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for JUSTICE**_{Inc.}

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June 10, 2022

Hon. Glenn A. Grant, J.A.D.

Acting Director

Administrative Office of the Courts

Attn: 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

Dear Judge Grant:

On behalf of the 2,700 members of the New Jersey Association for Justice (NJAJ), thank you for the opportunity to comment on the Recommendations of the Committee of the Judicial Conference on Jury Selection.

The fair administration of justice requires unbiased juries. Unbiased juries result from a jury selection system that is free from discrimination. The New Jersey Association for Justice thanks the Committee for its diligent and comprehensive work and respectfully provides the below comments.

The New Jersey Association for Justice supports the Committee's Recommendations 1-12. These Recommendations serve to enlarge the pool of potential jurors as well as seek to improve the overall juror experience. Increasing juror compensation, in particular, has the capacity to make jury service feasible for many who are unable to serve due to the economic hardships associated with lost wages. Further, the engagement initiatives will reinforce the value associated with jury service in our state. Overall, these recommendations, if enacted, will positively impact the jury selection process by broadening and diversifying the pool of prospective jurors.

The New Jersey Association for Justice enthusiastically supports the concept of an Attorney Conducted *Voir Dire* ("ACVD") program. Meaningful *voir dire* is vital to secure a jury free of bias. Many jurisdictions recognize that judge dominated *voir dire* is not preferable.

In order to make certain that the jury is "fair and impartial," a thorough *voir dire* is required to "probe the minds of the prospective jurors to ascertain whether they hold biases that would interfere with their ability to decide the case fairly and impartially." *State v. Erazo*, 126 N.J. 112, 129 (1991). There is no better antiseptic to implicit or explicit discrimination than the *voir dire* process, assuming that a representative sample of the community makes it to the central jury room in the first place.

Attorney-conducted *voir dire* must become the principal means of jury selection. The lawyers and the parties have superior knowledge of the factual details and are better positioned than judges to understand how explicit and implicit biases of jurors may affect the outcome of the case.

As noted by retired federal Judge Mark Bennett, judge-dominated *voir dire* may exacerbate implicit bias in the selected jury's determinations because it prevents detection and removal of implicitly biased jurors.



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That said, the New Jersey Association for Justice does not support the proposed pilot program in its present form as set forth in the Recommendation 13.

The New Jersey Association for Justice has great concerns regarding the viability of a pilot program that requires a criminal defendant to voluntarily deprive him or herself of the substantive statutory right to a significant number of peremptory challenges. Peremptory challenges are among the most important rights afforded the criminal defendant. *See Pointer v. United States*, 151 U.S. 396, 408 (1894) ("The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused.") The proposed pilot program places the criminal defendant in the difficult position of trading the opportunity for more meaningful *voir dire* in exchange for half the statutorily afforded peremptory challenges. From a practical perspective, most attorneys may never consider participation due to the necessary requirements to assure voluntariness. Further, appellate challenges will most likely arise based upon a defendant's assertion that the recommendation to participate in the program constituted ineffective assistance of counsel.

Further, testing multiple variables in the jury selection process through a pilot program is not advisable. When change is tested, it may frustrate the ability to draw conclusions when more than one significant variable is altered. It is respectfully suggested that a pilot program be initiated that *does not* include the forfeiture of the statutorily afforded peremptory challenges. This would provide an opportunity to measure the impact and effectiveness of ACVD while not potentially disadvantaging the criminal defendant.

The New Jersey Association for Justice also supports, with some qualification, Recommendation 25. This Recommendation proposes new Rule 1:8-3A that modifies the *Batson/Gilmore* analysis. It clarifies and provides practical guidance regarding the New Jersey Supreme Court's findings in *State v. Andujar*.

The proposed Rule does not require a finding of purposeful discrimination, nor does it assess a party's subjective intent in exercising a challenge. We note that the proposed Rule's wording may unintentionally focus on the party exercising the challenge and their intent. As such, it is respectfully suggested that the standard would more precisely incorporate the guidance of *Andujar* if it were phrased to move the focus away from the party exercising the challenge, and instead place that focus on the underlying basis for the challenge itself. As such, the following revised language is suggested:

A peremptory challenge violates paragraph (a) of this Rule if a reasonable, fully informed person would believe that the juror's actual or perceived membership in a group protected under that paragraph was a factor in the use of the peremptory challenge.

This revised wording makes it clear the court need only find that protected group membership be a reason for challenge.



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Further, the proposed Rule also includes proposed Official Comments. These comments set forth presumptively invalid reasons for exercising peremptory challenges. While the New Jersey Association for Justice does not dispute that these reasons have been associated with improper discrimination, we are concerned that there may be inconsistency and other difficulties in applying presumptions set forth in the Comments rather than the Rule itself.

Thank you for the opportunity to comment in connection with these important recommendations regarding jury service in New Jersey.

Respectfully,

A handwritten signature in black ink, appearing to read "James S. Lynch", written in a cursive style.

James S. Lynch, Esq.
President