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From: Leslie Ellis <leslie@thecaissagroup.com>
Sent: Wednesday, November 3, 2021 8:45 AM
To: Comments Mailbox
Subject: [External]Comments for the New Jersey Judicial Conference on Jury Selection

To Hon. Glenn A. Grant, the New Jersey Supreme Court, and those organizing the New Jersey Judicial Conference on Jury Selection:

I would like to submit comments for consideration at the Judicial Conference on Jury Selection. The subjects the Conference is tackling are critical to preserving an accessible and fair justice system, and I commend the New Jersey Supreme Court for looking closely and critically at the existing jury selection process and discussing ways to improve it.

Diversity among decision making groups is important and beneficial for many reasons, and juries are no exception. From a purely decision-making perspective, a large body of multidisciplinary research shows diverse groups simply make better decisions. Within the legal context, research shows racially diverse groups remember and discuss more evidence and make fewer factual errors in their deliberations. In addition, public perception of juries, trials, their outcomes, and the court in general are more favorable when juries are racially diverse. Unfortunately, multiple structural and human factors within the legal system result in decreased diversity and underrepresentation of large portions of the jury-eligible population.

One human factor has been the use of peremptory challenges to strike venire members of one race or gender (based on mostly false assumptions about the relationship between these demographics and legal decision making). Research shows counsel on both sides of the courtroom exercise peremptory challenges in unconstitutional ways and, unfortunately, *Batson v. Kentucky* and *J.E.B v. Alabama* and their progeny have been unsuccessful in stopping it. This has led to a longstanding debate about the elimination of peremptory challenges and, recently in Arizona, their elimination.

However, many structural points that are upstream in the jury selection process also result in reduced representativeness and diversity in the jury pool, albeit not intentionally. For example, inaccurate, outdated, and limited source lists, difficult-to-access summons procedures, inadequate juror pay, and burdensome jury duty procedures and service terms all work to restrict who is included in source lists, gets called for jury duty, and who can respond to the summons and report for jury duty in ways that disproportionately impact minority and women potential jurors. The result is a venire that starts out being unrepresentative of the population from which it was pulled and, particularly in New Jersey's case, counsel with enough peremptory challenges to either dramatically reduce or eliminate whatever diversity is left.

Another critical human factor that is important to consider in the jury selection process is the problem of bias, both explicit and implicit. Nothing gives a party the constitutional right to a representative jury (rather, *Batson* and *J.E.B.* are premised on the potential juror's right not to be discriminated against because of race or gender), but parties do have the constitutional right to an impartial jury. Voir dire is intended to uncover bias, and cause challenges are the primary tool to excuse jurors who express bias that they cannot put aside. Judges vary widely in how they exercise cause challenges. They have different thresholds for what constitutes explicit bias, and they vary in extent to which they attempt to rehabilitate jurors after expressing explicit bias. Recent research shows rehabilitation is not effective at mitigating explicit bias, despite judges and jurors' best intentions. Research also shows judges, like many people in many settings, rely on in accurate cues like confidence in determining how well those jurors can set aside their bias.

Implicit bias is very difficult to uncover during voir dire, in part because people are poor at self-diagnosing bias. Most people, including jurors, are quite unaware of what affects our decision making, and they cannot express in voir dire that of which they are unaware. Further, for several reasons many courts have moved toward more and more limited voir dire, often conducted mostly or all by the judge (as is the case in New Jersey). Research shows that these voir dire limitations severely restrict opportunities to uncover implicit bias. Further, research indicates that videos well-intended to increase awareness of implicit bias, such as the one developed and used in Washington State, are ineffective at mitigating implicit bias, and in fact might open the door to increased levels of implicit bias because jurors who have seen the video think they are now immune to whatever biases they may have previously had.

Expanded voir dire and limited rehabilitation are far better at identifying implicit bias that could affect a juror's ability to be impartial. Many judges fear counsel will take advantage of expanded voir dire and venture into inappropriate subjects but, with education and training, counsel can be very effective at asking relevant and direct questions targeted at identifying bias without going out of bounds. Additionally, juror questionnaires (ideally distributed and collected in advance of voir dire) provide a valuable opportunity to identify areas of both explicit and implicit bias that inform counsel and the court on what to ask the juror during voir dire. Jurors report they find online juror questionnaires easy to manage, and many jury management offices currently have the tools, or can modify the tools they already have, to accomplish this efficiently. Juror questionnaires provided to counsel in advance of voir dire also preserve time, effort, and resources for jurors who have already been qualified, prevent undue burden on those who are easily identified as unable or unqualified to serve, and would leave more time for expanded voir dire.

Because of the reasons discussed above, some number of peremptory challenges should be preserved as a tool to remove jurors with explicit or implicit bias that would prevent them from being impartial from the venire. This can be balanced with the need to preserve the venire's diversity by looking at the number of peremptory challenges granted to each party.

A few examples of effective upstream practices that improve diversity are, 1) improved and expanded source lists and summonses procedures, as Connecticut is attempting, 2) measures to reduce the negative impact of serving on under-represented communities through efforts like shorter service terms, better pay, eJuror systems that work on mobile phones, or being able to call in to check on service status, 3) virtual jury selection that includes more people in the selection process (and, in fact, judges have reported greater venire diversity with virtual jury selection compared to in-person jury selection), and 4) expanding the use of juror questionnaires, completed in advance of trial, that ask about hardship, schedule conflicts, knowledge of the parties, and a short list of case-specific questions that could identify in advance jurors who would be excused for cause, if stipulated to by counsel.

Additional improved courtroom practices could include, 1) expanded judge- and attorney-conducted voir dire and limited rehabilitation, which would permit counsel to identify actual bias rather than presumed bias based on race or gender, and would allow jurors to more freely admit they would have difficulty setting aside biases, 2) permitting mini- or full opening statements before voir dire, which would improve jurors' ability to identify relevant biases that would impact their ability to be impartial, and 3) changes to how *Batson*-like challenges are handled, as Washington and California have recently done, which would make it easier for judges to grant a *Batson* challenge. All of these are additional critical steps at preserving diversity in petit juries.

Respectfully submitted,
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L. Ellis & S. Diamond, "Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy" *Chicago-Kent Law Review* 78:1033 (2003)

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