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AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

New Jersey

P.O. Box 32159
Newark, NJ 07102

Tel: 973-642-2086
Fax: 973-642-6523

info@aclu-nj.org
www.aclu-nj.org

KAREN THOMPSON
Senior Staff Attorney

973-854-1729
kthompson@aclu-nj.org

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VIA EMAIL: Comments.Mailbox@njcourts.gov

Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Hughes Justice Complex
P.O. Box 037
Trenton, New Jersey 08625-0037

**Re: Comments Regarding Proposed New *Voir Dire* Questions and
Supplements to the Model Jury Charges**

Dear Judge Grant:

On behalf of the American Civil Liberties Union of New Jersey ("ACLU-NJ"), I submit the following comments regarding proposed changes to *voir dire* questions and jury charges in support of the Supreme Court's ongoing efforts to support juror impartiality and to address unconscious bias within the criminal justice system.

The ACLU-NJ works to safeguard constitutional rights for all and repair those spaces where constitutional promises have often not been delivered, particularly within the criminal justice system. To that end, the ACLU-NJ works diligently to address disparities at every point of contact, from police stops and interrogations, to jury selection, to the rights of defendants, to prosecutorial misconduct and carceral abuses. We have appeared as *amicus curiae* in every level of court in New Jersey and submitted written comments on various topics, all in an effort to work both independently and with our many community partners to strengthen all of the promises enshrined to the people in our State and Federal Constitutions, including those guaranteeing the right to trial by an impartial jury.

The ACLU-NJ commends the Court's larger efforts and process to address equal justice in New Jersey's courtrooms. The ACLU-NJ hopes to provide additional input that may assist in aiding the long-term reduction of systematic bias against all who pass through the state's justice system.

We work within a legal structure that stretches towards equal justice despite origins informed by prejudice and oppression. Indeed, the root causes of bias are intractable beliefs that have molded this nation from its earliest days and, thus, also fashioned its justice system.¹ Undoing centuries of racial conditioning requires a remembering and accounting merely to *perceive* the impact in and on courtrooms. Judges and attorneys all harbor implicit bias²; however, jurors bring their own

¹ While the biases addressed in the proposal are not only race-based, and while issues of racial bias do not singularly belong to Black Americans, any examination cannot ignore the particular legacy of racial bias within the legal system in New Jersey towards Black people, exemplified by the fact that Black Americans make up less than 15 percent of New Jersey's population but more than 60 percent of the state's prison population. See The Sentencing Project, *State-by-State Data: New Jersey*, <https://www.sentencingproject.org/the-facts/#map> (last checked Mar. 11, 2021); The Fund for New Jersey, *Crossroads NJ: Criminal Justice Reform*, <https://www.fundfornj.org/crossroadsnj/reports/criminal-justice-reform?page=1> (last checked Mar. 11, 2021). This overrepresentation cannot be detached from detailed research showing implicit bias associations between being Black and the trait of criminality, being Black and being more prone to aggression than whites, and being Black and being more likely to be guilty of a crime. Jennifer K. Elek and Paula Hannaford-Agor, "Implicit Bias and the American Juror," COURT REVIEW: THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION 522, 117 (2015). Indeed, "blackness and criminality shaped racial identity [for both Black people and all other races] and racial oppression in modern America" and all of us have been taught to believe in "the ideological currency of black criminality." Khalil Gibran Muhammad, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME AND THE MAKING OF MODERN URBAN AMERICA*, 2-3 (2010). Whether conscious or not, biased interpretations of evidence predict guilty verdicts, which in turn results in real world harmful effects that specifically impact Black communities.

² See Judith Olans Brown *et al.*, *Some Thoughts About Social Perception & Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 Emory L.J. 1487, 1517 (1997) ("Of course judges, being human, are prone to the same prejudices as the rest of us. They too hear stories through a skewed cognitive filter . . ."); Theodore Eisenberg & Sheri Lynn Johnson,

layer of it to deliberations. In order to do more than merely seek justice, but fully obtain it, active measures are not only important but necessary. As a baseline, such effort signals an investment in awareness and remediation from the highest reaches. The Judiciary should be lauded for taking important first steps toward identifying and rooting out bias; but even more can be done.

Accordingly, the ACLU-NJ appreciates the rigorous substance already laid out by the Court, and respectfully suggests some additional changes to reduce the potential for a backlash effect. First, we recommend the court shift to open-ended *voir dire* questioning with ample space and time to reveal both overt and unconscious bias. Second, the Judiciary should set forth judges' explicit recognition of their own implicit biases, as well as actions an empaneled juror can take to manage unconscious bias. Third, we believe there should be multiple prompts throughout the duration of a case alongside the defining information contained in the initial video regarding what implicit bias is and how it impacts one's duties as a juror.

THE USE OF RIGOROUS VOIR DIRE QUESTIONING

“Asking a general question about impartiality and race is like asking whether one believes in equality for Blacks; jurors may sincerely answer yes, they believe in equality and yes, they can be impartial, yet [the same jurors] oppose interracial marriage and believe that Blacks are more prone to violence.” Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1675 (1985). The

Implicit Racial Attitudes of Death Penalty Lawyers, 53 DePaul L. Rev. 1539, 1555, n.8 (2004) (reporting that many of the capital defense attorneys tested for racial preference “were surprised at their own automatic preferences and, therefore, would not have previously realized that they should struggle against those preferences”); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L. REV. 2626, 2632-34 (2013) (comparing the triage performed by public defenders to that performed by emergency room personnel and suggesting that documented implicit racial bias in the latter influences the former in similar ways); Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DePaul L. Rev. 599, 617 (2009) (citing research indicating that implicit bias among prosecutors may lead to racial disparities in capital cases, and that unconscious bias may affect prosecutors even more than others).

challenge, then, is to ask questions that reach underneath the shallow answer to the true beliefs or the bias-infused idea, so as to ensure a neutral and fair arbiter.

Indeed, “[v]oir dire into racial bias can and should take the form of encouraging prospective jurors to think about racial bias in general . . . making race salient, whether through witness testimony or questions asked during voir dire, can inhibit the automatic associations that otherwise are likely to come into play when the defendant, the victim, or a witness is a member of a racially stereotyped group.” Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 UC Irvine L. Rev. 843, 870 (2015).³ Reaching under the shallow answer requires open-ended questions that encourage reflection and thought about the powerful influence of biases like race, class, sex, sexual orientation, gender identity or ability status. Open-ended questions function more powerfully than close-ended questions that may encourage the prospective juror to give the response they might believe as more politically/socially acceptable than one that is fully reflective of their own beliefs. Eliminating opportunities for jurors to mask their biases would result in more equitable end-results.

To that end, the ACLU-NJ suggests the follow question be specifically added to the open-ended questions already put forth by the Court:

You have just learned about the concept of implicit or unconscious bias. Not everyone agrees on the power of its influence or that they are personally susceptible to it. I’d like to get a sense of your reaction to the concept of unconscious bias and whether you believe it may influence you in your day-to-day decision-making. Let me start by asking for your reaction to learning about the idea of implicit, or subconscious, racial bias.

³ This sort of “stereotype threat” affects anyone who belongs to a negatively stereotyped group and thus using *voir dire* to probe around these sorts of socially fraught corners as broadly as possible can only be useful.

**JURY CHARGES MUST PROVIDE EXPLICIT GUIDANCE THAT
ALLOWS FOR BOTH JUDICIAL LEADERSHIP
AND JUROR SELF-AWARENESS REGARDING BIAS**

Studies show that individuals can control the behavioral expression of implicit biases in specific laboratory contexts if provided with a concrete strategy for bias reduction. Saaid A. Mendoza *et al.*, *Reducing the expression of implicit stereotypes: Reflexive control through implementation intention*, Personality and Social Psychology Bulletin, 36 512-523 (2010) Gollwitzer, & Amodio, 2010; Stewart & Payne, 2008). Unfortunately, those studies also show that strategies which put forward an extrinsic motivation in an individual to be non-prejudiced through external controls (*e.g.*, the language typical of jury instructions), produce *more* explicit and implicit prejudice than not intervening at all, ultimately failing to reduce and perhaps even exacerbating expressions of prejudice. Elek, at 118; Patricia G. Devine *et al.*, “The Regulation of Explicit and Implicit Race Bias: The Role of Motivations to Respond Without Prejudice, 82 J. PERSONALITY & SOC. PSYCHOL. 835 (2002).

Communications that foster internal, more egalitarian motivations may thus more effectively reduce both explicit and implicit expressions of bias. Lisa Legault, Jennifer N. Gutsell, Michael Inzlicht, *Ironic Effects of Antiprejudice Messages: How Motivational Interventions Can Reduce (but Also Increase) Prejudice*, PSYCH. SCI., 22, 1472-1477. Further, studies have also shown that when and where “individuals are held accountable for the decision-making process itself, they tend to think more deliberatively; when only held accountable for outcomes, they may be more likely to attempt to justify unjust decisions retrospectively.” See Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULLETIN 255 (1999).

Given this backdrop, it is of great importance that (a) judicial leadership sets a strong and explicit example of introspection regarding any bias examination; (b) that any potential backfire effects (resistance to an extrinsic motivation) are moderated by reducing external pressures to comply and promoting *intrinsic* motivations, and (c) that potential jurors are squarely focused on the process of deliberation. To that end, the ACLU-NJ recommends the additional following language for the “Preliminary Instructions to the Jury” Model Criminal Jury Charge (underlined and incorporated into the Court’s proposed language):

Our system of justice depends on the willingness and ability of judges like me and jurors like you to make careful and fair decisions. This is a difficult because of a universal challenge: we all have biases. Every one of us makes implicit or unconscious associations and assumptions and has biases of which we are not consciously aware. We each have our own stereotypes, prejudices, and fears.

These biases can influence how we categorize the information we take in. They can influence the evidence we see and hear, how we remember what we see and hear, and how we make decisions. And they can influence the “gut feelings” and conclusions we form about people and events. When we are aware of these biases, we can at least try to fight them. But we are often not aware that they exist.

Jurors have an obligation to judge facts and apply the law as instructed without bias, prejudice or partiality. For this reason, you are encouraged to thoroughly and carefully examine your own decision-making process for bias to ensure that the conclusions you draw are a fair reflection of the law and the evidence, and so as to not be affected by any bias during the trial and jury deliberations.

Please also listen to the other jurors during deliberations who may be from different backgrounds and who will be viewing this case in light of their own insights, assumptions, and even biases. Listening to different perspectives may help you to better identify the possible effects these hidden biases may have on decision-making.

Our system of justice relies on each of us to contribute toward a fair and informed verdict in this case. Working together, we can reach a fair result.

The ACLU-NJ also recommends the following change to the “Instructions After Jury Is Sworn” Model Criminal Jury Charge as follows:

The responsibility of all jurors is to reach a fair verdict based on the law as the judge explains it and on the evidence in the case. The Court’s goal in every jury trial is to seat jurors who will decide the case before them without prejudice or bias because under our Constitution everyone deserves a fair trial.

Jurors fulfill this responsibility by remaining impartial, or neutral, until the jury reaches a verdict. Accordingly, I ask you to please examine any reasoning you use during the duration of this case for possible bias by reconsidering your first impressions of the people and evidence in this case. Ask yourselves: is it easier to believe statements or evidence when presented by people who are more like you? If you or the people involved in this case were from different backgrounds—more conservative or liberal, more or less educated, richer or poorer, older or younger, or of a different sex, race, religion, sexual orientation or gender identity—would you still view them, and the evidence, the same way? Remaining impartial throughout the trial means ensuring that jurors are not affected or influenced by biases or any preconceived ideas about the case.

THE USE OF MULTIPLE PROMPTS THROUGHOUT A CASE

Raising implicit bias at different points in the proceedings will strengthen efforts to disentangle existing bias from the deliberative process.

With each introduction, the juror is provided an opportunity to consider the different ways in which bias may sway what is about to be or has been presented to them. By way of example, during *voir dire*, the prompt may awaken the juror’s personal relationship with bias and spawn self-awareness. During the jury charge, the prompt may bring consciousness as to how the juror is viewing the witnesses, the attorneys or the defendant.

Prodded again prior to deliberations, the juror may re-examine how bias might inform issues of witness probity or morality and what “short-hand” efforts may have informed the interpretation of evidence. Repetition, at the very least, creates a disruption, which makes the familiar shorthand of bias less of a steady thrum. Interruption to the mental habit creates space for observation of the behavior, which in turn may at least assist in diminishing any negative outcomes.

The ACLU-NJ appreciates the opportunity to provide these comments. 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 'Karen Thompson', with a long horizontal flourish extending to the right.

Karen Thompson
Senior Staff Attorney