

THE USE OF PEREMPTORY CHALLENGES

The goal in jury selection is to obtain persons whom will be fair and impartial, will decide the case based solely on the evidence they will hear in the courtroom and will follow the instructions given by the judge as to the law. To accomplish that purpose, the court conducts a voir dire of the panel as a whole and of each person. If the court determines that any particular person cannot be fair or impartial or cannot decide based solely on the evidence presented or follow the court's instructions as to the law, that person is excused for cause.

Besides excusing a prospective juror for cause, N.J.S.A. 2B:23-13 authorizes the parties to exercise peremptory challenges:

- a. In any civil action, each party, 6.
- b. Upon an indictment for kidnaping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree as defined by subsection b. of N.J.S.2C:21-1, or perjury, the defendant, 20 peremptory challenges if tried alone and 10 challenges if tried jointly and the State, 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded the defendants if tried jointly. The trial court, in its discretion, may, however, increase proportionally the number of peremptory challenges available to the defendant and the State in any case in which the sentencing procedure set forth in subsection c. of N.J.S.2C:11-3 might be utilized.

c. Upon any other indictment. defendants. 10 each; the State, 10 peremptory challenges for each 10 challenges allowed to the defendants. When the case is to be tried by a jury from another county, each defendant, 5 peremptory challenges, and the State, 5 peremptory challenges for each 5 peremptory challenges afforded the defendants.

In 1986 the Supreme Court in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) held that the Equal Protection Clause prohibits prosecutors from using peremptory challenges to remove jurors based solely on their race or on the assumption that black jurors are incapable of impartially weighing the State's evidence against a black defendant. In Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), Batson was extended to civil cases holding that state action exists when private litigants exercise peremptory challenges in a discriminatory manner. We should also recognize that jurors are injured when they are excluded by improper use of peremptory challenges in the courthouse where society expects justice. In J.E.B. v. Alabama, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), the Supreme Court extended Batson to include gender-based peremptory challenges.

In State v Gilmore, 103 N.J. 508 (1986), the New Jersey Supreme Court held that the discriminatory use of peremptory challenges violated the New Jersey Constitution because Article I, sections 5, 9, and 10 guarantee the - right to trial by a jury drawn from a representative cross section of the community." It found that the New Jersey Constitution provides greater protection in that area than does the U. S. Constitution. The Court established a three-step test for determining whether peremptory challenges were used in a

discriminatory manner, and changed the nature of the peremptory challenge since the party making the challenge may be asked to articulate reasons for those challenges.

Exercising peremptory challenges is a negation of the goal of obtaining a jury that is fair and impartial, that will decide the case based on the evidence in the courtroom and follow the instructions of the judge as to the law to be applied. Recognize that everyone is a product of their birth, upbringing, environment, education and life experiences, the issue in jury selection is whether the individual can set aside any preconceived notions the person may have and decide the case based solely on what the person will hear in the courtroom and can follow the judge's instructions as to the law to be applied. If the person can meet that test, then there should exist no basis to challenge that juror for cause or to arbitrarily eliminate that juror from the jury by exercising peremptory challenge.

There is no constitutional right to peremptory challenges. Swain v. Alabama, 380 U.S. 202, at 219 85 S.Ct. 824, 13 L.Ed.2d 759. See also Stilson v. U.S., 250 U.S. 583, 40 S.Ct. 28, 63 L.Ed. 1154 (1919): "There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured. Peremptory challenges are a creature of the common law and are now governed by statute. Historically, the use of peremptory challenges had some justification in the limited number of persons eligible for jury duty."

In 1995 our legislature has broadened the qualifications for jury service and has substantially enlarged the pool of potential jurors. Exemptions from jury service have been repealed although grounds for excuse exist for certain limited hardship circumstances. With the

striking down of artificial barriers to jury service and eliminating exemptions from jury service, jury pools have been enlarged to include representation by all members of the community. N.J.S.A. 2B:20-2 now provide that the names of persons eligible for jury service shall be obtained from a merger of these lists: registered voters, licensed drivers, filers of state gross income tax returns and filers of homestead rebate application forms. The qualifications of jurors are contained in N.J.S.A. 2B-20-1;

Every person summoned as a juror:

- a. shall be 18 years of age or older;
- b. shall be able to read and understand the English language;
- c. shall be a citizen of the United States;
- d. shall be a resident of the county in which the person is summoned;
- e. shall not have been convicted of any indictable offense under the laws of this State, another state, or the United States;
- f. shall not have any mental or physical disability which will prevent the person from properly serving as a juror.

With the broadening of representation in jury pools, the historical basis for peremptory challenges has lost its justification. By allowing the use of peremptory challenges, the cross section of the jury can be distorted. This could affect the perception of the public as to the fairness of the justice system. Broad societal participation on juries is critical to maintaining public confidence in the fairness of trials. If the jury comprises a cross section of the community, randomly chosen, acceptance of verdicts and of the justice system will be enhanced. It should be noted that England eliminated the use of peremptory challenges by prosecutors in 1825 (Juries Act 1825 § 29). The use of peremptory challenges by the defense was reduced from seven to three in 1977 (Criminal Law Act of 1977, 43) and finally totally eliminated in 1988 (Criminal Justice Act of 1988) because defense attorneys were misusing the system to "stack" juries with individuals who favored their side.

Using peremptory challenges impacts upon the citizens whom we call to jury service. When eliminated with no reason or when they see others being eliminated by exercising peremptory challenges, questions arise in their minds about both the fairness of the justice system and the reason for the inconvenience we cause them when we require them to report for jury duty.¹

The current use of peremptory challenges often runs counter to the goal of having impartial jurors. Courts should be ever mindful that the purpose of voir dire is to get jurors who will be fair and impartial, will decide the case based on the evidence produced in the court room and will follow the court's instructions as to the law to be applied to the facts as found by the

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My Personal Experience as a Juror

On January 10, 1996 I reported for jury duty. I believe I was the first state court judge in New Jersey to be called under the amended statute listing those eligible for jury duty. I was on a panel sent out to a criminal court and was in the first round of names called to be seated in the jury box. The Judge conducted voir dire and when my turn came I explained that I was a judge in Essex County and was appearing in response to a jury notice I had received. After the Judge completed the voir dire, the attorneys began exercising their peremptory challenges. The Assistant Prosecutor excused me from the panel. I reported back to jury control but was not sent out again. Subsequently, I was told by the Judge who was handling the criminal case that the Assistant Prosecutor had peremptorily excused me because she always was late in coming to court and was concerned that I might report her to the Prosecutor.

Subsequent to my retirement from the bench in 1999, I received another notice to report for jury duty. I appeared as required and was eventually sent with a panel to hear a civil malpractice case. I was once again selected to be seated as a juror. In introducing the jurors to counsel, the Judge told the court room that I was the recently retired Assignment Judge of the county. This time I was not excused and was able to sit through the trial and subsequent deliberations. Because the Judge had disclosed that I was a former judge I told my fellow jurors that I had no more expertise in deciding the case than they did, that I would be the last to speak in deliberations, if at all, and the last to vote so that no one would be influenced by my participation. I was very impressed with how the jurors approached their task and the quality of their discussion during deliberation. We rendered a verdict.

jury. The elimination off peremptory challenges should come with a reexamination of the voir dire being conducted by courts. Courts must be more cognizant of the need for more meaningful voir dire. Programs on conducting voir dire should be part of judicial education and training. In addition, counsel should be encouraged to provide the court with additional questions for the court to include in its voir dire of potential jurors. Using meaningful voir dire should go a long way to assuring that persons selected as jurors will meet the goal of each litigant receiving a fair trial.

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ALVIN WEISS

(A.J.S.C. Ret.)