ and be done in tandem with the implementation of various additional equitable measures described *infra*.

⁸ Cheryl Corley, “Arizona’s Supreme Court Eliminates Peremptory Challenges,” NPR (Sept. 6, 2021), *available at* <https://www.aclu-nj.org/about/careers/research-and-data-analyst-criminal-justice>

⁹ Specifically, the Judiciary should follow the path blazed by Washington State’s Supreme Court General Rule 37, which outlines procedures for evaluating “race neutral reasons” for peremptory challenges. The rule (a) allows a judge to evaluate the types of questions asked of all jurors *sua sponte*, (b) presumptively deems certain types of questions asked of jurists of color as invalid, and (c) closely scrutinizes nonverbal reasons (lack of eye contact, attitude, etc.) given for a strike. *See* Wash. Sup. Ct. Order No. 25700-A-1221 (Apr. 5, 2018) (adopting WASH. CT. GEN. R. 37). Of particular interest is the list that immediately rejects questions targeting jurors of color by invoking lived experiences that are predictive of one’s race and class background due to discriminatory and racist practices spanning issues from policing, to sentencing, to redlining:

- (i) having prior contact with law enforcement officers;
- (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
- (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;
- (iv) living in a high-crime neighborhood;
- (v) having a child outside of marriage;
- (vi) receiving state benefits; and
- (vii) not being a native English speaker.

WASH. CT. GEN. R. 37(h).

This suspect question list should inspire thought as to the racialized taxonomy that informs New Jersey’s legal landscape and the incorporation of these and more excluded questions in lodging peremptory challenges.

II. EQUITY AND PROCESS REFORMS

As noted above, with or without peremptories, there are several equity issues that undermine the process of picking a representative and fair jury. The following comments are proposed by the ACLU-NJ to address the most pressing roadblocks to establishing diverse jury pools and as the most effective means by which to expand the pool of eligible jurors to ensure that juries accurately represent the communities they serve.

A. *Eliminate Prohibition on Jurors With Convictions*

An immediately effective fix comes from allowing previously incarcerated individuals the opportunity to serve. The idea that a person can have their cases heard by peers—the community itself—remains a primary basis for the justice system’s overall legitimacy. Juries can only speak with the voice and authority of the community if they truly and accurately reflect that community.

Currently, New Jerseyans with criminal convictions are barred from serving on juries.¹⁰ Hundreds of thousands of New Jerseyans, disproportionately Black men, too often through racist abuses built into the system, have criminal convictions, some dating back decades. Years after served time and the alleged purpose of prison or probation has been fulfilled (retribution, incapacitation, deterrence, and rehabilitation) their exclusion from jury service, in both criminal and civil cases, virtually ensures that litigants who go to trial will not have their fate decided by a fair cross section of the community.¹¹ It is important to note that it has not always been this way in New Jersey. From 1995 until 1997, the New Jersey Legislature allowed some people with criminal convictions to serve as jurors, so long as they were no longer on probation or parole.¹² In 1997, the Legislature reinstated a per se ban on jury service, even for people who had completed supervision.¹³

¹⁰ See N.J.S.A. 2B:20-1(e) (requiring that every person summoned as a juror “shall not have been convicted of any indictable offense under the laws of this State, another state, or the United States[.]”).

¹¹ This is particularly true in New Jersey, which recently regained the distressing title of having the worst racial disparity among its incarcerated population in the country. See The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, Oct. 13, 2021, available at <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

¹² See Brian C. Kalt, *The Exclusion of Felons from Jury Service*, American University Law Review Vol. 52 Iss. 01 (2003) (n. 406, p.155) (explaining that from 1995 to 1997 New Jersey allowed people with indictable convictions to serve on juries after they had completed their sentences).

¹³ *Id.* (citing N.J.S.A. 2B:20-1(e)). The Assembly Judiciary Committee statement in support of the legislation explained “The very real potential for bias by convicted criminals against law enforcement officers and the criminal justice system dictates that these individuals should be barred from jury service.” N.J. Assem. Comm. State., S.B. 264, Feb. 10, 1997.

While New Jersey recently expanded the right to vote for people on probation and parole,¹⁴ New Jerseyans with criminal convictions remain barred from serving on juries. To ensure that all New Jersey citizens can fully participate in our democracy they must be able to vote not only at the ballot box but in the jury room. We urge the Judicial Conference on Jury Selection to call on the Legislature to restore the right of New Jerseyans with criminal convictions to serve on juries.

B. *Review and Expand Source Lists to Broaden Jury Pool*

Key to creating a diverse jury is finding diverse jurors with a panoply of experiences, belief systems, communities, and personal histories. To create a deeper and more active well, the ACLU-NJ urges the Committee to expand source lists, to expand its use of technology in service of communicating with potential jurors, and to annually review its practices to ensure it is employing best practices regarding the maintenance of its lists and communications. We encourage the Committee to further research other sources for potential jurors that could be shared by state agencies, for example, databases of people who may use various public benefits.

C. *Fair Compensation for Jury Service*

It is appalling that the only jurisdictions paying jurors less for their service than New Jersey are those that pay nothing at all. As an immediate need, statutory provisions regarding juror pay should be revised to increase public participation, to facilitate the creation of more representative juries, and to reward those who do sit for trials.¹⁵ While hardships are real and disproportionately affect jurors of color, dismissal of prospective jurors on this vector can also be subject to abuses.¹⁶ Raising pay would open up entire bands of participants and prevent abuses of “benevolent” hardship excusals and their associated pernicious effects. Indeed, efforts to test the results of increased payments are currently underway in California.¹⁷

¹⁴ See, e.g., Ashley Balcerzak, NorthJersey.com, “New Jerseyans on parole and probation can register to vote in November election”, Sept. 1, 2020, available at <https://www.northjersey.com/story/news/politics/elections/2020/09/01/election-day-2020-new-jerseyans-parole-probation-can-vote/3452265001/>.

¹⁵ Although New Jersey has a rather detailed certification process for excusing jurors for financial hardship, it is not without flaw and asks for definitions and documentation that might be difficult for the average person to explain or provide.
https://www.njcourts.gov/forms/12255_jury_financial_hardship.pdf

¹⁶ See *People v. Gray*, 118 P.3d 496, 508 (Cal. 2005).

¹⁷ On October 13, 2021, Governor Gavin Newsom signed Assembly Bill 1452 establishing the “Be the Jury” pilot program through a partnership with the San Francisco Superior Court and paid for through philanthropic funding which would compensate low- to moderate- income jurors on criminal trials with \$100 per day of jury service, replacing the current \$15 a day. The program will assess whether higher juror pay leads to more racial and socio-economic diversity in juries. See <https://www.sfexaminer.com/news/sf-welcomes-pilot-program-that-increases-pay-to-low-income-jurors/>.

We encourage the Committee to look to minimum wage standards as a starting point, and to consider creative solutions that look to other measures of wage replacement, including unemployment and paid family leave insurance benefits. Similarly, providing childcare or reimbursing childcare expenses for jurors requiring such a service would make participation possible for those who ordinarily would not be able to pay for care and/or accommodate for lower juror pay by removing a costly barrier for particular demographics who struggle to pay for care, from single parents to the self-employed.

D. *Attorney Conducted Voir Dire*

Lawyers should be entitled to examine prospective jurors in both civil and criminal cases. This act is more likely to result in a fair and impartial jury than the current judge-forward system. Allowing attorneys to perform open-ended questioning would provide another opportunity to unmask biases in potential jurors. Attorneys would be able to illicit more illuminating answers, and such questioning would result in more equitable end results. As with direct examinations, open-ended questions function more powerfully as a fact-finding tool than close-ended ones that may encourage a prospective juror to give the response they might believe as more politically/socially acceptable than one that is fully reflective of their own beliefs. Litigants should be given the opportunity to reach underneath the shallow answers requested in questionnaires. To meet the goal of an impartial jury, the Committee must support a system that allows attorneys to encourage reflection and thought about the powerful influence of biases regarding the criminal justice system and how issues like race, class, sex, sexual orientation, gender identity or ability status shape our worldview and lived experiences in general.¹⁸

Attorney conducted voir dire also promotes confidence in the system. Satisfaction with a jury, even with some “unfavorable” picks, is more likely when all parties participate in and have some control over the process. Being able to interview prospective jurors thus gives litigants control because the litigant makes the decision to remove a juror, while the current process requires a judge’s intervention and even a for cause strike requires a judge’s approval.

E. *Reform “For Cause” Challenge Standards*

In a system where litigants receive so many peremptory challenges, judges appear hesitant to excuse jurors for cause. Instead, they assume that any juror at the margins of a cause challenge will ultimately be removed by an attorney, so courts refuse to grant cause challenges. In a system with dramatically fewer peremptory challenges, judges must ensure that jurors that cannot overcome their bias can be removed for cause. Courts should not simply accept a potential jurors self-reflection that they “can be fair.” If objective evidence suggests that fairness is in question, courts should excuse potential jurors, even if the juror believe they can put aside their significant biases.

¹⁸ See Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L & Pol’y. Rev. 149.

To effectuate meaningful change, trial judges must be trained on when cause challenges should be granted. Additionally, appellate courts should not routinely defer to trial courts in how voir dire is conducted: where trial judges actively “rehabilitate” potential jurors or refuse to grant cause challenges despite objective evidence of bias, appellate courts cannot shy away from reversing convictions. A fair trial process demands no less.

F. *Judiciary Training*

The obvious truth is that judges are the backbone of courtroom functionality. As the referee and the host, they witness the day-to-day performance of the courts. Accordingly, parity and equity must be modeled by judges and extend to every corner of the system.

To this end, judges and their staff must receive truly effective bias training. Such training should be based on the reality of the judges’ own courtrooms. It would include modules for more comprehensive attorney monitoring, allowing judges to referee any lawyer voir dire to ensure that interrogation is consistent with the purposes of voir dire and safeguards juror privacy, and as noted, when for cause challenges should be granted without attempts to artificially rehabilitate.

G. *Community Education Campaign*

As noted *supra*, jurors serve a purpose that goes far beyond our courtrooms. Jury service builds civic awareness, removes the cloud of mystery from the criminal justice system and encourages participation as a member of democratic society. Accordingly, as a general push the judiciary, in conjunction with community organizations, must embark on a public relations campaign to bring awareness to communities around the state about why jury service is of the utmost importance. With the help of participants in this Conference as well as their community partners, a public relations campaign should be waged to change the perception of jury service and to bring awareness to New Jerseyans of the foundational importance of this Sixth Amendment right.¹⁹

CONCLUSION

The ACLU-NJ appreciates the opportunity to provide these comments. As the facts of *State v. Andujar* made plain, the question of jury service extends not only to the effective performance of New Jersey’s courtrooms, but to the rights of its residents, rights that, unfortunately, are diminished when racial bias infects what should be a fair process. These infected places not only demean the just functioning of the law, but irrevocably damage the desire of the individual to fully participate in institutions. A failure to recognize the impact of these harms ignores the isolation of large swaths of people from systems that are supposed to protect and include them.

¹⁹ See, e.g., The Juror Project, at <https://www.thejurorproject.org>

We are grateful for the judiciary's continuing efforts to ensure that the justice system serves all who move through it equitably and for its commitment to reducing the harmful effects of bias.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Thompson', with a long horizontal flourish extending to the right.

Karen Thompson
Senior Staff Attorney