
IN THE
Supreme Court of New Jersey

No. 54,075

STATE OF NEW JERSEY,

Plaintiff-Respondent

v.

LLOYD FULLER,

Defendant-Petitioner.

ON A PETITION FOR CERTIFICATION AND APPEAL AS OF RIGHT FROM A FINAL DECISION OF THE APPELLATE DIVISION, SUPERIOR COURT, NO. A-4655-00T4 (SAT BELOW: HON. DOROTHEA WEFING, J.A.D. HON. JOSEPH LISA, J.A.D. AND HON. JOSE FUENTES, J.A.D.)

ON APPEAL FROM A FINAL JUDGMENT OF THE SUPERIOR COURT, LAW DIVISION, ESSEX COUNTY, NOS. 2000-10-2901, 1999-09-2896 (SAT BELOW: HON. JOSEPH CASSINI, III)

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of New Jersey (ACLU-NJ) is a nonprofit, nonpartisan organization with approximately 8000 members. It is the state affiliate of the national American Civil Liberties Union, an organization of nearly 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution. Since its founding in 1920, the ACLU has appeared before numerous courts in cases involving the right to equal protection and freedom of religion, both as direct counsel and as amicus curiae, and the ACLU-NJ in particular has appeared in New Jersey courts in many such cases. E.g., South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elem. Sch., 150 N.J. 575 (1997); State v. Szemple, 135 N.J. 406 (1994); Ran-Dav's County Kosher, Inc. v. State, 129 N.J. 141 (1992); Elmora Hebrew Center, Inc. v. Fishman, 125 N.J. 404 (1991). This case presents significant issues of equality and religious freedom. Its proper resolution is therefore a matter of direct concern to the ACLU-NJ and its members.

STATEMENT OF CASE

Amicus relies on the Statement of the Procedural History and Statement of Facts of Defendant-Appellant Lloyd Fuller.

SUMMARY OF ARGUMENT

The exercise of peremptory challenges based on the actual or perceived religious beliefs or affiliation of the potential juror violates both the United States and New Jersey Constitutions. (Part I). In this case, the exercise of peremptory challenges by the prosecutor, ostensibly based upon his perception that the venirepersons were "demonstrative about their religion," amounted their removal based upon their religious beliefs or affiliation. (Part II). It is particularly offensive to constitutional principles for a prosecutor to draw superficial conclusions about the venireperson's religiosity based on the outward appearance or dress, and legitimating such assumptions by permitting peremptory challenges would lead to discrimination against identifiable religious minorities. (Part II.A.) And while it is normally permissible for a party to exercise a peremptory challenge based on profession or occupation, in this case it is clear that the prosecutor's challenge was based not on occupation but on the fact that the potential juror had unspecified religious beliefs. (Part II.B.)

ARGUMENT

This case is less about identifying individuals who are "demonstrative about their religion" as it is about identifying individual religions that are considered "demonstrative," at least in the perception of the prosecutor exercising a peremptory

challenge. Because such distinctions in the exercise of peremptory challenges violate both the United States and New Jersey Constitutions, the judgment of conviction in this case should be vacated and the matter remanded for new trial.

I. PEREMPTORY REMOVAL OF A POTENTIAL JUROR ON ACCOUNT OF RELIGION VIOLATES BOTH THE UNITED STATES AND NEW JERSEY CONSTITUTIONS.

It has at this point become canonical that the federal Equal Protection Clause forbids exercise of a peremptory challenge to remove a potential juror based on membership in a suspect classification. Batson v. Kentucky, 476 U.S. 79 (1986) (forbidding peremptory challenge based on race); Hernandez v. New York, 500 U.S. 352 (1991) (ethnicity); J.E.B. v. Alabama, 511 U.S. 127 (1994) (gender).

Similarly, this Court has also held that "Article I, paragraphs 5, 9, and 10 of the New Jersey Constitution forbid a prosecutor to exercise peremptory challenges to remove potential petit jurors who are members of a cognizable group on the basis of their presumed group bias." State v. Gilmore, 103 N.J. 508, 517 (1986) (striking down use of peremptory challenges based both on race and religion). "Read together, these provisions guarantee that in all criminal prosecutions the defendant is entitled to trial by an impartial jury without discrimination on the basis of religious principles, race, color, ancestry, national origin, or sex." Id. at 524 (emphasis added). Although

concurring with Batson and its progeny in their results, Gilmore's independent analysis under the state constitution announces an arguably broader rule of "representative cross-section," applicable "not merely to methods of selection of the jury venire but as well to methods of selecting the petit jurors from the jury venire, and so to the stage of exercising challenges for cause and peremptory challenges." Gilmore, 103 N.J. at 526-27. Compare Holland v. Illinois, 493 U.S. 474 (1990) (Sixth Amendment to U.S. Constitution requires venire panel to be comprised of fair cross-section of community, but not petit jury).

It is also essential to note that the constitutional proscription against use of discriminatory peremptory challenges derives not only from the due process and equal protection rights of the litigants, but also from the constitutional interests of the potential juror. As noted by the United States Supreme Court in J.E.B. v. Alabama:

We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.

511 U.S. at 128. Similarly, the Court noted in Georgia v. McCollum, that:

denying a person participation in jury service on account of his race unconstitutionally discriminates against the excluded juror. While an individual juror does not have a right to sit on any particular petit jury, . . . he or she does possess the right not to be excluded from one on account of race. Regardless of who invokes the discriminatory challenge, there can be

no doubt that the harm is the same -- in all cases, the juror is subjected to open and public racial discrimination.

505 U.S. 42, 44 (1992) (internal citations omitted; emphasis added). Accord, Powers v. Ohio, 499 U.S. 400 (1991); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991) (in civil trial, exclusion on account of race violates prospective juror's equal protection rights).

Especially because a potential juror's rights, independent of the defendant, are at issue, Amicus ACLU-NJ respectfully disagrees with Judge Wefing's concurring opinion, which argues that it is unnecessary to consider the religious freedom issues implicated in this case. State v. Fuller, 356 N.J. Super. 266, 282-86 (2002) (Wefing, J.A.D., concurring). Because the venireperson is, as a practical matter, in no position to assert his rights,¹ the courts should be especially

¹ In granting criminal defendants standing, under federal law, to assert the rights of excluded jurors, the United States Supreme Court observed:

The barriers to a suit by an excluded juror are daunting. Potential jurors are not parties to the jury selection process and have no opportunity to be heard at the time of their exclusion. Nor can excluded jurors easily obtain declaratory or injunctive relief when discrimination occurs through an individual prosecutor's exercise of peremptory challenges. . . . And, there exist considerable practical barriers to suit by the excluded juror because of the small financial stake involved and the economic burdens of litigation. The reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights.

Powers, 499 U.S. at 414-15.

assiduous in doing so on their own initiative, especially when "discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' Rose v. Mitchell, 443 U.S. 545, 556 (1979), and places the fairness of a criminal proceeding in doubt." Powers v. Ohio, 499 U.S. at 411. The stakes in this case, therefore, go beyond the individual interests of the defendant, since "The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders." J.E.B., 511 U.S. at 140.

Although the United States Supreme Court has not had the occasion to address the specific issue of whether the federal Equal Protection Clause prohibits exercise of a peremptory challenge against a venireperson on account of religion, it is beyond dispute that religion constitutes a suspect classification that triggers strict scrutiny of government action based upon that classification. E.g., Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993). "Just as we subject to the most exacting scrutiny laws that make classifications based on race . . . so too we strictly scrutinize governmental classifications based on religion." Board of Education of Kyrias Joel v. Grumet, 512 U.S. 687, 714 (1994) (quoting Employment Division, Department of Human Resources v. Smith, 494 U.S. 872, 886, n.3 (1990)); see also, Larson v. Valente, 456 U.S. 228 (1982) (under Establishment and Free Exercise Clauses, law that differentiates among

religions must be invalidated unless it is justified by a compelling governmental interest).

Because religion is undisputedly among those classes that receive heightened, and indeed strict scrutiny under the federal Equal Protection Clause, it follows inexorably that it is included among those classes against whom a peremptory challenge may not be constitutionally exercised (absent a situation specific reason for doing so). Indeed, in J.E.B., the Court applied the general proposition that the rationale of Batson regarding race-based challenges logically extends to all classifications that receive heightened scrutiny under federal constitutional jurisprudence.² “[S]hort of overruling a decade of cases interpreting the Equal Protection Clause, the result we reach today is doctrinally compelled.” 511 U.S. at 141 n.12. “[G]iven the Court's rationale in J.E.B., no principled reason immediately appears for declining to apply Batson to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause.” Davis v. Minnesota, 511 U.S. 1115 (1994) (Thomas, J., dissenting from denial of certiorari).³

² Indeed, J.E.B. extended the Batson rationale to gender, which receives only intermediate scrutiny under federal equal protection analysis. E.g., Mississippi University for Women v. Hogan, 458 U.S. 718 (1982). It can therefore be argued that, a fortiori, religion must be included within the forbidden classifications, since it triggers the even higher standard of strict scrutiny under the Equal Protection Clause.

³ See also, United States v. Somerstein, 959 F. Supp. 592, 595 (E.D.N.Y. 1997) (“Batson applies to religious classifications such as persons of the Jewish faith”); State v. Purcell, 199 Ariz. 319, 326-27, 18 P.3d 113, 12-21 (2001) (applying Batson and

Furthermore, the New Jersey Constitution's equal protection standard is "more stringent" in its protections than its federal counterpart. McCann v. Clerk of Jersey City, 167 N.J. 311, 326 (2001). "We have rejected the federal multi-tiered approach in favor of a less rigid balancing approach in which we consider 'the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.'" Id. (quoting Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985)). Balancing these three factors results in an even more compelling conclusion that peremptory challenges may not be exercised on account of religion: (1) the affected right of freedom of worship is fundamental in nature, (2) exercise of a peremptory challenge based upon religion or religious affiliation results in a form of open and public discrimination that intolerably intrudes upon the right of

J.E.B. to religion but finding that peremptory challenge exercised because of specific beliefs, not religious affiliation); People v. Martin, 64 Cal. App. 4th 378, 75 Cal. Rptr. 2d 147 (1998) (same); State v. Hodge, 248 Conn. 207, 245, 726 A.2d 531, 553 ("Absent a showing that the holding of J.E.B. is not logically applicable to religion, we conclude that the equal protection clause of the fourteenth amendment to the United States constitution prohibits the exercise of a peremptory challenge to excuse a venireperson because of his or her religious affiliation"), cert. denied, 528 U.S. 969 (1999). But see, State v. Davis, 504 N.W.2d 767 (Minn. 1993) (declining to extend Batson to exercise of peremptory challenge on Jehovah's Witness), cert. denied sub nom. Davis v. Minnesota, 511 U.S. 1115 (1994); Casarez v. State, 913 S.W.2d 468 (Tex. Ct. Crim. App. 1995) (reversing prior opinion on rehearing and finding that interests served by system of peremptory challenges were sufficiently great to justify state's decision to exclude persons on the basis of their religious affiliation).

religious freedom, and (3) there is utterly no public need for restricting jury service based on religious affiliation of belief, except perhaps in the case of a situation-specific circumstance, not present here, in which specific religious attributes may interfere with providing a fair and impartial trial.

II. THE PEREMPTORY CHALLENGES EXERCISED IN THIS CASE AMOUNTED TO SELECTIVE DISCRIMINATION BASED ON RELIGIOUS AFFILIATION AND ON THE FACT THAT THE POTENTIAL JURORS HAD UNDETERMINED RELIGIOUS BELIEFS.

The result in this case may not depend so much on the abstract proposition of whether exercise of a peremptory challenge based on religion is unconstitutional, but rather on whether the mechanism for invoking peremptory challenges at issue here amounts to a proxy for discriminatory selection based upon religion or religious affiliation. In this regard, Justice Ginsburg has noted "two key observations" that may explain why this issue has not arisen in the past with greater frequency: "Religious affiliation (or lack thereof) is not as self-evident as race or gender; (2) Ordinarily . . . , inquiry on voir dire into a juror's religious affiliation and beliefs is irrelevant and prejudicial, and to ask such questions is improper." Davis v. Minnesota, 511 U.S. 1115 (1994) (Ginsberg, J., concurring in denial of certiorari, quoting State v. Davis, 504 N.W.2d 767, 771-72 (Minn. 1993)) (internal citations omitted). Although, as a

result, religious affiliation or religiosity may not be generally knowable characteristics with regard to all or most venirepersons, the record in this case demonstrates that they can be knowable with regard to certain discrete denominations. Here, two empirical observations permitted the prosecutor to draw such conclusions: (1) outward appearance and (2) occupation. Because these two criteria involve distinct analyses, Amicus addresses them separately.

A. Identifying a Potential Juror as "Demonstrative" about His Religion on Account of His Dress Discriminates on the Basis of Religious Affiliation.

In addition to the Equal Protection Clause that undergirds the federal decisions in Batson and J.E.B., and the requirement of a fair and impartial jury chosen without discrimination imposed by Article I, ¶¶ 5, 9 & 10 of the New Jersey Constitution, both the Establishment Clause and the Free Exercise Clauses of the United States Constitution, and Article I, ¶ 4 of the New Jersey Constitution, forbid the creation of sectarian preferences, in which one denomination is either given better or worse treatment in relation to any other. E.g., Larson v. Valente, 456 U.S. 228 (1982) (federal constitution); Schaad v. Ocean Grove Camp Meeting Association, 72 N.J. 237 (1977) (N.J. constitution).

Such a denominational preference (or discrimination) need not literally name in haec verba the religious sect that is

the recipient of discriminatory treatment. It is sufficient that the government procedure or mechanism at issue effectively leads to de facto distinctions based on religious denomination. In Larson, for instance, a state charitable solicitation law exempted from registration requirements only those religious organizations that receive more than half of their total contributions from their own members or affiliated organizations. Although superficially no particular denomination was preferred or burdened, the Court quickly concluded that this statutory scheme created a denominational preference in favor of more established churches, and against newer denominations, and thereby rejected the contention that the rule was one of neutral application that merely had a "disparate impact" on certain sects. 456 U.S. at 244-48 & n.23. Larson therefore applied the strict scrutiny test reserved under federal jurisprudence for suspect classifications, and struck down the state law as violative of the religion clauses of the First Amendment.

A similar mechanism for separating out certain religious denominations, but not others, for special treatment is at work in this case. The prosecutor's own explanation for removing Juror No. 4, "M.S.," from the petit jury was based on the venireperson's dress, and his name:⁴

And [M.S.], the gentleman who came in wearing head to

⁴ Although it did not include the juror's full name in its opinion, the Appellate Division concurred with the prosecutor's assumption that "the full name of M.S. is a Muslim name." State v. Fuller, 356 N.J. Super. 266, 276 n.1 (App. Div. 2002).

toe black and a skull cap is obviously a Muslim.

He [M.S.] was -- I'm not really sure what particular name you give the garb,⁵ but he was wearing a skull cap or a rather long outer garment.

And the other juror was, apparently, Muslim, I would say, based upon his dress and the name, if I'm not mistaken.

Based only upon his dress and his name, therefore, not only did the prosecutor conclude that the venireperson was Muslim, but that he was "demonstrative about his religion," and for that reason removed him from the jury.

In this case, outward appearance operates as a thinly disguised proxy for religious affiliation. If allowed to stand, this basis for removing a juror will have a pernicious effect on discrete and identifiable religious denominations, who are recognizable by their attire or their name. A partial list of other examples in which religious affiliation can be surmised by dress can be drawn from common knowledge:

- Sikhs, who wear a turban
- Observant Jewish men, who wear a yarmulke
- Muslim women, who wear the hijab, or scarf
- Hasidic men, who wear a kapote or bekeshe (long black coat or caftan) and a streimel (black hat)
- Amish, who wear plain dark colored clothes with no lapels or buttons.

The use of names can also provide a basis upon which to identify members of certain religious denominations. In addition

⁵ The garment that Juror No. 4 apparently wore was either a thobe or a jilbaab.

to the example in this case, in which the prosecutor concluded that Juror No. 4's name sounded "Muslim,"⁶ it is also well-known that members of the Sikh religion all have "Singh" as some part of their name. Moreover, the process by which members of the Jewish faith might be identified by their name has a long (and often unhappy) history. Thus, the prosecutor's methodology of using outward appearance and name to identify a venireperson's religious affiliation singles out certain religious minorities for special scrutiny and treatment.

The prosecutor's purported justification for exercising the peremptory challenge was that Juror No. 4 was "demonstrative about his religion," which he argued, and which the Appellate Division accepted, was distinguishable from religious affiliation itself. This distinction is too evanescent and malleable to be legally tenable. If by "demonstrative" the prosecutor meant to suggest that the venireperson exhibited a depth of religiosity over and above that which might customarily be expected of an "ordinary" believer, then the immediate question arises as to what baseline level of demonstrated religious belief the prosecutor would deem to be sufficiently innocuous to pass without objection. Does a Roman Catholic who wears a crucifix or

⁶ Simply because a name is Arabic in origin does not itself give reliable evidence that the person is Muslim, since the majority of Arab Americans in the United States are Christian. It is possible, however, that the prosecutor combined an Arabic sounding name with the fact that Juror No. 4 was African-American to reach what, at least in his mind, may have been a more reliable conclusion that he was an adherent of Islam.

a Protestant who wears a cross on their neck exceed a baseline level of religiosity that, presumably, the vast majority of citizens who have religious beliefs possess? If the answer to this question is "yes," then the "demonstrative about their religion" qualification would require huge swathes of potential jurors to be excised from the venire pool. And if the answer to this question is "no," then the only explanation can be that such "acceptable" demonstrations of religiosity do not deviate sufficiently from the prosecutor's own subjective scale of social and cultural norms to rise to the level of "demonstrative." Either alternative raises grave constitutional concerns.

Moreover, the application of the "demonstrative about their religion" test requires the prosecutor to inject into the inquiry his own personal understanding of what "conventional" displays of religion might entail, with regard to a number of diverse religious denominations about which he could not possibly have a complete understanding. Many of the practices described above are an intrinsic part of the particular religion, adhered to by such a large majority of its members that they could not accurately be used to measure relative depth of religious commitment. All Sikh men wear turbans, and the vast majority of Muslim women wear the hijab, as an irreducible minimum requirement of their faith. The fact that they adhere to these practices is not evidence that they are "demonstrative" when compared to other Sikhs or Muslims, but rather that the religions themselves to which they adhere engage in practices that attract

the attention of many. The inquiry therefore reduces to one of religious affiliation. And even if, hypothetically, the prosecutor did act from a position of perfect knowledge with regard to the religious laws and customs of all denominations, so that he could assess whether an venireperson was being individually "demonstrative" in relation to other co-religionists, application of such religious norms by a state official would itself raise Establishment Clause concerns. See, Ran-Dav's County Kosher, Inc. v. State, 129 N.J. 141, 162-64 (1992) (state may not be involved in enforcement and interpretation of religious doctrine).

The inquiry into whether venirepersons are "demonstrative about their religion" due to their outward appearance therefore quickly reduces to an inquiry into whether certain minority religious denominations are themselves "demonstrative" when compared to the majority culture's expectations of what common displays of religiosity entail. Even if, theoretically, this inquiry into "demonstrativeness" ever had a legitimate case-specific justification, it will in effect "become so broad as to approximate presumed group bias itself." Gilmore, 108 N.J. at 543. It therefore is a test that is directed at specific religious sects, not individual beliefs.

To hold that a Sikh who wears a turban, or a Jew who wears a yarmulke, or a Muslim who wears a hijab or jilbaab, is thereby disqualified from jury service, would be to legitimate a rule that discriminates on the basis of religious affiliation, in

clear contravention of both the United States and New Jersey Constitutions. "No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience." N.J. Const., Art. I, ¶ 3. To disqualify someone from participation in a civic process such as jury service, therefore, because they are a member of a certain religion that calls for a certain name, or an appearance by which they can be identified, imposes an impermissible burden on the right to worship freely, and amounts to discrimination based on their religious affiliation.

B. The Peremptory Challenge Exercised Against Juror No. 1 Was Based upon His Holding Unspecified Religious Beliefs, Not His Occupation, and Therefore Is Unconstitutional.

The peremptory challenge exercised against Juror No. 1, "C.E.," ostensibly because he gave his occupation as a "missionary," also raises significant constitutional concerns in the specific context of this case.

It is true that in most cases, the use of a peremptory challenge based upon occupation, including a profession as a pastor or minister, has been upheld as a neutral or a justifiable case-specific exercise of discretion. The contention by prosecutors that they may exercise peremptory challenges based on the belief that clergy, by virtue of their profession, are unusually forgiving of criminal defendants has generally been

sustained by the courts.⁷ If the prosecutor had merely exercised the challenge based on the assumption that certain professions acquire undue sympathy or prejudice for criminal defendants, then no constitutional issue is raised. Cf., United States v. Wilson, 867 F.2d 486 (8th Cir.) (upholding peremptory challenge of juror who was a social worker), cert. denied, 493 U.S. 827 (1989). And if the prosecutor had exercised a challenge based upon a specific belief--e.g., aversion to the death penalty in a capital case--then such a situation-specific reason for removal would be sustainable even if that belief were religious in origin.

The prosecutor in this case, however, did not justify his challenge of Juror No. 1, "C.E.," because of any sympathy for criminal defendants acquired through his profession as a missionary. Indeed, his recollection of the juror's background was somewhat hazy, apart from the basic fact that he was religious.

White juror I dismissed, I believe, was a minister, if memory serves me correctly, or was a missionary -- I tend to forget; but had some sort of religious affiliation.

Nor was this a case in which a member of the clergy, by virtue of his special training or knowledge, may have undue influence on other jurors in a case in which such knowledge was germane. This

⁷ See, e.g., United States v. Mixon, 977 F.2d 921 (5th Cir. 1992) (upholding peremptory challenge of African-American juror who was an ordained minister); Click v. State, 695 So.2d 209 (Ala. Crim. App. 1996); State v. Martinez, 999 P.2d 795 (Ariz. 2000); Rodriguez v. State, 826 So. 2d 494 (Fla. Ct. App. 2002); Horne v. State, 825 So. 2d 627, 636 (Miss. 2002).

case, which involved an indictment for conducting an armed robbery of a Chinese takeout restaurant with a child's toy water pistol, presents no issues in which religious knowledge would be at all relevant. Cf. U.S. v. Berger, 224 F.3d 107, 120 (2d Cir. 2000) (peremptory challenge of rabbi with knowledge of Jewish education permissible in case involving members of Hasidic Jewish community charged with conspiracy to defraud the federal government by obtaining student aid money for non-existent Jewish Seminary school).

Rather, apparently in an effort to buttress the general legitimacy of exercising challenges against those who are "demonstrative about their religion," the prosecutor simply added Juror No. 1, the missionary, as a further example of that classification. It is curious, however, to characterize a person as "demonstrative" simply because he revealed, only when asked in voir dire, that his occupation was as a missionary. The prosecutor either simply assumed, without substantiation, that someone whose employment was religious in nature must be otherwise "demonstrative" about his religion. Alternatively, and more likely, the prosecutor conflated the issue of "demonstrativeness" with the completely separate issue of the depth of the person's religious beliefs.

Indeed, the only conclusion that the prosecutor could reliably draw from the fact that Juror No. 1 was a missionary was that "C.E." held some set of religious beliefs, presumably sincerely and deeply held. Of course, the prosecutor had no idea

what those specific religious beliefs actually were, and it would have obviously been improper to ask, barring some case specific reason to do so. Based on his own statements, striking Juror No. 1 from the venire, therefore, amounted not to a challenge based upon occupation, but to a challenge exercised because the prosecutor assumed that the venireperson subscribed to some deeply and sincerely held, but otherwise unknown, set of religious beliefs. As the prosecutor himself explained:

what I said was it's been my experience that persons who strongly profess to religious belief or religious persuasion might be more lenient toward -- might be more forgiving toward a defendant, and might not listen to the evidence as perhaps they should. They may very well tend to be more accepting of a person's professions of innocence in the face of facts to the contrary. And that's why I exercised those challenges.

In simple terms, Juror No. 1 was removed from the jury because he was a religious person.

To disqualify from jury service a venireperson simply because they "strongly profess" some unspecified set of religious beliefs, without even attempting to describe how being those beliefs would affect a juror's judgment in the particular case at hand, burdens the juror's free exercise of religion in a constitutionally impermissible manner. Indeed, it is somewhat offensive to conclude that simply by being a "religious" person, a juror would be intellectually unable to consider the evidence and discharge the same duties that any citizen is assumed able to perform.

Given the large percentage of Americans who, without

specifying a denomination, consider themselves to be "religious," permitting the exercise of a peremptory challenge based upon that general characterization would, in theory, empower the prosecutor to exercise virtually unbridled discretion in removing jurors. Such uncabined discretion, if unchecked, could successfully mask a discriminatory animus. As Batson itself warned, "there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" 476 U.S. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1952)).

In practice, however, it may be difficult for a prosecutor to exercise a challenge against everyone who has deeply held religious beliefs, since the depth of one's religious conviction is usually not obvious without explicit inquiry, and since inquiry into the depth of religious beliefs would not be permitted in voir dire, absent some extraordinary case-specific justification for doing so. This then raises the question of whether a challenge based on a criterion that would be impermissible to inquire into directly on voir dire should be permitted if that the information should become known accidentally through some other means. Because of the dangers of discriminatory application of this ill-defined criterion, especially when directed at religious minorities whose customs and beliefs may single them out for notice, Amicus ACLU-NJ urges this Court to reject general religiosity as justification for peremptory removal from a petit jury.

CONCLUSION

For the reasons expressed above, Amicus ACLU-NJ respectfully urges this Court to vacate the judgment of conviction in this case, and remand this matter for a new trial, tried before a jury chosen consistent with the principles described herein.

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Respectfully submitted,

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