NOTICE TO THE BAR & PUBLIC

JURY REFORM -- RECOMMENDATIONS OF THE COMMITTEE OF THE JUDICIAL CONFERENCE ON JURY SELECTION -- PUBLICATION FOR COMMENT

The Supreme Court invites written comments on the recommendations of the Committee of the Judicial Conference on Jury Selection. The Committee's recommendations, as listed in this notice, are intended to improve the jury selection process in New Jersey by expanding the pool of individuals summoned and eligible to serve as jurors; supporting qualified individuals in serving as jurors; reducing the effects of purposeful discrimination and all forms of bias, including implicit bias, in jury processes; and increasing attorney involvement in jury selection.

Overview -- Judicial Conference on Jury Selection

The Court in State v. Andujar called for a Judicial Conference on Jury Selection to examine New Jersey's jury selection processes and recommend improvements designed to broaden participation and representativeness and reduce the effects of discrimination and all types of bias. 245 N.J. 275 (2021). The Court conducted the Conference in November 2021, bringing together members of the New Jersey bar and public, national experts on jury processes, and three Chief Justices from other states that have undertaken jury reform. Recordings of Conference sessions and public testimony, as well as comprehensive resource materials, are posted on the Judicial Conference page on the Judiciary's website.

To develop recommendations on the topics highlighted in Andujar and discussed at the Conference, the Chief Justice established and chaired a Judicial Conference Committee comprised of Executive Branch and Legislative Branch leaders, justices, judges, and legal and community stakeholders -- including the Attorney General, Public Defender, New Jersey State Bar Association, County Prosecutors Association, Association of Criminal Defense Lawyers of New Jersey, Garden State Bar Association, Hispanic Bar Association of New Jersey, ACLU of New Jersey, NAACP of New Jersey, New Jersey Institute for Social Justice, League of Women Voters of New Jersey, New Jersey Business and Industry Association, Trial Attorneys of New Jersey, Legal Services of New Jersey, and representatives of Rutgers and Seton Hall Law Schools. The Committee then divided into three

Subcommittees to enable focused consideration of each topic raised. Each Subcommittee -- the Subcommittee on Systemic Barriers to Jury Service; the Subcommittee on Voir Dire & Peremptory Challenges; and the Subcommittee on Strategies to Address Institutional & Implicit Bias -- developed a series of recommendations, which were presented for consideration and endorsement by the full Committee.

Recommendations of the Committee of the Judicial Conference

The Committee has endorsed the following recommendations, as listed below and described in further detail in the three attached Subcommittee reports.

Subcommittee on Systemic Barriers to Jury Service

Recommendation 1: Composition of the Jury List

- The Supreme Court should add records from the Department of Labor to those used to create the single jury list.
- In addition, the Legislature should continue to explore additional steps to formalize and standardize the records used to create the list.

Recommendation 2: Restoration to Juror Eligibility of Some Individuals with Prior Criminal Convictions

- The Legislature should explore options for an individual who has completed their sentence (including any term of supervision) to be restored to eligibility to serve as a juror, subject to potential challenge for cause or peremptory challenge.

Recommendation 3: Juror Compensation

- The Legislature should explore options to increase juror compensation.

Recommendation 4: Term of Service

- All counties, except for the lowest-volume counties, should adopt a one-day-or-one-trial term of petit jury service.

Recommendation 5: Juror Summons

- The Judiciary should continue to use an initial postcard jury notice and should add a QR code to connect jurors to online information.

Recommendation 6: Written Communications

- The Judiciary should maximize readability of printed communications.
- The Judiciary should continue to offer online options for qualification and to communicate with jurors through electronic methods.

Recommendation 7: Community Engagement

- The Judiciary should engage in targeted outreach to educate the community about jury service.
- The Judiciary should launch a multifaceted media campaign on the importance of answering the call to jury service.

Recommendation 8: Juror Appreciation

- The Judiciary should expand juror appreciation efforts.

Recommendation 9: Public Access to General Jury Information

- The Judiciary should continue to provide general information about the jury process.

Recommendation 10: Party Access to the Petit Jury List

- The Supreme Court should amend Rule 1:8-5 to formalize the scope of juror records available before selection and to confirm that availability is limited to parties.

Recommendation 11: Juror Records Excluded from Public Access

- The Supreme Court should amend Rule 1:38-5(g) to more accurately specify the types of juror records that are excluded from public access.

Recommendation 12: Juror Noncompliance

- The Judiciary should continue to take steps to recapture eligible jurors who initially fail to respond or fail to appear.
- The Judiciary should continue to refrain from penalties for "noncompliance" except in the most egregious situations.

Subcommittee on Voir Dire & Peremptory Challenges

Recommendation 13: Attorney Conducted Voir Dire (ACVD)

- The Supreme Court should authorize exploration of a New Jersey model of attorney conducted voir dire (ACVD).
- The Supreme Court should explore ACVD through a voluntary pilot program that also includes a consent-based reduction in the number of peremptory challenges available to each party.

Recommendation 14: For-Cause Challenges -- Standard

- Judges should dismiss a juror for cause if there is "a reasonable basis to doubt that the juror would be fair and impartial."

Recommendation 15: For-Cause Challenges -- Data

- The Judiciary should refine its data collection categories to differentiate between hardships and other for-cause challenges.

Recommendation 16: Juror Utilization

- The Judiciary should collect and share data as to the effects on juror utilization of the proposed pilot program on ACVD and reduced peremptory challenges.
- The Judiciary should compile and publish quantitative and qualitative data for cases within and outside of the pilot program.

Subcommittee on Strategies to Address Institutional & Implicit Bias

Recommendation 17: Demographic Data Collection and Analysis

- The Judiciary should implement the Court's direction in State v. Dangcil by adding three questions -- on race, ethnicity, and gender -- to the juror qualification questionnaire. 248 N.J. 114, 146 (2021)

Recommendation 18: Juror Demographic Data -- Publication

- The Judiciary should publish aggregate juror demographic data on an annual basis.

Recommendation 19: Juror Demographic Data -- Availability Pretrial

- Aggregate demographic information (for jurors scheduled to report on a selection date) should be included in the petit jury list provided before selection pursuant to Rule 1:8-5.

Recommendation 20: Prescreening of Jurors Before Voir Dire

- The Judiciary should issue public information about processes for screening jurors before voir dire.

Recommendation 21: Data on Juror Outcomes -- Hardships

- The Judiciary should collect more nuanced data as to juror outcomes, including to differentiate between hardship dismissals and for-cause challenges. [See #15 for this same recommendation.]

Recommendation 22: Data on Juror Outcomes -- For-Cause Challenges

- The Judiciary should develop a method to collect data as to applications and determinations of for-cause challenges.

Recommendation 23: Implicit Bias Training for Judges and Attorneys

- Judiciary should continue to require implicit bias training for judges and staff.
- In collaboration with stakeholders, the Judiciary should expand implicit bias training focused on jury selection.

Recommendation 24: Best (or Preferred) Practices for Presenting the Issue of Implicit Bias to Jurors

- The Juror Impartiality Video should be used statewide during juror orientation, with an in-person introduction by a judge.
- The model jury instructions should be enhanced to reinforce juror awareness of implicit bias.
- Two new model voir dire questions should be promulgated for required use by judges in judge-led voir dire and for optional use by attorneys during ACVD.

Recommendation 25: Court Rule on the Exercise of Peremptory Challenges

- Following receipt and consideration of public comments, the Supreme Court should adopt a version of proposed new Rule 1:8-3A (with Official Comment).

Attached: Subcommittee Reports and Member Comments

The three Subcommittee reports are attached. Following those reports are three comments submitted by Committee members: (1) Senate Republican Leader Hon. Steven V. Oroho; (2) the Association of Criminal Defense Lawyers of New Jersey; and (3) the New Jersey Institute for Social Justice.

Request for Public Comments

Please send any comments on the Recommendations of the Committee of the Judicial Conference on Jury Selection by June 10, 2022, to Comments.mailbox@njcourts.gov. Comments may also be sent by mail to:

Glenn A. Grant
Administrative Director of the Courts
Comments on Recommendations of the Committee of the Judicial Conference on Jury Selection
Hughes Justice Complex, P.O. Box 037
Trenton, New Jersey 08625-0037

The Supreme Court will not consider comments submitted anonymously. Thus, those submitting comments by email should include their name and email address (those submitting comments by mail should include their name and address). Comments are subject to public disclosure upon receipt.

Questions should be directed to the Office of the Administrative Director at (609) 376-3000.

Stuart Rabner
Chief Justice

Dated: April 28, 2022

Judicial Conference on Jury Selection

- Report of the Subcommittee on Systemic Barriers to Jury Service
- Report of the Subcommittee on Voir Dire & Peremptory Challenges
- Report of the Subcommittee on Strategies to Address Institutional & Implicit Bias

JUDICIAL CONFERENCE COMMITTEE ON JURY SELECTION

Chair: Chief Justice Stuart Rabner

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Sarah Fletcher, New Jersey Senate Minority Office
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Jash Gill, New Jersey Assembly Majority Office
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Henal Patel, Board Director, League of Women Voters of New Jersey
Hon. Fabiana Pierre-Louis, Associate Justice

Hon. Matthew Platkin, Acting Attorney General[1]
(Invited Participant: Lyndsay Ruotolo)
Lesley C. Risinger, Director, Last Resort Exoneration Project at
Seton Hall University School of Law
Michele N. Siekerka, President and CEO, New Jersey Business and
Industry Association
Alexander Shalom, Senior Supervising Attorney, ACLU-New Jersey
Richard T. Smith, President, NAACP of New Jersey
(Designee: Gregg Zeff)
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Matthew J. Tharney, President, Trial Attorneys of New Jersey
Hon. Lisa P. Thornton, A.J.S.C.
Hon. Mary Gibbons Whipple, J.A.D.

Committee Staff: Caroline Hatton
Jessica Lewis Kelly

[1] Then-Acting Attorney General Andrew Bruck represented the Department of Law and Public Safety during his tenure.

REPORT AND RECOMMENDATIONS OF THE SUBCOMMITTEE ON SYSTEMIC BARRIERS TO JURY SERVICE

The Subcommittee on Systemic Barriers to Jury Service was asked to develop recommendations on four topics:

A. Engaging all segments of the community -- composition of the jury list, including felony disqualification;

B. Potential barriers to jury service -- compensation, childcare, & terms of service; employer incentives;

C. Summons documents and other communications; and

D. Community outreach.

As part of its discussions, the group also considered access to juror records and modes of follow-up with jurors who do not respond to the summons or appear when scheduled. Additional recommendations on those areas are included.

A. Engaging All Segments of the Community

1. Composition of the Jury List

As provided by N.J.S.A. 2B:20-2, the Judiciary creates a single jury list comprised of records from three sources: registered voters; licensed drivers; and filers of State gross income tax returns and/or homestead rebate or credit application forms. Those records are merged on at least an annual basis, with efforts made to eliminate duplicates and to update addresses. New Jersey's use of three sources for the jury list is broader than many other jurisdictions.

The Subcommittee recommends that the Supreme Court exercise its existing authority, see N.J.S.A. 2B:20-2(c), to add a fourth source: records from the Department of Labor. Adding those records, also on an annual basis,

would include as potential jurors individuals who have applied for or are receiving unemployment or other public benefits. In the Subcommittee's view, expansion of the source list is one of the most effective ways to improve the representativeness of jury pools.

The Subcommittee submits that legislative changes would be most effective to codify specific requirements regarding the records provided, notably the types of records that should be received from the custodians, as well as the content and timeliness of those records in order to create the most accurate jury list.

The Subcommittee[1] therefore recommends that the Legislature consider amendments to N.J.S.A. 2B:20-2(a) to expand the sources used to compile the jury list and to require that custodians provide their most current records in a format prescribed by the Administrative Director of the Courts. To that end, the Subcommittee respectfully offers the following draft language for consideration, with bolded brackets used to recommend deletions and underscoring to propose additions:

§ 2B:20-2. Preparation of juror source list

> a. The names of persons eligible for jury service shall be selected from a single juror source list of county residents whose names and addresses shall be obtained from a merger of the following lists: active and inactive registered voters; holders of non-driver identification cards[2] issued pursuant to section 2 of P.L. 1980, c. 47

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[1] All recommendations reflect the view of a majority of the Subcommittee. Designees of legislative members attended the meetings but were non-voting participants.

[2] Those who are not licensed to drive may obtain non-driver identification cards through the Motor Vehicle Commission (MVC). The MVC currently includes records of those identification cards among the information it provides to the Judiciary. This proposed language is therefore designed to

(C: 39-3-29.3); licensed drivers, including holders of a driver's license that has been suspended; filers of State gross income tax returns; [and] filers of homestead rebate or credit application forms; and persons filing, applying for, or receiving unemployment benefits or other assistance pursuant to a State program administered by the Department of Labor and Workforce Development or the Department of Community Affairs. The county election board, the [Division of Motor Vehicles] Motor Vehicle Commission, and the State Division of Taxation, the Department of Labor and Workforce Development, and the Department of Community Affairs shall provide [these lists annually] lists comprised of the most current available records by May 1 of each year to the [Assignment Judge of the county] Administrative Office of the Courts. The records in the annual lists shall include data fields as prescribed by the Administrative Director of the Courts. The Administrative Director of the Courts [Assignment Judge] may provide for the merger of additional lists of persons eligible for jury service that may contribute to the breadth of the juror source list. Merger of the lists of eligible jurors into a single juror source list shall include a reasonable attempt to eliminate duplication of names and a reasonable attempt to select the mailing address from the most frequently updated source list.

2. 'Felony' Disqualification

Currently, New Jersey residents are permanently disqualified from jury service if they have ever been convicted of an indictable offense. The exclusion of individuals with a criminal conviction from jury venires disproportionately affects communities of color. The Subcommittee submits that individuals who have repaid their debt to society should be eligible to represent their community and serve on a jury, just as they are able to vote in elections.

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formalize the current practice, rather than to expand the categories of MVC records currently received.

The Subcommittee recommends that instead of a permanent disqualification from jury service, individuals who have been convicted of an indictable offense should be restored to eligibility upon successful conclusion of any term of Parole/Probation supervision[3]. In conjunction with this proposed legislative change, the Subcommittee recommends that jurors should be subject to a potential for-cause challenge if their criminal history would affect their ability to be fair and impartial. For example, a juror who was convicted of an offense that is among those charged in a criminal trial might be challenged for cause in that matter but not subject to a for-cause challenge in a civil trial.

The Subcommittee respectfully offers the following draft amendments to the two relevant statutes for consideration:

§ 2B:20-1. Qualifications of jurors

Every person summoned as a juror:

…

e. shall not <u>be in custody or under supervision for any</u> **[**have been convicted of any**]** indictable offense under the laws of this State, another state, or the United States;

and

§ 2B:23-10. Examination of jurors

…

<u>b. A prospective juror who has been previously convicted of or has charges pending for an indictable offense may be challenged for</u>

[3] A number of Subcommittee members advocate to expand jury service eligibility to include individuals who have completed any custodial term -- even if those individuals remain subject to supervision.

cause if the similarity or recency of the prospective juror's conviction or charges calls into question that juror's ability to be fair and impartial in a particular case.

The Subcommittee recommends that all jurors be informed of eligibility criteria at the time of qualification, during orientation, and at the start of oral voir dire.

B. Addressing Potential Barriers to Jury Service

1. Juror Compensation & Employer Incentives

Jurors in New Jersey state courts are paid $5/day, with petit (trial) jurors receiving an additional $35/day starting on their fourth day of service. Jurors are not reimbursed for meals or transportation. New Jersey's juror pay is among the lowest in the nation and is insufficient to offset lost wages or costs incurred for service, such as parking. Annually, Assignment Judges excuse more than 25,000 jurors before reporting based on documented financial hardship, and trial judges dismiss many more jurors during selection because they are unable to serve for the duration of trial. The financial burden associated with jury service can impede participation and undermine efforts to achieve a jury comprised of all segments of the community.

The Subcommittee submits that increased juror compensation would support more representative juries. Accordingly, the Subcommittee recommends legislative action to increase juror compensation so that more qualified individuals can report when summoned and more reporting jurors can serve on petit or grand juries, without financial hardship.

With deference to legislative expertise in this complex area, the Subcommittee recommends consideration of a multi-part approach to improve juror compensation. Among others, the group respectfully suggests the following potential options:

i. For individuals who are not employed, and for individuals who are not paid by their employer during jury service, an increase in daily juror pay to a rate equal to minimum wage (subject to automatic adjustment based on cost-of-living increases), for both petit and grand jurors;

ii. The creation of tax incentives for employers who pay employees during jury service, and possibly also for certain jurors; and

iii. The establishment of a requirement that, like the State of New Jersey, certain publicly subsidized employers and/or other employers must pay employees during jury service.

The Subcommittee appreciates the additional comments submitted by the New Jersey Civil Justice Institute (NJCJI) regarding options to improve juror compensation. NJCJI proposed a Small Business Jury Service Pay Tax Credit, which would entitle eligible employers who pay an employee's regular salary or wages for the first five days of jury service to a credit against the employer's New Jersey state tax liability. NJCJI also proposed the creation of a Lengthy Trial Fund for jurors who serve for more than five (5) days and receive less than full compensation from their employer.

2. Term of Service

Assignment Judges determine the terms of jury service for the county or counties within their vicinage. About one half of New Jersey counties require trial jurors to report for one day or one trial, while other counties have lengthier terms -- up to one week or one trial. National studies have shown that a shorter term of service correlates to fewer jurors who request and obtain a pre-reporting excuse. A requirement for a juror to be available for multiple days can present more financial and other challenges and thereby reduce the portion of the population able to participate as jurors.

The Subcommittee recommends that all counties -- except for the lowest volume counties in which only one or two jury selections are scheduled in a week -- adopt a one-day-or-one-trial term of petit jury service. Such transition

should occur promptly after the conclusion of current operational adjustments implemented in response to the COVID-19 pandemic. The Subcommittee suggests that jurors be informed early (and often, if needed) that they may be required to return after the first day if they are in the midst of an ongoing selection or have been selected for a trial.

C. Summons Documents and Other Juror Communications

1. Juror Summons

Before the COVID-19 pandemic, jurors received a postcard summons notice that directed them to complete qualification online. The Judiciary mailed a letter-size qualification questionnaire only to the small portion of jurors (around 15%) who did not use the online response option. A letter-size summons notice has been used on a temporary basis to inform jurors of protocols implemented in response to COVID-19. Preliminary national research suggests that postcards generate a higher response rate.

The Subcommittee recommends that the Judiciary resume and continue use of a postcard notice as soon as practicable. The Subcommittee further recommends that the existing notice be enhanced to incorporate a scannable QR code as an additional means through which jurors can access information about jury service.

2. Format of Written Communications

The Judiciary communicates with jurors in various ways, including the Jurors page of the public website, the Judiciary Jurors App (for Apple and Android phones), emails and text messages through the jury management system, and hardcopy mailings.

The Subcommittee recommends that all printed communications -- including the postcard notice, qualification questionnaire, and hardcopy attendance letters -- be formatted in 14-point Times New Roman or comparable font. The group supports the continued availability of online

options for jurors to complete qualification and communicate with court staff, and it recommends an ongoing focus on accessibility, user interface, and user experience for those formats as well.

The Subcommittee further recommends the addition of a link to the New Jersey Juror App on the main Jurors page.

D. Community Engagement

1. Outreach to Prospective Future Jurors

The Judiciary regularly engages in community outreach events to share information and answer questions about the courts. To date, jury service has not been a standard area of focus.

The Subcommittee recommends that, as part of routine community engagement events -- including virtual listening sessions and on-site court information nights -- judges and staff speak about the importance of jury service and why everyone should serve if eligible.

The Subcommittee also recommends targeted outreach in coordination with trusted leaders to reach communities that at present are underrepresented in jury panels and seated juries. The Judiciary should work with faith leaders, community advocates, legal service providers, and others who can reinforce key messages and correct potential misunderstandings, as is done with other court initiatives.

In the future, and perhaps in connection with the announcement of improvements to the jury selection process, the Subcommittee recommends a multifaceted media campaign -- including radio announcements and posters placed in prominent public areas, on mass transportation and in newspapers -- to raise awareness about the importance of answering the call to jury service.

2. Appreciation for Jurors Who Serve

Juror Appreciation Week is traditionally celebrated at the beginning of May. Recognition efforts often include localized celebrations for jurors who report for service, as well as print and online publications to thank jurors for their contributions to the administration of justice.

In addition to those existing methods, the Subcommittee recommends the development of additional videos (see, e.g., this short video from 2018), social media posts, and other communications to post on the Jurors webpage, distribute to community leaders, and display on courthouse video monitors.

The Subcommittee further recommends that the Judiciary formalize a statewide practice for Assignment Judges to send letters thanking jurors after service on lengthy trials or as grand jurors.

In addition, the Subcommittee recommends that the Judiciary provide stickers to all jurors after the conclusion of their service, like those distributed at blood drives and voting centers, with a positive statement like "I answered the call for jury service!" That low-tech and low-cost step could have broad benefits if jurors post social media selfies with the stickers (as people do after voting and donating blood). External messengers -- including jurors who have served and had a positive experience -- can be highly effective in sharing the benefits of jury participation.

E. Additional Recommendations

1. Public Access to General Jury Information

Transparency is essential to public trust in the jury selection process and the operations of the courts. Certain information about jury summoning and selection should be easy to access for attorneys, media, researchers, prospective jurors, and other interested persons. Other information, including that which is necessary to assess the composition of the venire for purposes of a fair-cross-section claim, must be available to parties in a case. At the same time, individual juror information -- including information about a juror's

criminal history, citizenship status, or demographics -- must remain confidential.

The Subcommittee recommends that the Judiciary continue to provide general information on its public website and in other formats. Such information should include the sources from which jurors are summoned as well as instructions for researchers to request a sanitized version of the single jury list from which jurors are summoned, i.e., a version without any portions of Social Security numbers or other information as may be contained in the records provided to the Judiciary.

2. Party Access to the Petit Jury List

Rule 1:8-5 states that the court clerk shall provide information about a jury panel upon request. The Rule does not specify whether the panel includes only jurors who are confirmed for service or also those who have been dismissed (based on ineligibility), excused (on a statutory ground), or deferred (and rescheduled to a future date).

The Subcommittee recommends the following amendments to Rule 1:8-5 to formalize the scope of records available before selection and to confirm that availability is limited to parties.

Rule 1:8-5. Availability of Petit Jury List.

> The list of the general panel of petit jurors, including jurors who have been disqualified, excused, or deferred, as well as jurors who are scheduled to report for selection, shall be made available by the clerk of the court to any party requesting the same at least 10 days prior to the date fixed for trial. Such lists shall not be provided to anyone who is not a party to the case. Any provision of juror lists shall be subject to a prohibition against unauthorized use or dissemination.

The Subcommittee further recommends that records or papers used in conjunction with the jury selection process should be available to any party contemplating a challenge based on the fair-cross-section requirement. Such

records should contain aggregate, but not individual, demographic information once that is collected by the Judiciary.

3. Juror Records Excluded from Public Access

Rule 1:38-5 itemizes types of jury records that are not accessible to the public or to parties absent a court order. The current language does not specifically exclude from public access the records used to compile the source list, questionnaires completed by jurors after reporting for service, or other individual juror information maintained by the Judiciary.

The Subcommittee recommends amendments to Rule 1:38-5(g) to more clearly and accurately specify the types of juror records that are excluded from public access, as follows:

Rule 1:38-5. Administrative Records Excluded from Public Access

The following administrative records are excluded from public access:

. . . .

(g) Records used to compile juror **[**Juror**]** source lists, and the list prepared pursuant to N.J.S.A. 2B:20-2**[**,**]**; jury qualification questionnaires completed pursuant to N.J.S.A. 2B:20-3, any other questionnaires completed by prospective jurors, and individual juror information maintained by the Judiciary**[**,**]**; and **[**preliminary**]** lists prepared pursuant to N.J.S.A. 2B:20-4 of persons **[**to be**]** summoned for possible service as grand or petit jurors, which shall remain confidential, except as provided in Rule 1:8-5, unless otherwise ordered by the Administrative Director of the Courts **[**Assignment Judge**]**;

Among other benefits, the above proposed amendments should preempt or minimize juror concerns about the privacy of their personal information.

4. Non-Responsive or Non-Appearing Jurors

Some jurors do not respond to the summons, do not appear when scheduled, or stop reporting mid-service. In practice, many of those jurors may have not received or understood the summons or have made a mistake about when to appear at the courthouse. The Judiciary at this time engages in follow-up with such jurors but does not maintain lists of individuals who failed to respond or appear. The Judiciary does not enter default judgments or schedule enforcement hearings. New Jersey seeks to communicate with prospective jurors in a way that reinforces the importance of responding to the jury summons without creating undue anxiety or fear about penalties.

The Subcommittee recommends that the Judiciary continue to explore efforts to reach non-responsive jurors without penalty.

The Subcommittee recommends that the Judiciary continue to communicate with and seek to reschedule jurors who complete qualification but do not appear when scheduled. If, after multiple communications from the court, the juror does not appear, an appearance to speak with a judge may be required; however, penalties should not be imposed.

The Subcommittee recommends that Assignment Judges continue to exercise discretion as to jurors who stop reporting mid-trial or mid-grand jury term. Civil penalties should be imposed only in the most egregious of situations and only following a hearing and, as applicable, an ability-to-pay determination. If a judge is considering a sanction for a noncompliant juror, the court must afford the juror due process, conduct a hearing before issuing the sanction, and make findings on the record regarding the sanction.

REPORT & RECOMMENDATIONS OF THE SUBCOMMITTEE ON VOIR DIRE & PEREMPTORY CHALLENGES

The Subcommittee on Voir Dire & Peremptory Challenges was asked to develop recommendations on the following four topics:

A. Attorney-conducted voir dire

B. For-cause challenges

C. Peremptory challenges

D. Juror utilization

Considering the interrelatedness of those issues, the Subcommittee recommends that they be approached holistically.

In Part I, the Subcommittee presents general recommendations as to each area of review. In Part II, the Subcommittee offers a detailed proposal for a pilot program to explore and assess the recommended reforms to jury selection. An overwhelming majority of the Subcommittee endorses this report as presented. A few members do not support the proposal to allow for a reduction by consent of peremptory challenges for participants who opt into the pilot program for attorney-conducted voir dire.

PART I: SUMMARY OF RECOMMENDATIONS

A. Attorney Conducted Voir Dire

New Jersey state court judges have been responsible to conduct voir dire for more than a half century. See State v. Manley, 54 N.J. 259, 280-83 (1969). In current practice, judges in criminal matters ask jurors nearly 30 mandatory model questions. Attorney involvement is limited to the advance submission of additional open-ended questions and occasional follow-up questions if permitted by the judge.

Since the introduction of the mandatory model voir dire questions, the size of criminal jury panels has grown to more than 165 jurors on average -- more than double the 70-person panel that the National Center for State Courts

(NCSC) recommends for a jurisdiction like New Jersey. Voir dire typically extends beyond one day and sometimes continues for weeks, even in relatively straightforward trials.

Attorneys criticize judge-led voir dire as ineffective to reveal relevant information about the views and potential biases of jurors. Available data shows that in current practice attorneys often exercise only about half of their available peremptory challenges. However, if attorneys lack individual knowledge of prospective jurors, they could be left to exercise those peremptory challenges based on snap judgments or group extrapolations.

Participants in the Judicial Conference on Jury Selection advocated for a shift from judicial questioning of jurors to Attorney-Conducted Voir Dire (ACVD), which has been adopted in most other jurisdictions.

The Subcommittee sought education and insights on the ACVD process from former judges and current practitioners from Kentucky, Oregon, and Washington -- states that each employ distinct forms of ACVD -- as well as the Director of the NCSC Center for Jury Studies. Those experts described various ACVD models and offered their views as to strengths and limitations. While each jurisdiction follows a slightly different protocol, all jurists and practitioners endorsed ACVD as more effective than judge-led voir dire to reveal juror biases, support individualized challenges, and achieve fairer and more impartial juries.

The Subcommittee unanimously supports greater attorney involvement in jury selection and recommends exploration of a New Jersey model[1] of ACVD.

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[1] The Subcommittee dedicated several meetings to the development of a comprehensive framework as to how ACVD could be used in New Jersey. In addition to presentations from Paula Hannaford-Agor of the NCSC and experienced practitioners in ACVD jurisdictions, all Subcommittee members completed the attached 71-question survey regarding how voir dire would function, including among other areas: whether questions would be posed to the standard 14-juror box or to an expanded group of jurors; which questions would be introduced by the judge before attorney questioning; which topics would be covered only by attorneys; and when and how for-cause and peremptory challenges would be exercised. The Subcommittee's recommendations are reflected in Part II.

B. For-Cause Challenges

In current practice, attorneys may apply to the judge to dismiss a juror based on lack of qualification or inability to be fair and impartial. Statutes and Court Rules do not prescribe a specific process or standard for for-cause challenges.

Section 4.11 of the Judiciary Bench Manual on Jury Selection (2014) provides as follows:

> **Excusing Jurors for Cause.** Jurors should be excused for cause either by the court or upon parties' request when it appears that the juror will have difficulty in being fair and impartial. Judges should avoid extensive efforts to rehabilitate a juror or to reject reasons offered by the juror for not serving, recognizing that such efforts indicate that there are significant issues about that juror that need to be addressed. The follow up questions should be sufficiently probative to ferret out the ability of the individual to fairly judge the case. Jurors who express hardship problems (child care issues, absence from work without pay, etc.) should be liberally excused especially when the trial is anticipated to take an extended period of time.

Judges and attorneys offer different views as to the current state of for-cause challenges. Many judges claim to be liberal in dismissing jurors for cause. In contrast, attorneys report that judges are reluctant to dismiss and instead seek to rehabilitate jurors, contrary to Section 5.3 of the Bench Manual. ("Judges are not encouraged to attempt to rehabilitate a juror who has expressed a potential problem relating to an ability to be objective, fair, or impartial based upon a juror's prior experience or held beliefs.") Available data offers minimal clarification because for-cause challenges based on potential problems with objectivity and fairness are counted within the same category excusals based on hardship and other factors.

The Subcommittee unanimously recommends a low threshold -- a reasonable basis to doubt that the juror would be fair and impartial -- for the granting of a for-cause challenge. The Subcommittee further recommends that the Judiciary refine the categories for juror outcome data to differentiate between hardships and other for-cause challenges.

C. Peremptory Challenges

N.J.S.A. 2B:23-13 establishes the number of peremptory challenges afforded to parties in civil and criminal actions. Each litigant in a civil case is allotted 6 challenges. For lesser criminal offenses, the prosecution and defense are afforded 10 challenges each. For more serious crimes, the prosecutor receives 12 challenges, while each defendant has 20 challenges. Those numbers are substantially greater than the quantity of peremptory challenges available in other jurisdictions. Rule 1:8-3 ("Examination of Jurors; Challenges") restates the allotment of peremptory challenges and prescribes the order in which such challenges are exercised.

New Jersey legal and non-legal stakeholders express strong and often divergent views about peremptory challenges, from recommendations to abolish peremptories entirely in light of their capacity to be -- and history of being -- exercised in a biased manner, as the Court noted in State v. Andujar, 247 N.J. 275 (2021), to support for retaining New Jersey's current allotment of peremptories as the only aspect of criminal trials during which defendants are able to act directly to ensure the fairness of their proceedings.

Ultimately, a majority of the Subcommittee recommends that a reduction in the number of peremptory challenges be tested through a consent-based pilot program that would include a number of additional changes to the jury selection process. The Subcommittee is of the view that those additional changes -- which include a robust ACVD process supported by extensive written questionnaires and more liberal standard for evaluating for-cause challenges -- will promote greater fairness in their own right and will also allow for a more informed exercise of peremptory challenges, making it possible to proceed with fewer of them.

D. Juror Utilization

As described by Paula Hannaford-Agor, Director of the NCSC Center for Jury Studies,

> There are three primary points for measuring juror utilization --

[1] when jurors are told to report for service (percentage told to report);

[2] when jurors are sent to a courtroom for voir dire (percentage to voir dire); and

[3] when jurors are questioned during voir dire (percentage of panel used).

A more effective voir dire process, combined with a reduction in peremptory challenges, would directly improve the percentage of panel used. Panels would be smaller, and more of the members of those panels would be subject to questioning. That is true even if the expectation is that most or all available peremptory challenges would be exercised.

Smaller panel sizes would support further improvements both in the percentage of jurors sent to voir dire and in the percentage of jurors told to report. Those second-phase improvements would require analysis of data from cases that participate in the proposed pilot program and other cases that do not.

Those metrics are important because juror utilization is a matter of respect and fairness for members of the public. A better jury selection process in which the people of New Jersey spend less time waiting in assembly rooms or courtroom galleries and more time engaged in the actual process of our justice system would support public trust and confidence in jury verdicts and the court system.

The Subcommittee submits that an ACVD model (especially with advance written questionnaires) and fewer peremptory challenges would support more efficient juror utilization. The Subcommittee also recommends that the Judiciary collect both quantitative and qualitative data for cases within and outside of the pilot program, in order to evaluate objective criteria -- such as panel sizes and voir dire duration -- as well as subjective views of participants, including jurors, attorneys, and judges.

PART II: PILOT PROGRAM FOR ATTORNEY-CONDUCTED VOIR DIRE

To test and assess its proposals for improving the fairness of the jury selection process, the Subcommittee recommends that the Judiciary create a pilot program for ACVD that incorporates important complementary adjustments, including the expanded use of written questionnaires before oral voir dire; the formalization of certain standards and processes for the exercise of challenges for cause and peremptory challenges; the enhanced collection of data, including as to juror demographics, juror outcomes, and jury selection; and a reduction in the allotment of peremptory challenges.

The Subcommittee recommends an initial pilot program of at least six months and not more than one year with options to extend as to time or expand as to locations.

1. Locations. The pilot program would begin in three single-county vicinages -- one northern, one central, and one southern -- with sufficient criminal trial volume to support data collection and analysis.

2. Eligibility for Participation. At the outset, eligibility for participation in the pilot program would be limited to single-defendant criminal matters.

3. Voluntariness. Participation in the pilot program would be voluntary and would require the consent of both the prosecuting attorney and defense counsel. The court would provide written notice to the attorneys and would meet to explain the protocols and answer questions, including about the process for ACVD and the reduction in available peremptory challenges. The court would conduct a hearing with the defendant as well as counsel to confirm understanding and consent before finalizing a date for jury selection. A mutual consent and waiver would be executed before proceeding to jury selection.

4. For cases in the pilot program, jury selection would proceed as follows:

   a. Random Selection. Consistent with usual practices, jurors would be randomly selected to create a panel that would be assigned to the trial. That panel would be comprised of jurors who have

completed the standard qualification process and confirmed their availability to report for service.

b. Demographic Information. As part of qualification, and as directed by the Court in State v. Dangcil, 248 N.J. 114 (2021), the Judiciary would collect demographic information as voluntarily provided by jurors during qualification. Voluntary juror demographic information would also be collected for cases not participating in the pilot program.

c. Electronic Written Questionnaires. Before the start of oral voir dire, the panel of jurors would complete an electronic questionnaire, using the attached model with appropriate customization. See Attachment A. Jurors would submit their responses electronically, using Judiciary technology as appropriate, and subject to any ADA or other accommodations. Juror responses would be compiled and provided to the judge and attorneys before the start of oral voir dire.

d. Pre-Voir Dire Challenges. The court could dismiss a juror for a hardship or excuse a juror for cause based on their responses to the written questionnaire. Pre-voir dire dismissals and excusals should be few and should occur only in straightforward situations. Any pre-voir dire excusals would be addressed on the record in the presence of at least the attorneys.

e. Oral Voir Dire. All remaining jurors would proceed to oral voir dire. The preference is for all oral voir dire to be conducted in person in a single large room. However, oral voir dire may be conducted in stages if necessary to empanel a jury.

f. Expanded Jury Box. An “expanded box” of jurors would be seated in a group. That expanded box would include the total number of jurors to be empaneled plus the total number of peremptory challenges available to the attorneys. Additional jurors would be seated in the courtroom to the extent possible. If necessary, and with the consent of the attorneys, technology could be used to enable additional jurors to see and hear voir dire.

g. Process of Questioning. Instructions and questions would be posed to the expanded box, except for follow-up and sidebar questions. The process would incorporate some of the existing Model Criminal Voir Dire Questions (in the Judiciary Bench Manual on Jury Selection).

i. The judge would describe the case and ask the following questions: Q1: juror qualifications; Q2: hardship requests; Q3: knowledge of attorneys and parties; Q4: knowledge of witnesses; and Q9 ("Do you know anyone else in the jury box other than as a result of reporting here today?").

ii. For Question 5 ("I have already briefly described the case. Do you know anything about this case from any source other than what I've just told you?"), the judge should ask the question, and the attorneys should then follow up.

iii. Questions 6-19 should not be asked initially by the judge. Rather, the attorneys would ask those questions during oral voir dire.

iv. Questions 20-27 (legal principles and juror responsibilities) should be introduced to the group of jurors by the judge. The attorneys should pose follow-up questions.

h. Flexibility and Scope of ACVD. Attorney-conducted voir dire is a flexible and fluid process. Accordingly, there would be no requirement to pose questions in a specific sequence or wording. There would be no requirement that all model voir dire questions be posed orally. Attorneys would ask additional questions, both independently and in follow up to juror responses. No relevant questions or topics would be off-limits during ACVD. There would be no time limit for ACVD.

i. Challenges for Cause. The court would apply a liberal standard in dismissing jurors for cause. Rule 1:8-3(b) would be relaxed as follows:

> A challenge to any individual juror which by law is ground of challenge for cause must be made before the juror is

sworn to try the case, but the court for good cause may permit it to be made after the juror is sworn but before any evidence is presented. All **such** challenges shall be tried by the court on the record and outside the hearing of the other jurors. **The court shall require the party challenging the juror to state the basis for the challenge and shall permit the other party or parties to state their position. If the court finds there is a reasonable basis to doubt that the juror would be fair and impartial, the court shall grant the for-cause challenge and state the reason for its determination.**

j. Number of Peremptory Challenges. As a condition of participation in the pilot program, the State and defense would agree to reduce peremptory challenges as follows:

   i. The State would have **6** peremptory challenges, and the defense would have **8** peremptory challenges, for criminal matters in which the defendant has been indicted for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual 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 N.J.S.A. 2C:21-1(b), or perjury; and

   ii. In all other criminal actions, the State and defense would each have **5** peremptory challenges.

k. Exercise of Peremptory Challenges. Peremptory challenges would be exercised after the completion of questioning by the judge and attorneys. Consistent with Rule 1:8-3(e)(2), the court would establish the order of challenges, which would be set forth on the record before the start of the jury selection process. If some peremptory challenges are not exercised, then jurors would be selected at random to reduce the panel to the number for empanelment.

l. Objections to Peremptory Challenges (Batson/Gilmore Standard). Rule 1:8-3 would be relaxed and supplemented.

5. Data Collection. The Judiciary would continue to collect standard data as to jurors and jury trials. To evaluate ACVD, the Judiciary would also collect and publish data as to those cases that participate in the program, as well as other cases in the pilot counties (and elsewhere) that do not participate in the pilot. That initial report would be expected to include, among other data points, the following information: numbers and percentages of cases that choose to participate in the pilot program; size of jury panels; voir dire duration; and data as to the timing and volume of dismissals for hardships, challenges for cause, and peremptory challenges. To the extent practicable, that report would also include aggregate demographic data, including as to the composition of seated juries in the pilot and non-pilot cases.

6. Training for Judges and Attorneys. New Jersey has used a judge-led voir dire process for more than 50 years. Meaningful training must be provided to judges and attorneys in order to support a successful pilot exploration of ACVD. Such training would be coordinated with key stakeholders, including the Attorney General, the Public Defender, the New Jersey State Bar Association, the County Prosecutors Association, and the Association of Criminal Defense Lawyers.

Attachment A to the Proposed Pilot Program

Model Criminal Questionnaire

(to be completed electronically[2] before oral voir dire)

We are using your answers to this questionnaire to get information directly from you to help us pick trial jurors who can be completely fair to both sides for this particular case.

Your answers to the following questions are very important to the proceedings in this case. Please answer each question honestly and completely.

We all have attitudes, feelings, opinions, and life experiences that can affect the way we consider the testimony of a witness or how we evaluate evidence. It is okay to admit and talk about these feelings, opinions, and life experiences, and we need you to do so to ensure justice is served in this case.

Please do not withhold information. Please make sure your answers are as complete as possible. Complete answers are more helpful and will likely shorten the time it takes to select a jury. Do not be concerned with whether your answers are "right" or "wrong"; this is not any sort of test. Just be honest and candid in your answers.

You are not allowed to do any research or investigation regarding this case. You may not look up the parties or the lawyers. As a trial juror you must decide the case based on the evidence presented during trial.

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[2] Many of the questions on this questionnaire include optional narrative fields that appear based on a juror's answer. For example, if a question asks if the juror's experience would cause that juror to favor one side over the other and the juror answer "yes," then a box will appear with the directions "please explain." If a juror indicates having completed graduate school, a question will follow asking about the area of study, with a narrative box for an answer. That functionality can be illustrated in an automated version of the proposed questionnaire. For an example, see the "Jury Questionnaire: Criminal General (Long Version)" developed by the Arizona Supreme Court Statewide Jury Selection Workgroup, available here. Questions without listed response options would always provide a narrative field for response.

The information you provide will be reviewed only by the court, the lawyers and the parties in this case. For purposes of the public record, your name and identifying information will be deleted.

If you have trouble reading, understanding, or filling out this questionnaire, please [insert how you want the juror to seek help].

1. Juror Number

2. Name

3. Are you a resident of X County?
   □ Yes □ No

4. Are you a citizen of the United States?
   □ Yes □ No

5. Have you been convicted of an indictable offense?
   □ Yes □ No

6. Do you have difficulty understanding or reading English?
   □ Yes □ No

7. Do you have any difficulty seeing or hearing, or have any other medical problems that may affect your ability to serve as a juror?
   □ Yes □ No

8. This section provides you with information about the case.
   Have you seen, heard, or read anything about this case?
   □ Yes □ No

9. Have you, or any members of your close family or friends, ever been involved in a case with facts similar to this?
   □ Yes □ No □ Unsure

   {If the juror answers yes or unsure to this or other questions, a narrative filed would be provided, as shown.}

10. Please explain.

11. Is there anything about the nature of this case that might cause you to favor one side over the other?
□ Yes □ No □ Unsure

12. What caused you to answer "Yes" or "Unsure" to the prior question?

13. The following people may testify at trial: [insert names of potential witnesses]. Do you think you might know any of these people?
□ Yes □ No □ Unsure

14. The law requires the State to prove that a Defendant is guilty beyond a reasonable doubt. A Defendant in a criminal case is presumed by law to be innocent until proven guilty beyond a reasonable doubt. The law does not require a Defendant to testify or present any evidence. Can you accept these principles of law?
□ Yes □ No □ Unsure

15. [This question would be included unless waived by the Defendant.] A Defendant has a constitutional right to remain silent. Would your opinion of the Defendant's guilt or innocence be affected by a Defendant's decision to remain silent?
□ Yes □ No □ Unsure

16. Do you think you would hold a Defendant's decision to remain silent against them?
□ Yes □ No □ Unsure

17. The judge will instruct you on the law in this case. Sometimes people have beliefs about what they wished the law was, or they believe that certain conduct should be legal. Do you believe you will be able to apply the facts to a law you disagree with?
□ Yes □ No □ Unsure

18. Do you have any opinions about law enforcement officers that might cause you to favor one side over the other? [this question would not generate a narrative box]
    □ Yes □ No □ Unsure

19. Have you, or any members of your family or close friends, ever served as a law enforcement officer?
    □ Yes □ No □ Unsure

20. Have you, a family member, or close friend ever been arrested, charged, or convicted of a crime other than a minor traffic offense?
    □ Yes □ No □ Unsure

21. Have you, a close relative, or close friend ever been the victim of a crime?
    □ Yes □ No □ Unsure

22. Was it you or someone you know?
    □ Me □ Someone I know □ Both me and someone I know

23. What offense(s)?

24. Briefly describe what happened.

25. Would this cause you to favor one side?
    □ Yes □ No □ Unsure

26. Have you ever witnessed a crime?
    □ Yes □ No

27. This trial is scheduled to start XX and continue until XX. The daily schedule will be Monday through Thursday, from XX a.m. to 4:30 p.m., no trial on Fridays. There is a lunch break from noon until 1:00 p.m., and usually one mid-morning and one mid-afternoon break. The law provides that a juror can be excused from service only if their absence from work would impose an undue hardship on the juror.

Is there anything about our anticipated trial schedule that presents an undue hardship for you?
□ Yes □ No □ Unsure

28. Have you ever been called as a witness in court?
□ Yes □ No

29. Have you ever served on a jury?
□ Yes □ No

30. What type of case was it or what was it about?

31. Were you the foreperson of the jury?
□ Yes □ No □ Unsure

32. Have you ever served on a grand jury?
□ Yes □ No

33. Age:

34. What is the highest level of education you completed? [options]

35. Are you currently attending college or another educational program?
□ Yes □ No □ Unsure

36. What is your current employment status?
□ Employed full time
□ Employed part time
□ Retired
□ Student
□ Unemployed looking for work
□ Unemployed not looking for work
□ Caregiver or homemaker
□ Other [with narrative field]

37. Do you know anyone who works at the XX County Attorney's Office?
□ Yes □ No

38. Have you had any interaction with or experience with law enforcement officers from [investigating agency]?
    □ Yes □ No

39. Is there anything that would make you unable to come to a verdict in this case?
    □ Yes □ No □ Unsure

40. Is there anything else you think we should know about your ability to be a juror in this case?

41. [Defendant] has made the decision to represent themselves at this trial. Defendants have the right to represent themselves during trial. Do you have an opinion about a person's decision to represent themselves?
    □ Yes □ No □ Unsure

42. [Insert language] will be spoken or used during this trial and the [Defendant/victim/witness] will use an interpreter because they are more comfortable hearing or viewing what is communicated in [insert language]. Do you have an opinion about the use of interpreters during trial?
    □ Yes □ No □ Unsure

43. Do you speak, sign, or understand [insert language] in any way?
    □ Yes □ No

44. You are required to consider the statements of the interpreter rather than your own understanding of what has been communicated in [insert language]. Would you have any difficulty in doing this?
    □ Yes □ No □ Unsure

45. By typing my name, I swear or affirm the answers given in this questionnaire are true.

REPORT AND RECOMMENDATIONS OF THE SUBCOMMITTEE ON STRATEGIES TO ADDRESS INSTITUTIONAL & IMPLICIT BIAS

The Subcommittee on Strategies to Address Institutional and Implicit Bias was asked to develop recommendations on four topics:

A. Demographic data collection and analysis, and reporting of data;

B. Implicit bias training for judges and attorneys;

C. Best (or preferred) practices for presenting the issue of implicit bias to jurors, including jury charges and videos; and

D. A Court Rule on the exercise of peremptory challenges.

The Subcommittee considered each of those topics individually and as they relate to each other.

A. Demographic Data Collection and Analysis, and Reporting of Data

1. Demographic Data Collection and Analysis

The New Jersey Judiciary has not previously collected juror demographic information. In State v. Dangcil, the Supreme Court directed that the Administrative Office of the Courts collect voluntary juror demographic information as to race, ethnicity, and gender. 248 N.J. 114, 146 (2021).

Accordingly, three draft questions were presented at the November Conference for consideration as potential additions to the juror qualification questionnaires:

> This information helps the Judiciary understand the diversity and representativeness of jury pools. Your responses to these questions are optional and will not affect your selection.
>
> 1. Selecting from the race categories used by the U.S. Census, please select the response that most closely aligns with your racial identity.
>
> □ American Indian or Alaska Native

□ Asian
□ Black or African American
□ Native Hawaiian or Other Pacific Islander
□ White
□ More than one race

2. Selecting from the ethnicity categories used by the U.S. Census, please also select the response that most closely aligns with your ethnic identity.

□ Hispanic or Latino □ Not Hispanic or Latino

3. Selecting from the gender categories used by the State of New Jersey, please select the response that most closely aligns with your gender.

□ Female □ Male □ Non-Binary or Undesignated

The Subcommittee was asked to review the above questions and to offer any suggested changes.

The Subcommittee[1] supports the wording of the proposed juror demographic information questions and offers the following comments:

- The juror qualification questionnaire should include a clear and succinct explanation of why the demographic information questions are asked, and it should provide an option for a respondent to not answer the question. The New York court system collects juror demographic information and reports a robust rate of voluntary response. Although New Jersey plans to collect demographic data at the point of juror qualification, rather than at the point of reporting for service, a similarly high rate of response is anticipated.

- Although the collection of demographic information that can be compared to U.S. Census data is important for purposes of analysis, the Subcommittee recognizes that the limited, broad

[1] All recommendations reflect the view of a majority of the Subcommittee. Designees of legislative members attended the meetings but were non-voting participants.

categories employed in the Census do not necessarily correspond to how individual jurors may self-identify. The Subcommittee therefore supports (1) providing a means for jurors to access the U.S. Census guide to obtain further information about the response options; and (2) including additional questions that would permit jurors to respond more fully, such as jurors who would be directed by the U.S. Census guidance to report as White but who might self-identify or be perceived as people of color.

2. Reporting of Juror Demographic Data

The Subcommittee recommends that the Judiciary publish aggregate juror demographic data -- that is, demographic data that shows the numbers and percentages of jurors in each race, ethnicity, and gender category, by county -- on an annual basis. The Subcommittee also recommends that aggregate information for jurors scheduled to report on a selection date be included as a part of the petit jury list routinely provided to parties before a scheduled jury selection. See Rule 1:8-5.

3. Prescreening of Jurors Before Voir Dire

In New Jersey, a prospective juror can request to be disqualified, excused, or deferred without reporting to the courthouse. See N.J.S.A. 2B:20-10. If appropriate documentation is submitted to the Assignment Judge or designee, the juror is excused from reporting. A juror who reports for selection can also ask to be excused by the judge based on hardship.

In addition to those two options, the judge and attorneys in a lengthy trial may agree that jurors should be prescreened by court staff for availability.

The Subcommittee recommends that the Judiciary issue public information about processes for screening jurors before voir dire. Providing attorneys with such guidance will not only support transparency but will allow counsel and the court to work together to manage jury selection more effectively.

4. Data on Juror Outcomes

A juror who reports for service and is sent to voir dire may be dismissed by the judge based on a hardship, such as financial burden or childcare responsibilities, or excused for cause based on a finding that the juror might not be fair and impartial in the trial. In current practice, both types of dismissals are combined in one category.

The Subcommittee recommends that the Judiciary collect more nuanced data to permit more thorough identification and analysis of points in the jury selection process at which diversity changes. Specifically, the Subcommittee suggests that the Judiciary should:

- differentiate, in collecting data, between dismissals for hardship and excusals upon a for-cause challenge;
- when practicable, collect data as to subcategories of hardship dismissals during voir dire as is done in the pre-reporting phase. The Subcommittee specifically recommends that the Judiciary record unavailability to serve based on length of trial as part of an ongoing analysis of those aspects of jury service that may affect the diversity of juries;
- use automated processes to minimize data collection errors; and
- develop a method to collect data as to applications and determinations of for-cause challenges as combined with juror outcomes. Such data would include: the applicant for the challenge (judge; joint challenge; prosecutor/plaintiff; or defense); the judicial determination if applicable (granted or denied); and the juror outcome (dismissed by the judge for cause; peremptorily struck by prosecutor; peremptorily struck by defense; seated).

The Subcommittee observes that the Judiciary will be able in the future to cross-reference data as to hardships and for-cause challenges with juror demographic information and submits that analysis over time may reveal trends as to the points at which jury diversity changes.

B. Implicit Bias Training for Judges and Attorneys

All New Jersey state court judges participate in ongoing training on explicit and implicit bias. The Judiciary incorporates bias awareness training as part of orientation for newly appointed judges, as well as ongoing educational conferences and the annual Judicial College. In addition to judicial training, pursuant to recent amendments to Rule 1:42 ("Continuing Legal Education"), attorneys licensed in New Jersey are required to complete two hours of coursework in diversity, inclusion, and elimination of bias as part of the biennial ethics and professionalism requirement.

The Subcommittee recommends additional implicit bias training for judges, attorneys, and court staff. The group supports independent and collaborative efforts by the Judiciary, Attorney General, Public Defender, and legal associations to expand implicit bias training, including training that focuses specifically on jury selection. The Subcommittee also encourages individual use of assessment tools, such as the Implicit Association Test (IAT), to sustain efforts by all stakeholders to increase awareness and reduce effects of implicit bias, including in jury selection.

C. Best (or Preferred) Practices for Presenting the Issue of Implicit Bias to Jurors, including Jury Charges and Videos

The Judicial Conference showcased three in-development initiatives to support juror impartiality: a video to be shown to jurors during orientation; enhancements to the model jury charges; and new voir dire questions. The Subcommittee was asked to review and offer comments on those draft items.

1. Orientation Video on Juror Impartiality and Implicit Bias

The Subcommittee recommends statewide use of the juror impartiality and implicit bias awareness video developed by the Judiciary and available at this link. The Subcommittee suggests that a judge provide an in-person introduction before the video is shown during orientation. A live introduction by a local judge would frame the video and reinforce the message that jurors must strive to be impartial and not guided by implicit associations, implicit assumptions, or implicit biases.

2. Model Jury Instructions

The Subcommittee recommends enhancements to model jury instructions to reinforce juror awareness of implicit bias -- and to support jurors in taking steps to fulfill their responsibility as impartially as possible. The Subcommittee endorses the proposed wording of the jury instructions as set forth in Attachment K to the Guide to the Judicial Conference. The Subcommittee submits that reminders to jurors at appropriate points in their service -- as part of the preliminary instructions; after the jury is sworn; and before deliberations -- can support a juror's individual capacity to self-check and self-monitor to avoid implicitly biased thought processes and decision-making.

3. Model Voir Dire Questions

The Subcommittee supports additional voir dire questions to reveal reasons why a juror might favor one side or the other, such as the following questions based on those reviewed at the Judicial Conference:

> Question 1: In the juror orientation video and my introductory remarks, the concept of implicit bias was defined and discussed. In light of that information, do you think you will be able to decide the case fairly and impartially? Please explain.
>
> Question 2: Some of the witnesses, parties, lawyers, jurors, or other people involved with this case may have personal characteristics (such as their race, ethnicity, or religion) or backgrounds different from yours, or they may be similar to yours. Would those differences or similarities make it difficult for you to decide this case impartially based solely on the evidence and the law? Please explain.

In conjunction with the supplemental orientation video and enhanced jury instructions, additional new voir dire questions would provide an opportunity for the judge and attorneys to speak with jurors about known or potential implicit biases. In current practice, the judge would ask such additional questions about jurors' impressions of their ability to participate fairly and impartially in addition to the other model voir dire questions. In an attorney-conducted voir dire (ACVD) model, the Subcommittee recommends

that the attorneys would ask jurors about their capacity to participate fairly and impartially.[2]

D. A Court Rule on the Exercise of Peremptory Challenges

In recent years, a number of states have adopted court rules or statutes designed to reduce bias in the exercise of peremptory challenges. Participants in the Judicial Conference expressed support for a new Court Rule along the lines of Washington General Rule 37, which eliminates the need for an allegation that a party has used a peremptory challenge in a discriminatory manner and requires review of a contested peremptory according to an objective standard.

The Subcommittee considered the components of Washington GR 37 and similar reforms in California and Connecticut. The group determined not to include certain provisions found in some or all of those models, and has noted key decision points after the proposed Rule.

The Subcommittee recommends the following new Court Rule:

Rule 1:8-3A. Reduction of Bias in the Exercise of Peremptory Challenges

(a) A party may exercise a peremptory challenge for any reason, except that a party shall not use a peremptory challenge to remove a prospective juror based on actual or perceived membership in a group protected under the United States or New Jersey Constitutions or the New Jersey Law Against Discrimination. This Rule applies in all civil and criminal trials.

(b) Upon the exercise of a peremptory challenge, the court or any party who believes that the challenge may violate paragraph (a) above may call for review of the challenge pursuant to this Rule.

(c) Any such review shall take place outside the hearing of the jurors.

(d) In the review of a contested peremptory challenge,

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[2] The second Subcommittee has proposed a questionnaire for use during ACVD that -- by express design -- avoids any reference to "bias" in seeking information about potential juror biases.

(1) The party exercising the peremptory challenge shall give the reasons for doing so; and

(2) The court shall determine, under the totality of the circumstances, whether a reasonable, fully informed person would find that the challenge violates paragraph (a) of this Rule.

(e) A peremptory challenge violates paragraph (a) of this Rule if a reasonable, fully informed person would believe that a party removed a prospective juror based on the juror's actual or perceived membership in a group protected under that paragraph.

(f) If the court finds that a reasonable, fully informed person would view the contested peremptory challenge to violate paragraph (a) of this Rule, the court shall impose an appropriate remedy. No finding of purposeful discrimination or bias is required.

Official Comment

(1) Paragraph (a) prohibits the exercise of a peremptory challenge to remove a prospective juror based the juror's actual or perceived membership in groups protected by the United States or New Jersey Constitutions and the New Jersey Law Against Discrimination. Currently, the statute protects against discrimination on the basis of race or color; religion or creed; national origin, nationality, or ancestry; sex, pregnancy, or breastfeeding; sexual orientation; gender identity or expression; disability; marital status or domestic partnership/civil union status; and liability for military service. The Rule is intended to cover any future amendments to the statute.

(2) Consistent with RPC 3.1, any call for a review of a peremptory challenge should be advanced in good faith.

(3) In considering the reasons given for a peremptory challenge pursuant to paragraph (d)(1), the court shall bear in mind that the following reasons have historically been associated with improper discrimination, explicit bias, and implicit bias in jury selection and are

therefore presumptively invalid: "(i) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; (vii) not being a native English speaker"; (viii) having friends or family members who were victims of crime; and (ix) understating the degree to which the juror or the juror's family or friends have been victims of crime, based on a belief that only serious violent crime results in victimization. Wash. Gen. R. 37(h).

A party exercising a challenge on one of those bases may overcome the presumption of invalidity by demonstrating to the court's satisfaction that the challenge was not exercised in violation of paragraph (a), but rather based on a legitimate concern about "the prospective juror's ability to be fair and impartial in light of particular facts and circumstances at issue in the case." See Conn. Proposed New Rule (h).

The court shall also consider that certain conduct-based reasons for peremptory challenges have also historically been associated with improper discrimination, explicit bias, and implicit bias in jury selection. "Such reasons include allegations that a prospective juror: was sleeping, inattentive, staring, or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers." Wash. Gen. R. 37(i).

(4) In making its determination as to a contested peremptory challenge pursuant to paragraph (d)(2), the court should consider circumstances that include, but are not limited to: (i) "the number and types of questions posed to the prospective juror," including whether and how "the party exercising the peremptory challenge[] questioned the prospective juror about the alleged concern; (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the" challenged juror in comparison to other jurors; (iii) whether other prospective jurors gave similar answers but were not challenged by that party; (iv) whether a reason might be disproportionately associated with a protected group identified in paragraph (a); and (v) "whether the party has used

peremptory challenges disproportionately against" members of a protected group as defined in paragraph (a). See Wash. Gen. R. 37(g).

(5) Paragraph (f) calls upon the court to impose an appropriate remedy for a violation of paragraph (a). The following remedies may be applied in response to a court determination that a party has impermissibly exercised a peremptory challenge: (i) reseat impermissibly challenged juror(s); (ii) reseat impermissibly challenged juror(s) and order forfeiture of challenges; (iii) require subsequent peremptory challenges to be exercised at sidebar; (iv) grant additional peremptory challenges to non-offending party or parties; (v) dismiss empaneled jurors and start voir dire over; and (vi) combine multiple remedies. State v. Andrews, 216 N.J. 271 (2013).

The process as outlined in the proposed new Rule is intended to be straightforward and non-accusatory: a party seeks to exercise a peremptory; the court or another party requests review; the first party states the reason for use of the peremptory; and the court determines whether a reasonably, fully informed person would conclude that the peremptory challenge was exercised to remove a prospective juror based on the juror's actual or perceived membership in group protected under the United States or New Jersey Constitutions or the New Jersey Law Against Discrimination.

Some key decisions made in the course of developing the above Rule include:

- To allow for a streamlined Rule that sets forth the new process for making and evaluating peremptories in clear and concise terms while simultaneously providing easy-to-access guidance to the bar and bench, the Subcommittee proposes the adoption of an Official Comment alongside the new Rule and notes that additional details and instructions can be provided through the Bench Manual on Jury Selection or a new Directive, as well as through training.

- In consideration of the practical challenges faced by attorneys, the Subcommittee included language that a peremptory challenge may be exercised for any reason, except to remove a juror based on the juror's actual or perceived membership in a protected group. The

Subcommittee also proposes a provision that upholding a challenge to a peremptory does not entail a finding of either purposeful discrimination or bias.

- The Subcommittee declined to prohibit questioning as to any areas because it finds unrestricted inquiry to be critical to raising potential for-cause challenges.

- Other jurisdictions have adopted an "objective observer" standard for analyzing peremptory challenges. Rather than propose a new standard, the Subcommittee opted to adapt the familiar "reasonable, fully informed person" standard to this context. The Subcommittee recommends that challenges be evaluated from the vantage point of "a reasonable, fully informed person."

- Consistent with the Court's recognition that discrimination and bias may apply beyond the categories of race and ethnicity, see State v. Andujar, 247 N.J. 275, 315-16 (2021); State v. Gilmore, 103, N.J. 508, 526 (1986), the Subcommittee has tethered the proposed draft Rule to all groups protected under the U.S. and N.J. Constitutions and the New Jersey Law Against Discrimination. For clarity, the groups protected under the New Jersey Law Against Discrimination are also included in the proposed official comment to the Rule.

- The Subcommittee considered but declined to incorporate a reference to case law as a source of potential additional protected groups on the basis that courts in extending the scope of protection against discrimination or bias would be interpreting the provisions of the U.S. and N.J. Constitutions and the New Jersey Law Against Discrimination.

The Subcommittee recommends that any new Rule be effective after a sufficient period for training of both attorneys and judges. Training for attorneys should address the professional responsibility considerations for practitioners, including within the context of any future opinion that supersedes former ACPE Opinion 685, which found that use of race-based peremptory challenges was not prohibited by Rule of Professional Conduct

8.4(g). Judicial training should review the factors referenced by the Court in Andujar as well as the remedies available if a peremptory challenge is determined to violate the Rule.

New Jersey Senate

Senate Republican Office
New Jersey State House
P.O. Box 099
Trenton, NJ 08625

SenateNJ.com
njsenreps@njleg.org
P: (609) 847-3600
F: (609) 984-8148

March 11, 2022

Sent via e-mail

Honorable Ernest M. Caposela, A.J.S.C.
Chair, Subcommittee on Systemic Barriers
Judicial Conference on Jury Selection
Hughes Justice Complex
P.O. Box 037
Trenton, New Jersey 08625

Dear Judge Caposela,

In light of the important work you and the members of your subcommittee have undertaken to improve the jury selection process in New Jersey, I wish to offer my sincere appreciation. I would also like to thank Chief Justice Rabner for convening the Judicial Conference on Jury Selection and so graciously including me in these important deliberations.

I am in receipt of the draft Report and Recommendations of the Subcommittee on Systemic Barriers to Jury Service. You have indicated that members may provide comments before the report is finalized. For the record, I would like to note my concerns regarding three of the recommendations to be advanced by the subcommittee, specifically, recommendations 2 and 3 of section A and recommendation 1 of section B.

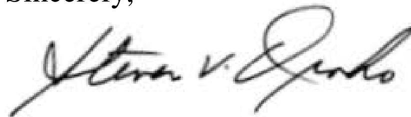
Recommendation 2 of section A would extend eligibility for jury service to individuals who have been convicted of an indictable offense upon the conclusion of their term of incarceration. I believe this recommendation goes too far. While I understand the need to facilitate the diversification of the jury pool, those who have been convicted of morally abhorrent crimes, such as rape and murder, have no place on any jury. Good character is and should continue to be a nonnegotiable eligibility requirement for any person with the power to administer justice.

Recommendation 3 of section A would support extending eligibility for jury service to individuals who are not citizens of the United States. Jury service is one of the most significant civic responsibilities a citizen has and requires an understanding of and commitment to the values that define the American justice system. American citizens are educated on these values as schoolchildren and those who gain citizenship in adulthood take an oath swearing to support and defend the Constitution and laws of the United States. Empaneling juries with noncitizens, especially those who hold only a temporary visa, would diminish the ability of Americans to be judged by a jury of their peers.

Recommendation 1 of section B would increase compensation for jury service. Although I agree that jurors should be better compensated, the potential cost implications of this recommendation are concerning. Therefore, it is imperative that a sustainable funding source be identified before this proposal is advanced beyond recommendation.

Thank you for providing an opportunity to comment on the subcommittee's draft report. I look forward to continuing to work with the Judiciary to root out all barriers to justice in our current jury selection process.

Sincerely,



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ACDL-NJ
Association of Criminal Defense Lawyers of New Jersey
P.O. Box 180 • West Allenhurst, New Jersey • 07711
(732) 517-1533 • Fax # (732) 531-0397 • www.acdlnj.org

April 19, 2022

Via Email

Honorable Glenn A. Grant, J.A.D.
Administrative Director of the New Jersey Courts
Richard J. Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08611

Re: Judicial Commission

Dear Judge Grant:

I am the President Emeritus of the Association of Criminal Defense Lawyers of New Jersey ("ACDL-NJ"). As you may be aware, the ACDL-NJ is a non-profit corporation organized under the laws of New Jersey to, among other purposes, "protect and insure by rule of law, those individual rights guaranteed by the New Jersey and United States Constitutions; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance, to promote justice and the common good." Founded in 1985, ACDL-NJ has more than 500 members across New Jersey. Our courts have found that ACDL-NJ has the special interest and expertise to serve as an amicus curiae per Rule 1:13-9 in numerous cases throughout the years.

TRUSTEES EMERITI
Matthew P. Boylan (1932-2009) • Raymond A. Brown (1915-2009) • S.M. Chris Franzblau • Richard L. Friedman
M. W. Pinsky • Michael A. Querques (1929-2013) • Theodore V. Wells, Jr. • Warren W. Wilentz (1924-2010)

In addition to its frequent appearance as an amicus to protect the rights of criminal defendants in numerous Supreme Court and Appellate Division cases, the ACDL-NJ has participated in many judicial and legislative committees relating to criminal law and the rights of defendants. In recognition of our role, our Supreme Court invited our participation in the ongoing Judicial Commission relating to Jury Selection and I was designated by the organization to attend the various meetings. While we acknowledge the goal of consensus, that cannot displace the true purpose of such a commission – to aim for a fairer jury selection process that will not trample on the rights of individual defendants to a fair trial. Similarly, we acknowledge the Court's interest in efficiency in selecting venire panels, but not at the cost of sacrificing an individual's right to a fair trial.

This Judicial Commission was initiated by cases involving the prosecution's misuse of peremptory challenges and a publicized desire to limit implicit bias and the underrepresentation of minorities in venire panels and juries. It quickly became clear that many in the judiciary saw this crisis as an opportunity to obtain something they had long aimed for – the reduction of peremptory challenges, even though the stated problems were not caused by the use – or misuse – of such challenges by defense counsel. Instead of arguments that defense counsel were misusing peremptory challenges, we heard how it would be more efficient for the judiciary to be able to call in less jurors and how New Jersey allowed more challenges than other jurisdictions. However, the claimed waste of resources was never adequately explained, as the court's own records show that trial lawyers were not abusing their challenges nor even using all of them in the majority of cases. Given the statistics available to the court

system, there is no doubt that the courts could estimate how many venirepersons would be needed to deal with for cause, conflicts and peremptory challenges in the vast majority of cases. And it is those exceptional cases, where a larger number of peremptory challenges were used that show the necessity and the wisdom of the current system which has worked for decades.

Cutting back on peremptory challenges, which the courts have tried previously – and failed without any harm to our judicial system – became a solution in search of a problem. Instead of seriously instructing trial judges to monitor the use of peremptories, especially by prosecutors, and more strictly enforcing the rule that challenges for cause were to be liberally granted, New Jersey judges frequently attempted to rehabilitate jurors who had been challenged for cause, leading to the necessity for the use of additional peremptory challenges.

It is beyond cavil that venire and jury panels in New Jersey are not truly representative and that people of color and of lower socioeconomic status are severely underrepresented. This Commission has put forward a number of suggestions that we support and hope will be implemented and which may help lead to more representative juries in the future. That future is not here yet. One of the major problems with the Commission's proposal is that it pays lip service to the concept of implicit bias, but does not allow the defendant to choose a jury that acknowledges that fact. On average, the venire pool will have few people of color or who look like the defendant. No matter the type of voir dire – attorney or judge led – some individuals may not disclose their actual or implicit bias and as history shows, judges will attempt rehabilitate them or not excuse them for cause. The defendant will now have less ability to strike those jurors through

the use of peremptories than he is presently guaranteed by New Jersey law. The defendant will also be less able to strike jurors without cause in order to get deeper into the venire panel so as to make it more representative.

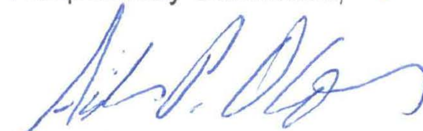
We support the introduction of attorney led voir dire and hope that judges in the future will truly grant more for cause challenges. The Commission has not however made a convincing case why these two changes are linked to a reduction in peremptory challenges, other than the imposition of a quid pro quo bargain. If so, it is a bad bargain, as the proposal to allow a pilot program (which experience shows may quickly become the norm and then the rule after a declaration of success) setting up an as yet undefined attorney led voir dire with a hope that judges will avoid the pressures to conduct "efficient" jury selection and remove more people for cause (which seems to run counter to the inexorable push for "efficient" use of venirepersons), comes at the price of losing more than half of a defendants peremptory challenges. Indeed, it is worse than what we feared, as the reduction is not to be borne equally by the defense and the prosecution. While the stated problem was the misuse of peremptories by the prosecution, the proposed "solution" is to reduce the defense's challenges from 20 to 8 (60%) while only reducing the prosecutions challenged from 12 to 6 (50%). Again, it is the defendant, often a minority, who pays the price for this "reform" in the name of efficiency.

We object strenuously to the reduction of peremptory challenges and object to this "pilot" program because it is a bad bargain – attorney led voir dire can be achieved without a reduction in peremptory challenges and there is little to no indication that defense counsel are misusing their peremptory challenges or that they we would

misuse them in a system employing attorney led voir dire. The proposal puts defendants in a Hobson's choice – in order to get the proposed advantage of attorney led voir dire they must give up 60% of their statutory peremptory challenges and in order to keep their challenges they must forgo the opportunity to have their attorney lead the voir dire. If the Commission is truly interested in setting up a pilot program it should either set up a test of attorney led voir dire <u>without</u> a reduction in challenges or it could set up duplicate pilot programs – one without a reduction in peremptory challenges and one with a reduction in peremptories (although that reduction should, at a minimum, be proportional for both sides and not larger for the defendant).

Our objection is based on protecting the rights of all defendants who enter court with a presumption of innocence and a guarantee of due process. Peremptory challenges are the only part of the system where the defendant has any autonomy to have a choice in how the trial will proceed and is the defendant's only unimpeded bulwark against the misuses of the system and implicit – and explicit – bias by jurors. For these reasons the ACDL-NJ objects to the proposal to implement a pilot program involving the unbalanced loss of peremptory challenges.

Respectfully Submitted,



AIDAN P. O'CONNOR
President Emeritus, ACDL-NJ

cc. Mark Friedman, Esq., President, ACDL-NJ (via email)

"Social justice should be the underlying goal of all humanity."
-Alan V. Lowenstein, Institute Founder

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do social justice.

April 19, 2022

STATEMENT OF THE NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE DISSENTING FROM RECOMMENDATIONS 13 & 25 IN THE JUDICIAL CONFERENCE ON JURY SELECTION COMMITTEE REPORT

Thank you, Chief Justice Rabner and the Judicial Conference for allowing the New Jersey Institute for Social Justice the opportunity to respectfully dissent from recommendations 13 and 25.[1] Specifically, recommendation 13 establishes a pilot program reducing peremptory challenges and recommendation 25 establishes a new standard to attempt to reduce bias in peremptory challenges. The full Judicial Conference Committee approved these recommendations to be included in its final recommendations.

The Institute is compelled to dissent from these two recommendations because they fall short of abolishing peremptory challenges, which have been used throughout history and across this country to suppress the participation of Black people and other people of color on juries.

Thirty-five years ago, the Supreme Court in *Batson v. Kentucky* confronted the question of peremptory challenges when it ruled that excluding a juror solely based on their race violated the Fourteenth Amendment.[2]

Much has been said about Justice Marshall's concurrence in *Batson v. Kentucky*, where he presciently stated, "[t]he decision today will not end the racial discrimination that peremptories inject into the jury-selection process."[3] However, his concurrence supported the *Batson* majority.

While *Batson* and its resulting cases may have constrained the ability to strike jurors through bias, they have never eliminated it. One may even ask whether Marshall's concurrence contributed to the continuation of peremptory challenges that perpetuate racial discrimination by allowing attorneys to remove jurors, potentially because of bias, without stating a reason for the record.

Through our dissent, we are stating that *enough is enough* when it comes to peremptory challenges. We are in an opportune moment where we can ensure that New Jersey's juries are as diverse as the state is. We must meet

this moment with bold and transformative ideas that will address the systemic racism faced by Black people and other people of color in this state, including in our judicial system. The Institute believes that by eliminating peremptory challenges, New Jersey can meet this moment.

I. Introduction

Before elaborating on the reasons for our dissent from two select recommendations, it is worth mentioning the areas of agreement between the Institute and many of the members of the committee on all the other recommendations. This conference has bravely confronted significant systemic challenges that have resulted in people of color being chronically underrepresented on juries in a state that is incredibly racially diverse. This committee will adopt several of the recommendations we outlined in our public comment[4] submitted in November 2021 – including increasing juror pay and extending jury service to many who have indictable offense convictions.

In fact, in the face of New Jersey's commitment to meaningfully increase the diversity of juries by expanding the jury pool through attorney conducted voir dire and expanding "for-cause" challenges, any argument for continuing peremptory challenges becomes even less tenable. This is because attorneys would have the tools to lead their own questioning of jurors and develop a transcript that would support on-the-record arguments to remove any jurors "for cause." This is better for transparency and stands in stark contrast to peremptory challenges, which are perpetually shrouded in suspicion and the possibility of abuse. Unfortunately, this conference has stopped short of taking the necessary bold action taken by the state of Arizona which wisely abolished peremptory challenges.[5]

To truly transform New Jersey's racially disparate criminal justice system into one based on fairness and equity, New Jersey, too, must abolish peremptory challenges.

Our statement highlights the following: (1) the racial disparities in New Jersey's criminal justice system and how recommendations 13 and 25 may maintain these disparities and (2) data showing that peremptory challenges are subject to racial bias and how recommendations 13 and 25 do not eliminate this potential for bias.

II. New Jersey already has stark racial disparities in its criminal justice system and recommendations 13 and 25 may maintain these racial disparities

New Jersey has stark racial disparities, some of which are the worst of any state in the country.

Black kids in New Jersey are locked up at almost 18 times the rate of white kids,[6] the highest disparity rate in America,[7] even though they commit most offenses at similar rates.[8]

And incarcerated kids too often end up part of the adult criminal justice system, where a Black adult in New Jersey is 12 times more likely to be in prison than a white adult[9] — the highest disparity in the nation.[10]

Forty-two percent of our detained population is Black[11] and 61% percent of our prison population is also Black[12] in a state that is only about 15% Black.[13]

And then what do we do with the racism in our criminal justice system? We import it into our democracy and our courtrooms. Not only are incarcerated people denied the vote[14] – but people with criminal convictions for indictable offenses are disqualified from serving on juries for life.[15] This bar impacts an estimated 438,000 to 533,000 of the overall population from serving on juries.[16] This is about 7-8% of the overall population of the state.[17] An estimated 219,000 to 269,000 of the Black population in New Jersey is impacted by this bar[18] – a staggering 23-29% of the Black population.[19]

Notably, a study commissioned by the New Jersey Supreme Court showed the underrepresentation of Black jurors in jury pools.[20] In that same study, Black jurors were found to be underrepresented in each of the 14 counties surveyed.[21] Black jurors were underrepresented in Mercer County compared to their proportion of the population by 41.3%.[22] In Essex County, the county with the highest concentration of Black individuals,[23] Black jurors were underrepresented by 20.3%.[24]

All told, Black people are overrepresented in detainment and incarceration and underrepresented on juries. New Jersey must stop including peremptory challenges in this toxic cocktail of structural racism, which may further remove jurors of color and makes the system appear even more rigged against people of color.

We are excited that the conference has coalesced behind the pilot program for "attorney-conducted voir dire"[25] and we thank the Office of the Public Defender for championing this program. We are proud to have made a small contribution to the recommendation for this program. Attorney conducted voir dire is the future for voir dire in New Jersey and we believe that it could be part of a system with expanded "for cause" challenges *without* peremptory challenges. In this system, attorneys can lead the questioning of jurors and develop a rapport with jurors. Attorneys could expose areas where jurors may have biases and are unable to be fair and impartial and develop a record that will support a "for cause" challenge. Coupled with liberalizing the granting of "for cause" challenges, peremptory challenges will have no place. Unfortunately, the Institute must dissent because this pilot does not take the next step to eliminate peremptory challenges.

III. Peremptory challenges are subject to racial bias and recommendations 13 and 25 do not eliminate this potential for bias

Peremptory challenges are problematic because they risk injecting racial bias into New Jersey's already racially disparate criminal justice system.

Throughout the United States, the impact of racially biased peremptory challenges has been on full display.

Peremptory challenges had a particularly pernicious effect in the trial of the white men who murdered Ahmaud Arbery, who was Black. It began with an incident that occurred in a southern town in Georgia.[26] Ahmaud Arbery was jogging down a residential street when he was followed by a group of white men in pickup trucks, one of whom was carrying a shotgun.[27]

They chased and confronted him, believing that he didn't belong there and shot him to death.[28]

The tragedy did not end there for Ahmaud Arbery, his family or his community. The town near where Ahmaud Arbery was killed has a population that is 55% Black.[29] The county has a population that is 27% Black.[30] However, during jury selection for a trial, 11 out of 12 Black potential jurors were struck from the panel through peremptory challenges made by defense attorneys, leaving a sole Black juror.[31]

The trial judge even conceded that intentional discrimination likely infected the jury selection process.[32] This makes a mockery of the right to a jury of one's peers.

This injustice was not limited to Ahmaud Arbury.

It happened during the six times that Curtis Flowers was tried in Mississippi for murder after the same prosecutor struck a total of 41 out of 42 Black potential jurors.[33] In a recent study in Mississippi, Black jurors were 4.51 times as likely as white jurors to be removed from a jury by prosecutors through peremptory challenges.[34]

In another study of North Carolina non-capital felony trials, prosecutors used 60% of their peremptory challenges against Black jurors although they were only 32% of the jury pool.[35]

In a study of capital cases in Philadelphia from 1981 to 1997, prosecutors used peremptory challenges to remove 51% of Black jurors compared to 26% of similarly situated non-Black jurors.[36]

This study also observed that *Batson* had only a modest impact on peremptory trends, with race-based peremptory challenges declining in the lead-up to *Batson* but then increasing thereafter.[37]

It should be noted that defense attorneys have also employed this practice – using peremptory challenges to exclude white jurors to combat the prosecution's improper peremptory challenges against Black jurors.[38] In the Mississippi study, white jurors were 4.21 times as likely as Black jurors to be removed from a jury by defense peremptory challenges.[39] In the North Carolina study, defense attorneys used 87% of their peremptory challenges against white jurors although they made up 68% of the pool.[40] Lastly, in the Philadelphia study, defense attorneys used peremptory challenges to remove 26% of Black jurors and 54% of similarly situated non-Black jurors.[41]

Specific statistics about the use of peremptory challenges in New Jersey are limited. While a recent study commissioned by the New Jersey Supreme Court found that the use of peremptory challenges *did* have an impact on the representation of people of color on New Jersey's juries, it also found that "the ability to observe a [statistical] relationship between attorneys' use of large numbers of peremptory challenges and levels of minority representation was limited."[42]

We do know, however, that peremptory challenges are part of New Jersey's overall racialized criminal justice system, which is characterized by some of the worst racial disparities in America. Again, recommendation 13 could have ended peremptory challenges, thus preventing the potential for bias that is borne out in data across the nation.

We are also compelled to dissent from the committee's inclusion of recommendation 25,[43] which maintains a system employing peremptory challenges. While it is laudable that the judicial conference would want to reduce bias within our system through a new Court Rule 1:8-3A entitled, "Reduction of Bias in the Exercise of Peremptory Challenges,"[44] the Institute cannot support a recommendation that merely *reduces* bias within peremptory challenges. The Institute would, however, support a recommendation that *eliminates* the potential for bias in peremptory challenges. The only way to truly eliminate this potential is to eliminate peremptory challenges.

There has been discussion about the particular language of Section (d)(3) within this rule: "For purposes of this Rule, a reasonable, fully informed person is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors."[45] If the conference expects that a reasonable, fully informed person is aware of structural racism, then the conference should take the bold step of eliminating peremptory challenges, which are a pillar of structural racism in our court systems. As such, we must dissent.

IV. Conclusion

For the reasons we have stated, we respectfully dissent from recommendations 13 and 25. Now is the opportunity for New Jersey to seize the moment to eliminate peremptory challenges and undo its legacy of systemic racism in our judicial system.

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[1] Recommendations to the Judicial Conference Committee (Apr. 12, 2022) (unpublished recommendations) (on file with the Judicial Conference on Jury Selection Committee).

[2] Batson v. Kentucky, 476 U.S. 79, 84 (1986).

[3] *Id.* at 102.

[4] Ryan Haygood, Judicial Conference – Comment #013 New Jersey Institute for Social Justice (Nov. 12, 2021), https://www.njcourts.gov/courts/assets/supreme/judicialconference/comments/comment013.pdf?c=htE.

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