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Supreme Court Rules Committee
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Dear Hon. Joseph G. McGraw and Members of the Committee on Equality,

I am writing in opposition to the proposed changes to Illinois Supreme Court Rule 434. As we have done for years, under Batson v. Kentucky[i], courts, prosecutors and private attorneys have engaged in Batson hearings when it was alleged that either party was dismissing a juror for an improper reason. This has been well settled law and practiced in all of our counties. This rule appears to add more rules and regulations to this practice.

First, the amendments to this Supreme Court Rule now creates an 'objective observer' standard. The "objective observer" is defined as a person that is "aware that implicit, institutional, and unconscious biases, have resulted in the unfair exclusion of potential jurors." This definition alone begins with the premise that the observer is not objective but rather aware of biases. Thus, it is my humble opinion that we are creating a flawed system of review.

The definition goes on to describe that "[t]he court shall evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances. If the court determines that an 'objective observer' **could view** any of the protected classes listed in Rule 434(d)(1) above as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination and shall explain its ruling on the record." (Emphasis added.) If implicit, institutional, and unconscious biases are as pervasive as this proposed amendment seems to imply, then it stands to reason that peremptory challenges will be denied at an alarming rate despite the rationale reasons given by qualified and ethical attorneys.

If the above argument has merit, then we must look towards the end result. Due to the unconscious biases, would we be in a position that we can no longer know the race, gender, religion, or the sexual orientation of the proposed juror? How can we possibly have purposeful jury selection if we either have the broad assumption of the pervasiveness of the biases or that the only solution is to never see the jury so that the implicit or unconscious biases are not activated?

Second, I question whether all of the "presumptively invalid" reasons laid out in subsection (d)(6) would aid in creating an unbiased jury. The purpose of voir dire is to determine who can decide the facts of a case without preconceived biases. Many of the listed "presumptively invalid" reasons are in everyday practice and are actually ethically valid attempts to ferret out potential biased jurors.

Generally, the authors of this proposed amendment are themselves showing a bias that potential jurors who may be objected to because of one of these reasons must be in a protected class. Isn't it in and of itself a bias that only protected-class people express distrust of law enforcement? Don't we make a bias assumption that only protected-class women have children out of wedlock? Will we not be showing our own bias to think that only protected-class people receive state benefits?

Indeed, people both in and out of the protected categories listed in subsection (d)(1) may have had prior contact with police, they may distrust law enforcement. Both protected-class citizens and nonprotected-class citizens may live in a high crime neighborhood. Women from both protected and non-protected categories have children out of wedlock. To be sure, this proposal will create and find bias where there is none.

But more than that, many of the specific presumptively invalid reasons are problematic. For example:

- Subsection (d)(6)(ii) would make it improper to strike a venire person because that potential juror is "expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling." As an example, this potential juror says that a police officer witness would start with less credibility when testifying. That would be permitted if this amendment passes.

  But what of the potential juror who says a police officer would have more credibility? Those potential jurors have routinely been excused from a jury panel for decades because they would start by giving one class of witnesses – police officers – a higher degree of credibility before the trial even begins. That practice, employed by courts for years, is proper. The goal is a jury starting with an even playing field.

  The proposal in (d)(6)(ii) does not level the playing field. It dramatically tilts it toward one side, and therefore moves the needle away from a fair jury to a more-biased trier-of-fact.

- Similarly, subsection (d)(6)(iii) would make presumptively invalid a reason that a potential juror has a close relationship with someone who has been convicted of a crime. In other words, prosecutors will not be able excuse a potential juror who is a family member of someone who has been convicted of a crime, a person who may begin jury service with a strong bias against the prosecution.

- What valid purpose is served by subsection (d)(6)(viii), disallowing a reason that someone comes to court for potential jury service not properly dressed? If a venire person appears for jury service in a ripped T-shirt and cut-off jeans with holes, isn't it a valid assumption that can be made by a lawyer that such a person does not care for rules and is less likely to uphold the law as it is written?

Also problematic is subsection (d)(7), which sets a standard that if a potential juror is sleeping, inattentive, staring, failing to make eye contact, or exhibited a problematic attitude, body language, or demeanor, that conduct is only a valid reason for excusing the potential juror if a second person observes that conduct. First, consider the example where during voir dire, the criminal defense attorney witnesses a potential juror rolling his eyes when the judge explains that it cannot be held against a defendant that the defendant does not testify, or put on any witnesses at all for that matter. The defense attorney brings that observation to the court. However, no one else in the courtroom sees that eye-rolling. This rule would not allow for the defense attorney to have this potential juror removed from the panel, because the defense attorney was the only person who saw the behavior. Such does not make sense.

Furthermore, it has long been a standard in a criminal court of law that a defendant can be convicted of a crime upon the testimony of only one witness. There does not need to be corroboration as long as the trier of fact is convinced beyond a reasonable doubt of the credibility of the witness and that the evidence shows guilt. Yet we are setting an even higher standard for jury selection. A trial court judge does not get to make a credibility determination of the attorney's observation in the above example and remove the juror because there is no corroborating witness to the eye-rolling. Setting a higher standard of proof for jury selection than for conviction of a crime is problematic.

The proposed changes to Supreme Court Rule 434 appear to be a proposed solution to a problem that does not exist. We have put more scrutiny on law enforcement officers' actions now because, for years, police worked independently and without oversight and behind curtains. Jury selection is different. During jury selection, there has always been and will continue to be an independent arbiter – the judge – who is in the courtroom and is in the best position to assess what goes on during jury selection. Trying to regulate what happens during jury selection has always been within the province of the trial court, to be reviewed if requested by the appellate court system. That system has not proven problematic. There is no reason to change it.

Rather, this proposed amendment appears to target prosecutors and does not serve the ends of which it attempts to describe. Instead, it is a blanket statement that the criminal justice system, despite those that have spent years ethically and honorably fighting for justice, is so flawed that the system can no longer trust our attorneys and judges to follow their ethical oaths.

Thank you to the members of the Committee for working to ensure that our courts have equality for all within them. I promised the people of Kane County that I would fight for Criminal Justice that is guided by public safety. While I appreciate what this amendment is attempting to do, it appears to me that this will cause our "truth-seeking process" to become a farce.

Sincerely,

Jamie L. Mosser

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[i] Batson v. Kentucky, 476 US 79, 1986