

A Guide to the  
*New Jersey Judicial Conference*  
on  
*Jury Selection*

# THE JUDICIAL CONFERENCE ON JURY SELECTION

November 10 & 12, 2021

*The purpose of the Conference is straightforward: to enhance ‘public respect for our criminal justice system and the rule of law’ by ‘ensur[ing] that no citizen is disqualified from jury service because of . . . race’ or other impermissible considerations.*

-- State v. Andujar, 247 N.J. 245, \_\_\_ (2021) (quoting Batson v. Kentucky, 476 U.S. 79, 99 (1986)).

In announcing this Judicial Conference in State v. Andujar, the Court explained that “[t]he Conference will explore the nature of discrimination in the jury selection process. It will examine authoritative sources and current practices in New Jersey and other states, and make recommendations for proposed rule changes and other improvements.”

This document provides context for many of the issues that will be addressed at the Judicial Conference. Information and reference materials have been gathered and summarized by staff of the Administrative Office of the Courts for the convenience of the reader. This document is not and cannot be all encompassing, however, and the inclusion of materials or informative overviews does not suggest that the Court will either rely on or limit itself to those resources when ultimately considering the post-Conference “recommendations for proposed rule changes and other improvements” requested in Andujar.

In addition to the materials referenced in this document, the Administrative Office of the Courts will accept materials submitted by Conference participants and attendees, as discussed in Section III below. Additional materials may also be posted after the Conference.

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## I. Why We Are Gathered

### A. State v. Andujar, 247 N.J. 275 (2021)

In Andujar, on behalf of a unanimous Supreme Court, Chief Justice Stuart Rabner called for a Judicial Conference on Jury Selection:

This appeal highlights the critical role jury selection plays in the administration of justice. It also underscores how important it is to ensure that discrimination not be allowed to seep into the way we select juries. Potential jurors can be removed for cause if it appears they cannot serve fairly and impartially. The parties can also strike individual jurors, without giving a reason, by exercising peremptory challenges.

New Jersey today allows for the highest number of peremptory challenges in the nation -- more than double the national average -- based on a statute enacted in the late 1800s. Yet, as the United States Supreme Court acknowledged decades ago, peremptory challenges can invite discrimination. See Batson v. Kentucky, 476 U.S. 79, 96, 98 (1986).

Although the law remains the same, our understanding of bias and discrimination has evolved considerably since the nineteenth century. And federal and state law have changed substantially in recent decades to try to remove discrimination from the jury selection process. See Batson, 476 U.S. 79; State v. Gilmore, 103 N.J. 508 (1986).

It is time to examine the jury selection process -- with the help of experts, interested stakeholders, the legal community, and members of the public -- and consider additional steps needed to prevent discrimination in the way we select juries. We therefore call for a Judicial Conference on Jury Selection. The Conference will convene in the fall to assess this important issue and recommend improvements to our system of justice.

The Court reached its decision to convene this Judicial Conference in considering the following facts and circumstances.

Defendant Edwin Andujar, convicted of murder, challenged his conviction based on the discriminatory exclusion of F.G. from the jury that heard Andujar's case. F.G., a black male from Newark, was questioned for about a half hour during the jury selection process. Throughout the questioning, F.G. told the court he believed he could be a fair and impartial juror.

F.G. volunteered that he had two cousins in law enforcement and knew "[a] host of people" who had been accused of crimes -- five or six close friends in all. In providing details about those accusations, F.G. used terms like "CDS" and "trigger lock." F.G. also told the court about three crime victims he knew. He said that two cousins had been murdered, and a friend had been robbed at gunpoint.

Asked if anything he had said would have an impact on him as a juror, F.G. suggested that he, like every other juror, has a unique background and perspective, which is why defendants are judged by a group. After additional questions, F.G. was asked whether the criminal justice system was fair and effective; F.G. responded, "I believe so because you are judged by your peers."

The State challenged F.G. for cause and asked that he be removed. The prosecutor noted that F.G. "has an awful lot of background" and "uses all of the lingo about, you know, the criminal justice system." A second prosecutor voiced concern that F.G.'s "close friends hustle, engaged in criminal activity" because "[t]hat draws into question whether [F.G.] respects the criminal justice system" and his role as a juror.

Defense counsel stated that "it is not a hidden fact that living in certain areas you are going to have more people who are accused of crimes, more people who are victims of crime," and that "to hold it against [F.G.] that these things have happened . . . to people that he knows . . . would mean that a lot of people from Newark would not be able to serve."

The trial court denied the State's motion, explaining that "[e]verything [F.G.] said and the way he said it leaves no doubt in my mind that he . . . does not have any bias towards the State nor the defense . . . . I think he would make a fair and impartial juror."

After the court's ruling, the prosecution ran a criminal history check on F.G. The next day, the court informed the defense of the State's finding that there were "warrants out for F.G." and the State's intention "to lock him up." Defense counsel noted there was "one warrant out of Newark Municipal Court." Afterward, the State renewed its application to remove F.G. for cause, without opposition. Andujar was ultimately convicted.

The Appellate Division reversed Andujar's conviction, and the Court upheld that reversal. In doing so, the Court confronted two questions: first, whether the prosecution may independently run criminal background checks on prospective jurors; and second, whether Andujar's right to be tried by an impartial jury, selected free from discrimination, was violated.

As to background checks on prospective jurors, the Court held that the decision to run a criminal history check

cannot be made unilaterally by the prosecution. Going forward, we direct that any party seeking to run a criminal history check on a prospective juror must present a reasonable, individualized, good-faith basis for the request and obtain permission from the trial judge. We refer to a check of a government database that is available to only one side. The results of the check must be shared with both parties and the court, and the juror should be given an opportunity to respond to any legitimate concerns raised.

The Court provided that guidance in an

attempt to accommodate multiple interests: the overriding importance of selecting fair juries that are comprised of qualified, impartial individuals; the need for an evenhanded approach that applies to all parties; the need to guard against background checks prompted by actual or implicit bias; and the importance of having a process that respects the privacy of jurors and does not discourage them from serving.

The Court also found "that defendant was denied his right under the State Constitution to a fair and impartial jury selected free from discrimination" because "[t]he record reveals that implicit or unconscious racial bias infected the jury selection process in violation of defendant's fundamental rights."

Stressing that nothing -- either in F.G.'s responses during jury selection or what was revealed through the improper background check -- disqualified F.G. from jury service, and underscoring that "[t]he trial court properly denied the State's challenge that F.G. be removed for cause," the Court found "that the circumstances surrounding F.G.'s dismissal allowed for an inference that his removal was based on race."

Quoting the Appellate Division's decision, the Court noted that "[t]he prosecutor presented no characteristic personal to F.G. that caused concern, but instead argued essentially that because he grew up and lived in a neighborhood where he was exposed to criminal behavior, he must have done something wrong himself or must lack respect for the criminal justice system" -- an argument that is "not new" and that has "historically stemmed from impermissible stereotypes about racial groups." The Court explained that the "trial court had already considered and discounted the State's reasons when the court denied its motion to remove F.G. for cause. And throughout the appellate process, the State has not provided a convincing non-discriminatory reason for the steps it took to keep F.G. off the jury."

The Court made clear that it did not "find the trial prosecutors engaged in purposeful discrimination or any willful misconduct." But the Court concluded that "F.G.'s removal from the jury panel may have stemmed from implicit or unconscious bias on the part of the State, which can violate a defendant's right to a fair trial in the same way that purposeful discrimination can" and that defendant Andujar's "right to be tried by an impartial jury, selected free from discrimination, was violated."

The Court explained that its consideration of implicit bias in this context was a new rule of law because federal and state cases had previously addressed only purposeful racial discrimination in jury selection.

"From the standpoint of the State Constitution," the Court wrote, "it makes little sense to condemn one form of racial discrimination yet permit another. What matters is that juries selected to hear and decide cases are chosen free from racial bias -- whether deliberate or unintentional." Because the rule is new, however, the Court determined that it would apply only in future cases (aside from Andujar's) and announced its "plans to provide additional guidance on how trial courts should assess implicit bias after th[is] Judicial Conference . . . . The new rule will go into effect when that guidance is available" -- after this Judicial Conference on Jury Selection.



## B. Supplemental Resources: About Attachments (A) through (D)

### 1. Glossary of Useful Terms

Andujar discussed aspects of the jury selection process, including challenges for cause, peremptory challenges, and voir dire. **Attachment A** is a glossary that provides working definitions of those terms, and others, that will be used throughout the Conference.

### 2. About Implicit Bias

In Andujar, the Court distinguished between explicit bias -- which has long been prohibited in the exercise of peremptory challenges -- and implicit bias, which will now be part of the inquiry into whether a peremptory challenge was permissible. **Attachment B** provides an introduction to implicit bias and its capacity to affect the justice system, as well as links to scholarly works and studies on implicit bias.

### 3. The Evolution of Peremptory Challenges

Employed in medieval England as a counterweight to the Crown's ability to influence the composition of juries, peremptory challenges came to the United States through the common law and have persisted here though they have been abolished in many other common law countries. **Attachment C** explores the history of the peremptory challenge, from its importation to the United States, to its abuse, to the United States Supreme Court's attempt to curtail that abuse in Batson. The Attachment also discusses later cases that adjusted Batson's three-part burden-shifting test for whether peremptory strikes rest on permissible grounds or impermissible group bias. Finally, the Attachment reviews the New Jersey Supreme Court's adoption of the Batson test in Gilmore and expansion of that test in Andujar.

### 4. Batson Questioned; Peremptories Challenged

**Attachment D** offers illustrative examples of the many critiques of the Batson. Batson's ability to prevent the discriminatory use of peremptory challenges has been questioned from the beginning, leading many to wonder how -- and, indeed, whether -- courts are able to ensure that peremptories are exercised in a fair and equitable manner. Those critiques and questions have come from judicial criticism, as well as legal and empirical analyses. Attachment D offers links to such works.

## II. The Jury Selection Process in New Jersey

In [Andujar](#), the New Jersey Supreme Court expanded its commitment to a fair and efficient jury process to include efforts to address implicit bias as well as intentional discrimination. In [State v. Dangcil](#), as discussed below, the Court directed the Judiciary to collect voluntary demographic data from jurors to support an empirical assessment of juror representativeness.

Taken together, those cases call for the Judiciary -- and all branches of government -- to engage in a meaningful reexamination of existing jury selection processes to identify points at which systemic, institutional, or individual biases may result in unfair exclusion that compromises the right of every criminal defendant to be tried “by a jury drawn from a representative cross-section of the community.” [State v. Gilmore](#), 103 N.J. 508, 524 (1986).

This section provides background information on each stage of the jury selection process to support a comprehensive review of these critical topics. The section proceeds chronologically through the selection process, up to the forward-looking preservation of data required in [Dangcil](#). A more detailed summary is included in **Attachment I**.

### A. Various Stages of the Jury Selection Risk Loss of Representativeness

#### 1. Jury Summoning: The Risk of Exclusion from the Outset

The jury selection process begins with the creation of the master jury list. As provided by N.J.S.A. 2B:20-2, presented in **Attachment E**, the Judiciary receives and compiles source records from the Division of Taxation, Motor Vehicle Commission, and Board of Elections. The Administrative Office of the Courts sorts and merges the source records to eliminate duplicate names and create a single list comprised of prospective jurors in each county.

The use of multiple lists is one way to reach more members of the community than would be represented in a single source.

New Jersey, like most state and local jurisdictions, uses a one-step summoning process, meaning that the summons informs the juror of the date when they are scheduled to report.

## 2. Juror Qualification & Pre-Reporting Administrative Processes

Eligibility to serve as a juror is set by N.J.S.A. 2B:20-1, as provided in **Attachment E**. In New Jersey, an individual who has been convicted of a felony is permanently disqualified from serving as a juror. The Judiciary maintains records of all jurors who are dismissed based on ineligibility for service, including the categorical reason for their dismissal.

A person who qualifies for jury service may request a pre-reporting excusal. N.J.S.A. 2B:20-10, provided in **Attachment E**, lists grounds for such excusals. As detailed in **Attachment F**, documentation may be required to substantiate a pre-reporting excusal, including for hardship grounds. In lieu of a request to be excused, a prospective juror may request to be deferred to a future date. The Judiciary maintains records of all jurors excused or deferred.

In New Jersey and all jurisdictions, some juror summonses do not generate a response, either because they do not reach the intended recipient or because the recipient does not complete the qualification process. Around 10% of summons notices are returned as undeliverable. Another 15% of delivered notices yield no response. Jurors who complete the qualification process and indicate they are available to report when summoned are confirmed for service.

Advocates for jury reforms sometimes point to qualification criteria as a source of potential exclusion and loss of representativeness. To reengage members of the community, some jurisdictions have modified provisions related to felony convictions so that they are a limited duration rather than permanent disqualification from jury service. See Attachment K.

And organizations like The Juror Project aim to promote responsiveness to jury summons; as founder William Snowden explains, “The Juror Project (has) two main goals. The first goal is to increase diversity of the jury panels. The second is to improve people’s perspective of jury duty because not everybody loves jury duty. Many people try to get out of jury duty. What this project is trying to do is to remind the community of the power that we have in that jury deliberation room. It was a power given to us for a reason -- to keep the system honest, to keep the system fair.” Anitra D. Brown, Local Public Defender Looks to the Jury Box for Criminal Justice Reform, The New Orleans Tribune, <https://theneworleanstribune.com/local-public-defender-looks-to-the-jury-box-for-criminal-justice-reform/>. See Attachment K.

### 3. From Confirmation of Service to Voir Dire

Confirmed jurors comprise “the panel” provided for in Rule 1:8-5, see **Attachment E**, and roughly align with the group of jurors who will report to the assembly room for selection.

The term “panel” generally refers to the group of individuals who have reported for service and are available for selection in one or more trials. It can also refer to the subset of jurors who are sent to voir dire for potential selection in a specific trial. Broadly speaking and for purposes of this document, it is accurate to refer to the starting pool (all individuals to whom a summons was mailed) as compared to the resulting panel (all confirmed and reporting jurors who are available on the selection date) and to use the term venire to describe the group of jurors assigned for potential selection for a specific trial. The categories are more fluid than static. For example, multiple pools may be required to create the panels from which jurors will be randomly selected as members of the venire in a multi-day criminal jury selection. Even for a briefer selection, the members of the venire may be increased if the initial group sent to voir dire is insufficient to empanel a jury.

Jurors who report for service are randomly selected for venire panels, each of which is assigned for questioning by the judge and attorneys in a specific trial. Once a juror is sent for voir dire questioning, they can be (i) excused for cause based on a case-specific conflict or bias; (ii) peremptorily struck by either party; (iii) empaneled (seated) as a juror; or (iv) not reached for questioning.

In a typical jury selection, some jurors will seek to be excused for reasons that could have been raised before reporting, such as financial hardship, or for scheduling conflicts. Others may be dismissed for cause based on personal familiarity with the parties or attorneys. Beyond such straightforward outcomes, judges dismiss substantial numbers of jurors for cause based on their responses during voir dire, including, in criminal cases, their views as to the credibility and weight of law enforcement testimony.

Today, the Judiciary requires substantially more jurors to report for jury selections, with many of those jurors dismissed for cause, peremptorily stricken, or not reached for questioning. Based on the average number of unused peremptory challenges, **more than 10,000 jurors annually report** for service but are not even asked a single question as part of the voir dire process. Yet they have to be summoned to provide a large enough panel **just in case** all peremptory challenges might be exercised.

#### 4. Juror Utilization

Efforts to assess and improve jury selection processes focus in part on juror utilization. Paula Hannaford-Agor, Director of the National Center for State Courts (NCSC) Center for Jury Studies, described the concept as follows:

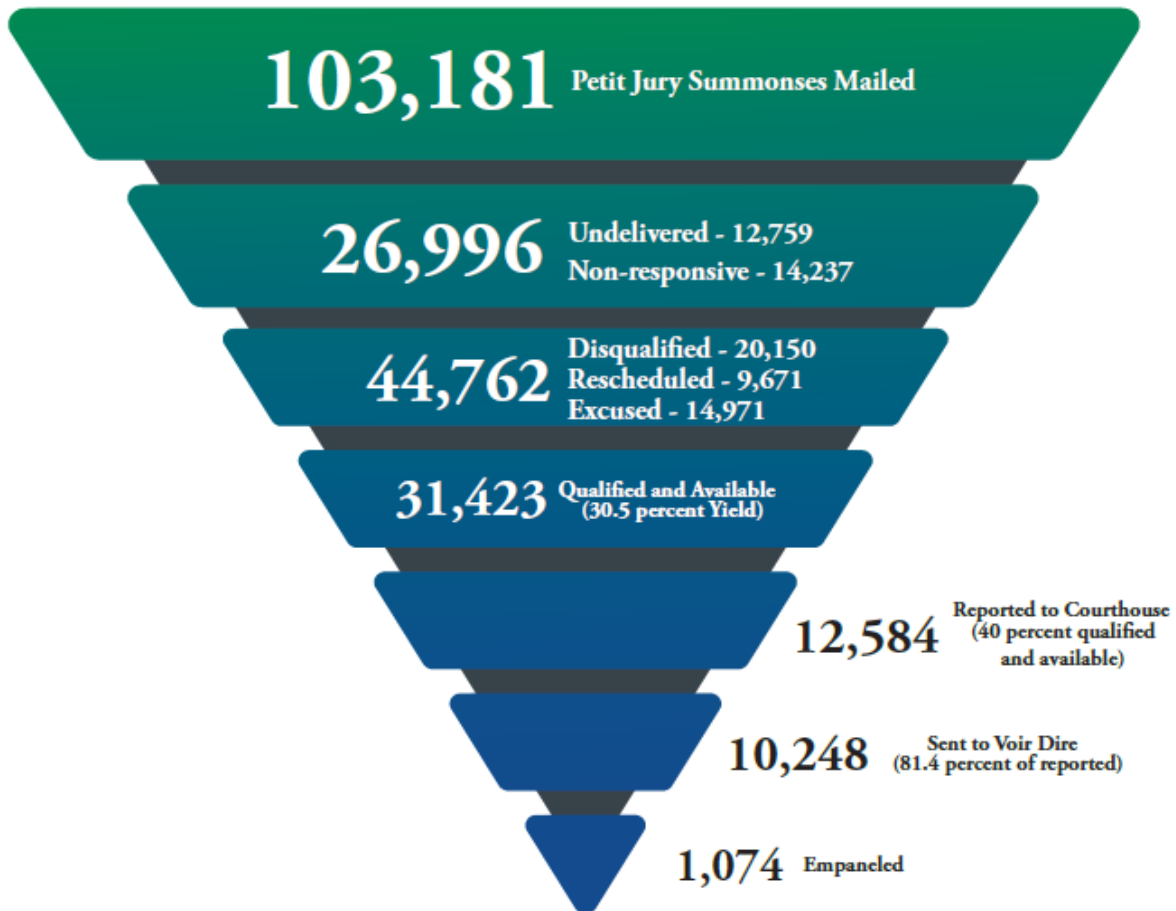
Juror utilization is essentially a measure of how effectively courts use their jury pools after they have gone to the trouble of summoning and qualifying jurors. There are three primary points for measuring juror utilization --

- [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).

Consistent with [NCSC](#) recommendations, jurisdictions strive to maintain a buffer of around 10 percent for each phase of utilization. This avoids a situation in which jury selection cannot proceed -- or must be prolonged -- in order to bring in just a few more jurors.

The following provides a numeric illustration of the jury selection process. The figures are not drawn from actual statistics, but the overall flow comports with standard practices: it takes around 100,000 summonses to yield about 30,000 qualified and available jurors, from which some portion will be called to report on any given date. Most reporting jurors will be sent to voir dire. Only a small percentage will be empaneled. The most difficult aspect of the process remains the final phase of utilization: the percentage of panel used, which excludes the majority of jurors assigned to voir dire who are dismissed for cause, peremptorily stricken, or not reached for questioning.

## Example of Monthly Jury Statistics



Any improvement to the efficiency of the final phases of selection -- specifically the number of jurors required to go to courtrooms even though they will not be questioned -- would produce greater benefits at the preceding phases, i.e., fewer unquestioned jurors result in smaller panels, leading to more modest pools and fewer called off jurors. Such end-stage improvements would ultimately reduce the total number of New Jersey residents who receive a jury summons and incur the costs associated with jury service.

## B. Peremptory Challenges

Andujar involved the capacity of peremptory challenges to inject implicit bias into the jury selection process, jeopardizing the guarantee of trial by a jury that constitutes a fair cross-section of the community. And the materials cited in Attachments C and D, discussed above, confirm the widespread challenges posed by the potentially discriminatory use of peremptory challenges.

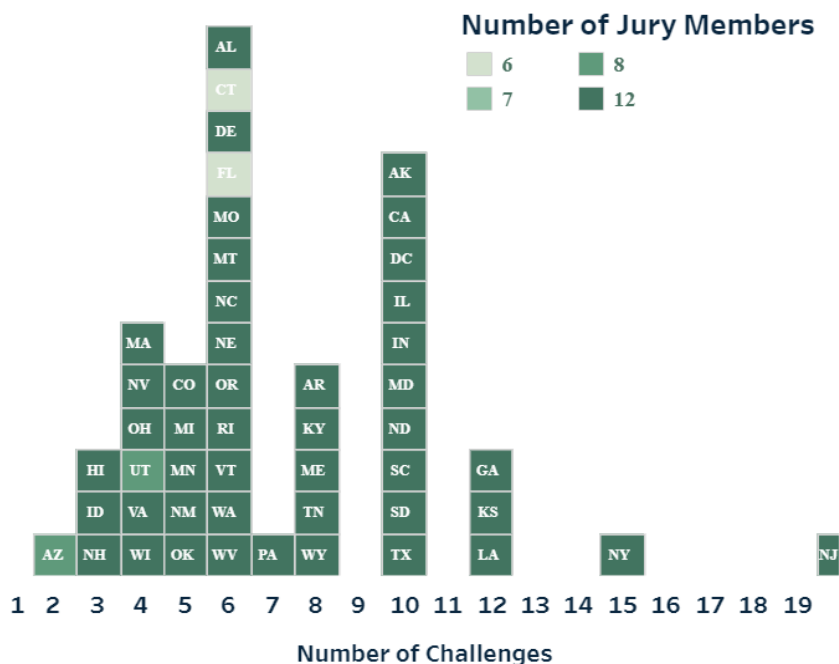
This section focuses on another way in which peremptory challenges can negatively affect a system of justice: by creating inefficiencies that, in turn, render jury service disproportionately burdensome on prospective jurors of color.

### 1. By Every Measure, New Jersey is an Outlier as to Peremptories

Most aspects of jury selection are relatively consistent throughout the United States. The National Center for State Courts Center for Jury Studies provides comparative [data](#) on a wide variety of topics such as juror selection and service terms; juror compensation; exemptions from juror service; disqualification of jurors based on felony convictions; and peremptory challenges. The NCSC website also features data showing how states rank on issues related to the voir dire process, including the amount of time devoted to voir dire and the respective degrees of judge and attorney participation in the questioning.

In most areas with available comparative data, New Jersey falls somewhere in the general national spectrum. Although some jurisdictions recently or at present are engaged in reexamination and reform of felony disqualification criteria, as of today most states still prohibit individuals with prior convictions from serving on juries. Likewise, residents of many states complain about the insufficiency of juror compensation relative to the direct and indirect costs of jury service. The \$5 per day paid in New Jersey is on the lower end of that scale, but some jurisdictions pay nothing for the first day of service. On the issue of peremptory challenges in criminal trials, however, New Jersey is an outlier.

## Non-Capital Felony



As illustrated above, New Jersey provides two or three times as many peremptory challenges as other state courts. See Attachment G.

In criminal matters, New Jersey provides more than twice as many peremptory challenges than 90 percent of the nation. See Attachment G.

N.J.S.A. 2B:23-13, see Attachment E, which dates back to 1898, 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. As the Court observed in Andujar (emphasis added):

The number of peremptory challenges in New Jersey stems from a statute enacted **more than a century ago**. See L. 1898, c. 237, §§ 80-83; see also Brown v. State, 62 N.J.L. 666, 672 (E. & A. 1899). The nineteenth-century law granted defendants twenty challenges and the State twelve for various serious crimes. Ibid. New Jersey still allows the same number of challenges for serious offenses. See N.J.S.A. 2B:23-13(b). Our state today provides far more



challenges than any other in the nation -- more than twice the national average, and twice the practice in federal court.

Most states have 12-person criminal juries, with the most common number of peremptory challenges at 6 (for 12 states) and the next most frequent number of challenges at 10 (for 10 states). Only two states have more than 12 challenges: New York (15 challenges) and New Jersey (20 challenges).

- Nationwide, the median number of peremptory challenges is 6.
  - 27 states have 6 peremptory challenges or fewer.
- The average number of peremptory challenges is 7.3.
- The 90th percentile of peremptory challenges is 10.6.
  - 43 of the 48 states shown use 10 peremptory challenges or fewer.
- New Jersey's 20 peremptory challenges figure is at least twice as large as almost 90 percent of the nation.

Among the 15 most populous states, juries tend to include 12 members, with an average of 8.1 peremptory challenges allowed in criminal matters (and with New Jersey having the highest allotment at 20 challenges). As compared to states of comparable populations, including New York and Pennsylvania, New Jersey provides more peremptory challenges in serious criminal matters.

The provision of 20 challenges per criminal defendant renders New Jersey a statistical outlier although the core aspects of jury selection and trial are the same here as throughout the nation.

New Jersey's outlier status, by itself, warrants further examination of the current allotment of peremptory strikes. It begs the question, for example, whether there is any justification for providing substantially more challenges in New Jersey than in any other jurisdiction. In light of growing social science research and case law that shows how peremptory challenges can be a source of explicit discrimination or implicit bias, it is especially critical that the New Jersey courts -- and all branches of state government -- consider whether the time has come to reduce peremptory challenges as one part of global reforms designed to yield a more equitable and inclusive justice system.

But New Jersey's unique allotment of peremptories requires review for another reason as well -- the severe burden it places on our system of justice.

2. Attorneys in New Jersey use one-half (or less) of the peremptory challenges allotted by statute.

The New Jersey Supreme Court, through various conferences and committees, has supported empirical analysis of the exercise of peremptory challenges, particularly in criminal trials. The 2005 Special Committee [report](#) summarizes one such study:

Data from 389 criminal trials from September 2004 through January 2005 shows that there were an average of 26 jurors sent to each voir dire who were not questioned during jury selection. **The same data shows that the average number dismissed through the exercise of peremptory challenges (by both sides) was 12.** Therefore, 38 jurors were either not questioned or removed by peremptory challenge at the typical trial during this period. (emphasis added)

An internal analysis of statewide data for 3,012 criminal trials conducted between 2011 and 2015 yielded similar results. Overall, that study showed that prosecutors on average used 6 or fewer peremptory challenges while defense attorneys in most cases exercised 10 or fewer challenges. See Attachment H.

Building on those earlier studies, the Judiciary preliminarily assessed the exercise of peremptory challenges in a small sampling of both civil and criminal jury trials conducted in fall 2018. Following that internal review, the Court authorized the engagement of Mary Rose, Ph.D., to conduct a deeper analysis, including as to the correlation between demographic characteristics and juror outcomes. Dr. Rose's [analysis](#) of criminal trials conducted in September-October 2018 aligns with the takeaways from earlier studies:

**[A]ttorneys rarely use the full complement of strikes allotted to them under statute.** In criminal cases, the prosecution used, on average, just under four strikes; those in the top 25% of the distribution used six, and those in the top 10% used seven. Stated in terms of number of cases, in all but six of the 26 criminal trials, prosecutors used fewer than seven peremptory challenges (all but one used eight or fewer). For criminal defense attorneys, who have more peremptory challenges allotted to them and therefore used

more on average, they nonetheless also did not use all their strikes. The top 75% of the distribution across cases used nine or more strikes; the top 10% used 13. Stated in terms of cases, all but seven cases used 8 or fewer peremptory strikes and all but five trials used 10 or fewer.

### 3. Allowing for Unused Peremptories Causes Inefficiency and Waste and Burdens the Public

Every year, thousands of New Jersey residents report for jury service -- not because it is expected that they will be needed as jurors but because jury panels must include a sufficient number of jurors in case attorneys exercise all available peremptory challenges.

Jury summoning combines both science and skill. Data guides the quantity and size of pools summoned in each jury session, and jury managers working closing with trial judges manage the numbers of jurors called into the courthouse each day. Judges and court staff plan for static variables, like courtroom occupancy, and documented trends, like the percentage of cases that will resolve on the date of trial. Such plans are calibrated to ensure enough -- but not too many -- jurors on any given date and for each scheduled selection.

In both civil and criminal cases, the size of the panel sent to voir dire is affected by the number of peremptory challenges. Specifically, the number of jurors assigned to a voir dire panel must be sufficient to cover

- (i) the number of jurors sought to be empaneled, including alternates;
- (ii) the number of jurors anticipated to be excused for cause, which varies substantially based on the nature of the case; and
- (iii) the number of jurors who could be subject to peremptory strikes.

A large number of peremptory challenges increases the size of the jury panel. To the extent that such peremptory challenges are not exercised, available peremptories also result in more unreached jurors, and poorer juror utilization.

Accordingly, in each panel, many jurors are not reached for questioning and are not engaged in any meaningful way in the jury selection process. Those jurors incur time and money costs (e.g., loss of income, childcare expenses) even though attorneys actually exercise only a portion of the challenges afforded by statute.

In court year 2019, more than 1.4 million New Jersey residents were summoned to potentially serve as jurors in the state courts. More than 250,000 of those individuals reported to courthouses for possible selection for more than 2,000 trials (684 criminal and 1,431 civil trials). Although most jury trials are civil, more jurors are summoned for criminal selections, owing in part to the relative sizes of juries: 6 jurors for a civil action as compared to 12 jurors in a criminal matter, plus alternates.

While the size of seated juries is consistent, the number of jurors required to select those juries varies county by county and trial by trial, based on a number of factors, including the nature and complexity of the case. In general, larger jury panels correlate to lengthier selections.

For court year 2019 (July 1, 2018 through June 30, 2019), criminal jury panels involved an average of 165 jurors. Most of those trials involved more serious crimes for which a total of 32 peremptory challenges are allocated by statute. Thus, in typical, pre-COVID-19 times:

- 112,680 jurors were required to report for service for criminal jury selections; and
- 21,880 of those jurors were necessary to account for available peremptory challenges.

Statewide, for criminal trials, more than one in five jurors is needed to cover possible peremptory challenges.

Data demonstrates the unlikelihood that 32 jurors will be excused by peremptory challenges; however, jury panels still must account for that possibility. Otherwise, the selection process could stall if the jury panel is exhausted and, in the worst-case scenario, additional jurors would need to be summoned, which could substantially delay the selection and trial.

For purposes of comparison, if New Jersey were to follow the federal model -- 6 peremptory challenges for the prosecution and 10 for the defense -- the total number of peremptory challenges would be reduced by one-half (from 32 to 16 per criminal selection). That adjustment would result in over 10,000 fewer summonses -- meaning more than 10,000 New Jersey residents would not be required to report for jury service **just in case** all peremptory challenges **might** be used.

Further, even if a reduction in available challenges had minimal or no effect on the number of peremptory strikes exercised by attorneys, the limit on available challenges would improve the efficiency of the process by minimizing panel additions and avoiding delays: protracted jury selection exacerbates hardships for jurors who are poor.

Prospective jurors who will not be paid by their employer during service, as well as those who have childcare and other responsibilities for which they will incur a cost, often can afford to serve only for a limited time. People of color disproportionately suffer adverse financial consequences associated with jury service.

The problem of waste and burden is compounded by the simultaneous increase in panel sizes. Judiciary data reveals that jury panels have steadily increased since publication of the 2005 [Report](#) of the Special Supreme Court Committee on Peremptory Challenges and Voir Dire (Special Committee), which recommended a two-part strategy to improve jury selection through (1) establishment of a comprehensive and consistent voir dire process; and (2) reduction of the numbers of peremptory challenges available in both civil and criminal jury trials.

As approved by the Supreme Court, the Judiciary implemented and continues to refine the model voir dire questions and standard jury selection practices recommended by the Special Committee. The Judiciary [Bench Manual](#) on Jury Selection guides the process for voir dire, which is managed by the trial judge with involvement of the attorneys. The Bench Manual incorporates model questions for both civil and criminal trials, including reiteration of qualification criteria, questions about juror experiences and views, open-ended questions, and biographical questions.

The Legislature in 2005 declined to adopt the recommendations to reduce peremptory challenges. From 2004 to 2019, the average size of civil

jury panels increased from 42 to 57 jurors. During that same period, the average size of criminal jury panels grew from 72 jurors in 2004 to 165 jurors in 2019.

The documented growth in average panel sizes correlates to a continuing prolongation of the time required for jury selection. This means that more jurors report for service for longer periods, which in turn results in more scheduling conflicts and financial hardships.

#### 4. Personal Experiences of Jurors Who Are Peremptorily Stricken

Whether viewed as an obligation or an opportunity, the right to serve as a juror is essential to our democracy. Like the right to cast a ballot in an election, the chance to serve as a juror is intended to be equally available to all citizens, regardless of their demographic identity. Indeed, the constitutional guarantee of a fair-cross-section can be understood not only as a pledge to the parties in a case but as a promise to the community that all of its members -- not just a select segment -- can participate in the administration of justice.

The disproportionate exclusion of people of color from seated juries contravenes those constitutional guarantees and denies people of color equal access to and participation in the court system. Accounts by black jurors peremptorily struck during selection substantiate the personal harms that flow from the process. Of course, that is not to suggest that a black juror, or any juror, should remain on a jury because of their race or the possibility that they will perceive a peremptory strike as based on their race or other observable aspect of their identity. Rather, it is a reminder that there are real consequences to the exercise of peremptory strikes, including individual and group experiences of the jury process.

On an individual level, exclusion by peremptory challenge may reinforce a suspicion, already suggested by the reduced diversity in the jury pool and venire panel, that the selection process is designed to eliminate prospective jurors who are not white. Indeed, the experience of being dismissed by a peremptory strike may suggest that when the application of stated standards (dismissal of jurors who are unable to be fair and impartial) fails to remove jurors of color, there is a back-up plan (in the form of peremptory challenges) designed to enable direct elimination based on race or other observable but unarticulated personal characteristics.

In its 2010 [report](#), Illegal Racial Discrimination in Jury Selection: A Continuing Legacy, the Equal Justice Initiative provides a number of personal stories of individuals who were excluded during jury selection for reasons perceived by them to be based on race, notwithstanding other justifications advanced by counsel. The firsthand accounts illuminate the ways in which excluded jurors -- including people of color who observe their underrepresentation in the jury venire -- internalize their exclusion as both a judgment of them individually and a threat to the promises of the justice system. In [testimony](#) to the Washington Supreme Court, a young mother and the only black juror in a venire described her feelings upon being peremptorily stricken despite affirming that she could be impartial.

A process that validates perceptions of systemic racism is harmful even if that process is in fact unbiased. As described, people of color are underrepresented in the pools of jurors who report for service. There is a measurable reduction in the representation of people of color among reporting jurors as compared to the counties from which they were summoned, including in diverse areas of New Jersey. The intensification of that underrepresentation through peremptory challenges adds another cause for concern, as the materials in **Attachment L** reflect.

### C. Juror Representativeness -- Collection of Demographic Data

The Supreme Court in [State v. Dangcil](#), 248 N.J. 114 (2021), directed the Administrative Office of the Courts to collect juror demographic data. The Court specifically approved the collection of juror demographic data at the qualification stage. This means that all jurors who complete the qualification questionnaire will be asked to voluntarily disclose their race, ethnicity, and gender. This approach will capture data from all summoned jurors, excluding those who do not respond at all to the summons documents. The universe will include jurors who are disqualified, excused, and deferred in advance, as well as those confirmed for the reporting date. Attached is a working draft of the updated juror qualification questionnaire, including three proposed new demographic information questions. See Attachment F.

Once the demographic information questions are finalized (as informed by the input at the Judicial Conference), the Judiciary plans to collect data for

a period of six months before publishing an initial snapshot report. That report will include the numbers and percentages of jurors who responded to the demographic inquiries followed by tables showing juror race and ethnicity, based on the categories used by the United States Census Bureau, and gender, based on categories used by the State of New Jersey. Juror age information will also be included in the public report. The tentative plan is to publish an initial report for a six-month period, followed by monthly updates as additional juror information is collected.

The Court in Dangcil considered a request by defense counsel for demographic data as to the jurors involved in a specific criminal trial. In addition to the county-level and statewide juror demographic information that will be published and periodically updated, the Judiciary could provide attorneys with additional, more granular data as to the pool of jurors who are summoned to report for service on a particular selection date. Individual juror demographic data would not be provided. If limited to confirmed jurors (meaning individuals anticipated to comprise the panel pursuant to Rule 1:8-5), the Judiciary upon request could provide to an attorney an aggregate view of the venire.

An illustration included in **Attachment F** shows one approach to that snapshot aggregate view.

While the Judiciary cannot predict with specificity the results of this important initiative, it is reasonable to anticipate that the data will show that responding jurors -- those who are summoned minus the 15% of jurors who do not respond to the summons documents -- do not perfectly match the demographic composition of the communities from which they are drawn.

#### D. Supplemental Resources: About Attachments (E) through (L)

##### 1. Attachment E: Overview -- Jury Selection in New Jersey

This attachment provides an overview of the jury qualification process and contains relevant New Jersey statutes -- N.J.S.A. 2B:20-1, -2, -9, -10, and -13 -- and court rules -- Rules 1:8-3 and -5.



## 2. Attachment F: Judiciary Jury Forms

This attachment contains standard jury forms, including those available to jurors to request pre-reporting excusals. Standardization of administrative processes is one way that the Judiciary seeks to maintain consistent and race-neutral approaches to the early phases of jury selection.

## 3. Attachment G: Peremptory Challenges -- Nationwide Data

This attachment contains information about the number of peremptory challenges allotted in each state for different types of proceedings.

## 4. Attachment H: Statewide Data re the Exercise of Peremptories

This attachment includes aggregate data compiled by the Judiciary from its legacy jury management system regarding 3,012 criminal jury trials conducted from 2011 through 2015. The pivot tables illustrate the numbers of peremptory challenges exercised by the prosecution and the defense, respectively.

## 5. Attachment I: Juror Engagement & Participation

This attachment includes information about initiatives to encourage juror responsiveness by stressing civic engagement, as well as data about felony disqualification and calls to increase juror compensation.

## 6. Attachment J: Jury Reforms in Other Jurisdictions

This attachment contains information about the jury selection reforms undertaken in Arizona, Connecticut, and Washington.

## 7. Attachment K: Supporting Juror Impartiality

This attachment summarizes the voir dire questions and jury charge enhancements that the Court has preliminarily approved to support juror impartiality.

## 8. Attachment L: Experiences of Excluded Jurors

This attachment assembles reflections about the exclusion of qualified prospective jurors through peremptory challenges.

### **III. The Goals of this Conference & Next Steps**

In the United States, the call to reform jury selection processes has reached a critical mass, as reflected by the reforms implemented or approved for implementation in Washington, Connecticut, and, most recently, Arizona. See Attachment J.

Today, New Jersey is positioned to undertake and advance similar improvements, informed by the efforts of those jurisdictions and the demographic information that will be collected from individuals summoned for jury service.

In partnership with the Executive and Legislative Branches of state government, the Judiciary invites proposals to improve all aspects of jury selection, including the following key areas:

1. To enhance judicial training on jury selection practices, including to educate judges about the potential effects of implicit bias in jury selection;
2. To implement approved statewide efforts to educate jurors about their own implicit biases, including the use of a new Juror Impartiality video, as well as new juror voir dire questions and enhancements to the model jury charges, see Attachment K;
3. To offer comments, and possibly suggested refinements, to the plan for the Administrative Office of the Courts to implement the Supreme Court's direction in Dangcil to collect voluntarily disclosed juror demographic data at the qualification phase; and
4. To reconsider the number of peremptory challenges afforded by statute, especially in criminal jury trials.

Additional issues may also be explored, including but not limited to the appropriate amount of juror compensation and whether a felony conviction should permanently disqualify a person from jury service. See Attachment I.

The Judicial Conference will provide a forum for participants from within and beyond the legal community to discuss the current jury selection process and to share suggestions as to how that process could be improved. Participants who are present on-site, as well as those who join the event virtually, will have the opportunity to pose questions to the featured jurists and legal and academic experts. In addition to written comments, stakeholders may present oral testimony.

All written and oral submissions will be included in the official record of the Judicial Conference and presented for initial consideration by the Conference Committee chaired by Chief Justice Rabner. Informed by the Conference presentations and the entirety of the public comments, the Conference Committee will develop recommendations to be submitted to the New Jersey Supreme Court. Subject to Court approval, the post-Conference report and recommendations will be published for public review and comment.

# Attachment A

## Glossary of Jury Terminology

**Absolute Disparity:** “Absolute disparity” is one measure of under- or overrepresentation in jury venires. The Supreme Court in Berghuis v. Smith, 559 U.S. 314 (2010), explained that “[a]bsolute disparity” is determined by subtracting the percentage of African-Americans in the jury pool (here, 6% in the six months leading up to Smith’s trial) from the percentage of African-Americans in the local, jury-eligible population (here, 7.28%). By an absolute disparity measure, therefore, African-Americans were underrepresented by 1.28%.” Compare Comparative Disparity.

**Assignment Judge:** In New Jersey, the Assignment Judge is the highest judge in a single or multi-county vicinage and oversees county-level jury operations. Among other jury-related responsibilities, the Assignment Judge determines the term of service for petit (trial) jurors and has final authority as to juror requests for pre-reporting excusals and deferrals, subject to delegation of such authority to staff such as the jury manager for straightforward matters.

**Attorney’s List:** The Attorney’s List includes all jurors assigned to a case for voir dire, with the names of those jurors listed alphabetically. Compare Judge’s List.

**Batson Challenge:** A Batson challenge -- named for Batson v. Kentucky, 476 U.S. 79 (1986) -- is a challenge by one party to another party’s use of peremptory challenges to strike potential jurors on prohibited grounds, e.g., race, sex, or ethnicity.

The procedure to be followed when one party asserts that the other party is exercising peremptory challenges to exclude jurors on an impermissible basis is outlined in State v. Osorio, 199 N.J. 486 (2009). Osorio refined procedures originally set forth in Gilmore, as detailed in the Bench Manual (pp. 24-25).

In Osorio, 199 N.J. at 492-93, the Court stated that a three-step process must be employed in order to assess an assertion that an exercised peremptory challenge was based on an impermissible

group bias and described the three-step process in the following way: Step one requires that, as a threshold matter, the party contesting the exercise of a peremptory challenge must make a prima facie showing that the peremptory challenge was exercised on the basis of race or ethnicity. That burden is slight, as the challenger need only tender sufficient proofs to raise an inference of discrimination. If that burden is met, step two is triggered, and the burden then shifts to the party exercising the peremptory challenge to prove a race- or ethnicity-neutral basis supporting the peremptory challenge. In gauging whether the party exercising the peremptory challenge has acted constitutionally, the trial court must ascertain whether that party has presented a reasoned, neutral basis for the challenge or if the explanations tendered are pretext. Once that analysis is completed, the third step is triggered, requiring that the trial court weigh the proofs adduced in step one against those presented in step two and determine whether, by a preponderance of the evidence, the party contesting the exercise of a peremptory challenge has proven that the contested peremptory challenge was exercised on unconstitutionally impermissible grounds of presumed group bias.

**Biographical Questions:** The model voir dire questions originally promulgated by directive and later incorporated in the New Jersey Judiciary Bench Manual on Jury Selection include standard biographical questions. For a criminal jury selection, the biographical question (which must be asked of each juror who has not been excused during preliminary questioning) is as follows:

You have answered a series of questions about criminal trials and criminal charges. Now we would like to learn a little bit about each of you. Please tell us the type of work you do; whether you have ever done any type of work which is substantially different from what you do now; whether you've served in the military; what is your educational history; who else lives in your household and the type of work they do; whether you have any children living elsewhere and the type of work they do; which television shows you watch; any sources from which you learn the news, i.e., the newspapers you read or radio or TV news stations you listen to; if you have a bumper sticker that does not pertain to a political

candidate, what does it say; what you do in your spare time and anything else you feel is important.

[Note: This question is intended to allow and encourage the juror to speak in a narrative fashion, rather than answer the question in short phrases. For that reason, it is suggested that the judge read the question in its entirety, rather than part by part. If the juror omits a response to one or more sections, the judge should follow up by asking, in effect: “I notice you didn’t mention [specify]. Can you please tell us about that?”]

**Called Off:** Because jurors are summoned to report around eight weeks in advance, it sometimes occurs that more jurors are scheduled to report than necessary on a given date. When this happens, jury management will “call off” jurors who are not needed through issuance of email and text messages and updates to the jury-reporting message on the Jurors page of the Judiciary website. A juror who is called off for one day of a multi-day term may be required to report on a subsequent day within that term.

**Challenge for Cause:** The goal of jury selection is to empanel a fair and impartial jury. Accordingly, jurors will be excused for cause either by the court or upon a party’s request when it appears that the juror will have difficulty being fair and impartial. A potential juror who claims that service will pose a hardship -- e.g., because the trial is anticipated to be lengthy and the individual will not be paid by their employer during service -- is included within the category of cause challenges (in contrast to peremptory challenges).

**Cognizable Group:** A “cognizable group” of jurors or potential jurors refers to one with a common trait or characteristic among them that is recognized as distinguishing them from others. In State v. Gilmore, 103 N.J. 508 (1986), the Supreme Court noted that cognizable groups might be based on race, religion, color, ancestry, national origin, or gender. In Andujar, the Court noted that such protection from categorical exclusion extends as well to individuals identified based on sexual orientation or other primary aspects of identity.

**Community:** For purposes of fair cross-section analysis, a “community” refers to the geographic area from which a jury is summoned and selected. The Sixth Amendment provides in part that, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury *of the state and district wherein the crime shall have been committed*, which

district shall have been previously ascertained by law.” In New Jersey, the community for trial jury purposes is determined at the county level. Only State Grand Jury is selected from the larger statewide community.

**Comparative Disparity:** “Comparative disparity” is one method of measuring the representativeness of jury venires. As described by the Supreme Court in Berghuis v. Smith, 559 U.S. 314 (2010), “[c]omparative disparity’ is determined by dividing the absolute disparity (here, 1.28%) by the group’s representation in the jury-eligible population (here, 7.28%). The quotient (here, 18%), showed that, in the six months prior to Smith’s trial, African-Americans were, on average, 18% less likely, when compared to the overall jury-eligible population, to be on the jury-service list.” Compare Absolute Disparity.

**Compensation:** Petit (trial) jurors are paid \$5 for each day of service. If a petit juror serves more than three days, the pay rate will increase to \$40 per day beginning on the fourth day. Grand jurors are paid \$5 for each day of service. Except for State Grand Jury, jurors are not reimbursed for expenses.

**Confirmed:** A juror is “confirmed” after completing the qualification process and indicating ability and availability to appear on the scheduled reporting date. The Rule 1:8-5 list is comprised of confirmed jurors and does not include jurors who have been dismissed as ineligible for service, or who have been excused or deferred.

**Deferred:** A juror who meets statutory qualification criteria can request to be deferred (or rescheduled) to a future date. Initial deferral requests are liberally granted.

**Demographic Information:** The New Jersey Supreme Court in State v. Dancil, 248 N.J. 114 (2021), directed the Administrative Office of the Courts to collect voluntary juror demographic information at the qualification phase. Such demographic information will include race, ethnicity, and gender.

**Dismissed:** At the pre-reporting stage, a juror is “dismissed” if they are excluded from the pool because they do not meet statutory qualification criteria. The term is sometimes also used to refer to a juror who is removed during the voir dire process, whether based on hardship, other cause grounds, or peremptory challenge.

**Duplicate Elimination:** As part of the “sort merge” process used to create the master jury list, the Judiciary attempts to eliminate duplicates, i.e., records that pertain to the same person as drawn from multiple sources. This process is designed to ensure that a potential juror is equally likely to be summoned whether they have records in one or more contributing sources. See also Master Jury List; Sort Merge.

**Empaneled (or Impaneled):** A juror who is selected to serve on a trial, or as part of a grand jury panel, is “empaneled.” In the petit (trial) jury context, additional alternate jurors are also selected.

**eResponse:** Summoned jurors are encouraged to complete qualification online through the eResponse jury portal. eResponse includes all of the same questions, in the same sequence, as the hard copy summons questionnaire. Statewide, around 85% of jurors complete qualification using eResponse.

**Excusal (Pre-Reporting):** N.J.S.A. 2B:20-10 sets forth grounds for pre-reporting excusals. Such grounds include: age 75 years or older; recent jury service; severe hardship, including medical inability, financial hardship, and caregiving or specialized employment responsibilities; or service as a volunteer firefighter or on a first aid squad. The Judiciary maintains records of jurors who are excused before reporting and the basis for such excusal.

**Explicit Bias:** “Explicit bias” refers to the attitudes and beliefs we have about a person, group, or other entity on a conscious level. It includes those preferences and views of which we are consciously aware, e.g., a preference for basketball over tennis, or for springtime over winter.

**Failure to Appear:** In the jury context, “failure to appear” refers to jurors who have completed the qualification process and confirmed that they will report for service but who do not appear on the scheduled reporting date. Failure-to-appear rates for most counties are around 10 to 15 percent. Jury managers adjust the numbers of jurors required to report based on the documented and anticipated percentage who will fail to appear.

**Failure to Respond:** A potential juror is categorized as having failed to respond if the summons notice and follow-up summons questionnaire are not returned as undeliverable, but the juror does not complete the qualification process or otherwise communicate with the court. Statewide, up to 20 percent



of potential jurors fail to respond when summoned. In some situations, the summons document may not have reached the intended recipient.

**Fair Cross-Section:** Fair cross-section analysis is guided by three United States Supreme Court cases. In the first, Taylor v. Louisiana, 419 U.S. 522 (1975), the Court held that the systematic exclusion of women from jury service violated a defendant's constitutional right to an impartial jury. A Louisiana statute excluded women from jury service unless they filed a written declaration of their desire to be subject to same. Consequently, while women comprised 53% of the jury-eligible population, they accounted for less than 1% of those summoned for jury service, as well as zero members of the venire. The Court emphasized that representativeness was relevant to the jury selection process, not the resulting jury.

[I]n holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition . . . but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

[Id. at 538.]

Next, in Duren v. Missouri, 439 U.S. 357 (1979), the Court considered a statutory scheme in which all women were entitled to claim an exemption from jury service and women who failed to respond when summoned were presumed to elect such exemption. As a result, while women accounted for 54% of the jury-eligible population, they constituted only 26.7% of those summoned for jury service and only 14.5% of the venires from which jurors were selected. Such disparity was held to violate the constitutional guarantee of a fair and impartial jury.

In Duren, the Supreme Court established a three-prong test to evaluate fair-cross-section challenges to the jury selection process:

In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the

community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

[Id. at 364.]

The next fair cross-section challenge considered by the Court was based upon race rather than gender. In Berghuis v. Smith, 559 U.S. 314 (2010), an African-American defendant convicted of murder by an all-white jury in Kent County, Michigan, challenged the composition of the jury venire, asserting that a juror-assignment procedure systematically excluded African Americans from jury pools for felony matters.

The Court held that the evidence failed to demonstrate systematic exclusion of African Americans and that a fair-cross-section challenge could not prevail based on a laundry list of factors that, taken together, might result in underrepresentation of a particular population in jury pools. The Court declined “to take sides today on the method or methods by which underrepresentation is appropriately measured” and did not sanction the exclusion of other methods the comparative disparity test embraced by the Sixth Circuit or the absolute disparity approach advanced by the State. Id. at 329-30.

**Grand Juror:** The Judiciary summons all jurors -- petit, county grand, and state grand -- using the same master jury list. Whereas a petit (trial) juror is required to report during a specified term for potential selection for a single trial, a grand juror, if empaneled, serves on a routine basis (typically one or two days per week) for a period up to 20 weeks.

**Implicit Bias:** The Supreme Court in Andujar explained that implicit bias is different from explicit bias of which we are consciously aware. “Implicit bias refers to . . . attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.” (quoting Cheryl Staats et al., Kirwan Inst. for the Study of Race and Ethnicity, Implicit Bias app. at 62 (2015), <http://kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implicitbias.pdf>.) The Court noted that “[s]uch biases ‘encompass both favorable and unfavorable assessments, [and] are activated involuntarily and without an individual’s awareness or intentional control.’ In other words, a

lawyer or self-represented party might remove a juror based on an unconscious racial stereotype yet think their intentions are proper.” (quoting ibid.)

**Judge’s List:** The Judge’s List includes all jurors assigned to a case for voir dire, with the names of those jurors listed randomly. Compare Attorney’s List.

**Jury Charge:** Judges administer standard “charges” -- i.e., instructions -- to the jury at various junctures in the process. The jury charge is one vehicle to advise jurors of their role and responsibility, including their duty to operate impartially.

**Jury Management System (JMS):** The Judiciary uses a statewide, integrated jury management system (JMS) to create pools; issue summonses; track and document dismissal, deferral, and excusal requests; call off jurors; create panels; and manage juror attendance and payment.

**Jury Manager:** The jury manager is a court executive with responsibility to manage county-level jury operations under the direction of the Assignment Judge. Pursuant to N.J.S.A. 2B:20-9, the Assignment Judge may delegate certain routine administrative tasks to the jury manager.

**Master Jury List:** N.J.S.A. 2B:20-2 governs the composition of the master jury list and provides in part that

[t]he 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: registered voters, licensed drivers, filers of State gross income tax returns and filers of homestead rebate or credit application forms.

The Judiciary annually updates the master jury list. See Duplicate Elimination.

**Model Voir Dire Questions:** The New Jersey Judiciary Bench Manual on Jury Selection includes model voir dire questions for civil and criminal trials. Those questions include qualification criteria, standard yes/no questions, open-ended questions, and biographical questions.

**National Change of Address (NCOA):** The NCOA registry is one source used by the Judiciary to ensure that contact information for potential jurors remains current. Once the master jury list is compiled, the list is forwarded to cross-check and update based on United States postal information so as to include the most current official address for potential jurors.

**Noncompliant:** Two categories of jurors are considered “noncompliant”: those who never respond to the summons (Failure to Respond) and those who respond and confirm service but do not report when scheduled (Failure to Appear). The Judiciary follows up with noncompliant jurors by rescheduling them for a future service date. The Judiciary before the COVID-19 pandemic was exploring the use of additional outreach efforts, such as requiring jurors who repeatedly failed to appear to report before a judge to explain their noncompliance.

**Not Reached:** A juror who reports for service and is sent to voir dire but is not questioned is “not reached.” The percentage of jurors per venire who are not reached is the third phase of juror utilization, following the percentage told to report and the percentage sent to voir dire. Jurors who are not reached are not engaged in the jury selection process and may view their time as wasted.

**One-Step:** In a one-step summoning process, the summons both directs the potential juror to complete qualification and notifies them of their reporting date. In a two-step process, the initial summons only requires that the recipient complete qualification. A second summons is sent in the future, once the reporting date is determined.

**Open-Ended Questions:** Open-ended questions -- questions that ask jurors to express their thoughts, feelings, and attitudes about particular issues -- may be posed to the individual juror either in open court or at side bar.

**Orientation:** By the time prospective jurors enter a courtroom for the actual voir dire and selection process, they have undergone several orientation and organizational procedures. The jury manager is responsible to provide or oversee the standard orientation process, which includes a review of qualification requirements and instructions as to policies, such as those governing electronic devices in court facilities. During orientation, jurors watch the “You, the Juror” video and receive county-specific information about parking, lunch options, and other operational details.

**Panel:** As used in jury management, the panel includes all confirmed and reporting jurors who are available on the selection date. The panel does not include potential jurors who did not receive or did not respond to the jury summons.

**Peremptory Challenge:** N.J.S.A. 2B:23-13 allocates set numbers of challenges, or strikes, that can be used by attorneys to remove a juror for any reason, other than a discriminatory reason, without explanation. It provides as follows:

Upon the trial of any action in any court of this State, the parties shall be entitled to peremptory challenges as follows:

- a. In any civil action, each party, 6.
- b. Upon an indictment 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 subsection b. of N.J.S. 2C:21-1, or perjury, the defendant, 20 peremptory challenges if tried alone and 10 challenges if tried jointly and the State, 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded the defendants if tried jointly.
- c. Upon any other indictment, defendants, 10 each; the State, 10 peremptory challenges for each 10 challenges allowed to the defendants. When the case is to be tried by a jury from another county, each defendant, 5 peremptory challenges, and the State, 5 peremptory challenges for each 5 peremptory challenges afforded the defendants.

**Petit Juror:** A “petit juror,” or trial juror, is summoned to report for potential selection for a civil or criminal trial.

**Pool:** The jury “pool” refers to the starting group of potential jurors to whom summonses are mailed. An inclusive pool is the first step to support jury venires drawn from a fair cross-section of the community.

**Prescreening:** For lengthy trials, judges -- in consultation with counsel -- may authorize limited prescreening of prospective jurors as to their availability to serve for the anticipated duration of the trial.

**Qualified:** A potential juror is “qualified” if they meet all statutory criteria for service.

**Response Rate:** The “response rate” is the number of prospective jurors who respond to the jury summons questionnaire, either online or in hard copy. The rate is calculated by adding the numbers of (i) confirmed, (ii) disqualified, (iii) excused, and (iv) deferred jurors in a pool.

**Sort Merge:** As required by N.J.S.A. 2B:20-2, the Judiciary annually prepares the master jury list by combining records supplied by the Department of Taxation, the Motor Vehicle Commission, and the Board of Elections. The Judiciary uses an iterative sort-merge process that is designed to prioritize the most reliable and current record and to avoid duplicates.

**Source Records:** The three records custodians -- the Department of Taxation, the Motor Vehicle Commission, and the Board of Elections -- supply records to the Judiciary for purposes of the annual sort merge and creation of the master jury list. The records are the most current available from each custodian.

**Summons Notice:** The first document mailed to a potential juror is the “summons notice,” which directs the recipient to complete qualification using the eResponse online portal.

**Summons Questionnaire:** If a potential juror does not respond to the summons notice, then 21 days later a hard copy “summons questionnaire” will be issued. The summons questionnaire sets forth all qualification questions, in the same format and sequence as in eResponse.

**Summoned (or Summoned):** The pool of summoned jurors includes everyone to whom a summons is mailed.

**Term of Service:** In New Jersey, the term of petit jury service ranges from one day (or one trial) to up to one week (or one trial).

**Undelivered:** In all jurisdictions, some percentage of jury summons documents do not reach the intended recipient and instead are returned to the courts based on an outdated or insufficient address. Since the transition to the new JMS, the Judiciary has reduced the statewide undelivered rate to around 10 percent, which is a few points lower than the national average.

**Utilization:** Juror utilization is a measure of how effectively courts use their jury pools after they have gone to the trouble of summoning and qualifying jurors. It is typically measured in terms of (1) percentage of confirmed jurors told to report; (2) percentage of reporting jurors sent to voir dire; and (3) percentage of jurors sent to voir dire who are reached for questioning.

**Venire:** The term “venire” refers to the entire group from which jurors are drawn. Accordingly, the term may be used in some contexts to describe the full cohort of individuals summoned for jury service, or to the subset of individuals required to report to the courthouse, or even to the panel sent to a particular voir dire. See panel; pool.

**Voir Dire:** Voir dire is the process of questioning prospective jurors. The Bench Manual provides as follows:

The trial court’s duty is to take all appropriate measures to ensure the fair and proper administration of a trial and that must begin with voir dire. A vital aspect of that responsibility is to ensure the impaneling of only impartial jurors by searching out potential and latent juror biases. To carry out that task, a thorough voir dire “should 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).

**Yield:** The juror yield is the number or percentage of jurors in a pool who are both (1) qualified for service and (2) available (i.e., did not request a pre-reporting excusal or deferral) to be called to report on their summons date.

# Attachment B

## About Implicit Bias

As “a team of legal academics, scientists, researchers, and a sitting federal judge” explain,

[m]ost of us would like to be free of biases, attitudes, and stereotypes that lead us to judge individuals based on the social categories they belong to, such as race and gender. But wishing things does not make them so. And the best scientific evidence suggests that we -- all of us, no matter how hard we try to be fair and square, no matter how deeply we believe in our own objectivity -- have implicit mental associations that will, in some circumstances, alter our behavior. They manifest everywhere, even in the hallowed courtroom. Indeed, one of our key points here is not to single out the courtroom as a place where bias especially reigns but rather to suggest that there is no evidence for courtroom exceptionalism. There is simply no legitimate basis for believing that these pervasive implicit biases somehow stop operating in the halls of justice.

[Jerry Kang et. al., Implicit Bias in the Courtroom, 59 UCLA L. Rev. 1124, 1126, 1186 (2012).]

The authors explain that bias comes in a number of forms, which can operate in concert:

[C]onsider a vegetarian’s biases against meat. He has a negative attitude (that is, prejudice) toward meat. He also believes that eating meat is bad for his health (a stereotype). He is aware of this attitude and stereotype. He also endorses them as appropriate. That is, he feels that it is okay to have a negative reaction to meat. He also believes it accurate enough to believe that meat is generally bad for human health and that there is no reason to avoid behaving in accordance with this belief. These are explicit biases.



Now, if this vegetarian is running for political office and campaigning in a region famous for barbecue, he will probably keep his views to himself. He could, for example, avoid showing disgust on his face or making critical comments when a plate of ribs is placed in front of him. Indeed, he might even take a bite and compliment the cook. This is an example of concealed bias (explicit bias that is hidden to manage impressions).

Consider, by contrast, another vegetarian who has recently converted for environmental reasons. She proclaims explicitly and sincerely a negative attitude toward meat. But it may well be that she has an implicit attitude that is still slightly positive. Suppose that she grew up enjoying weekend barbecues with family and friends, or still likes the taste of steak, or first learned to cook by making roasts. Whatever the sources and causes, she may still have an implicitly positive attitude toward meat. This is an implicit bias.

Finally, consider some eating decision that she has to make at a local strip mall. She can buy a salad for \$10 or a cheeseburger for \$3. Unfortunately, she has only \$5 to spare and must eat. Neither explicit nor implicit biases much explain her decision to buy the cheeseburger. She simply lacks the funds to buy the salad, and her need to eat trumps her desire to avoid meat. The decision was not driven principally by an attitude or stereotype, explicit or implicit, but by the price. But what if a careful historical, economic, political, and cultural analysis revealed multifarious subsidies, political kickbacks, historical contingencies, and economies of scale that accumulated in mutually reinforcing ways to price the salad much higher than the cheeseburger? These various forces could make it more instrumentally rational for consumers to eat cheeseburgers. This would be an example of structural bias in favor of meat.

We disentangle these various mechanisms -- explicit attitudes and stereotypes (sometimes concealed, sometimes revealed), implicit attitudes and stereotypes, and structural forces -- because they pose different threats to fairness everywhere, including the courtroom. For instance, the threat to fairness posed by jurors with explicit negative attitudes toward

Muslims but who conceal their prejudice to stay on the jury is quite different from the threat posed by jurors who perceive themselves as nonbiased but who nevertheless hold negative implicit stereotypes about Muslims. Where appropriate, we explain how certain studies provide evidence of one type of bias or the other. In addition, we want to underscore that these various mechanisms -- explicit bias, implicit bias, and structural forces -- are not mutually exclusive. To the contrary, they may often be mutually reinforcing. In focusing on implicit bias in the courtroom, we do not mean to suggest that implicit bias is the only or most important problem, or that explicit bias (revealed or concealed) and structural forces are unimportant or insignificant.

[Id. at 133-35 (footnote omitted).]

The authors explore ways in which biases may enter the judicial process in both criminal and civil cases, id. at 1135-68, and consider possible ways to reduce the impact of implicit biases -- and thus to promote greater fairness -- in the judicial process, id. at 1169-86.

Other scholarly works that have identified implicit bias and the negative impact it may have on the justice system include:

- Christine Jolls & Cass R. Sunstein, The Law of Implicit Bias, 94 Cal. L. Rev. 969 (2006);
- Jerry Kang, Trojan Horses of Race, 118 Harv. L. Rev. 1489 (2005);
- Justin D. Levinson, Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering, 57 Duke L.J. 435 (2007);
- Antony Page, Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge, 85 Boston U.L. Rev. 155 (2005);
- Jeffrey J. Rachlinski et al., Does Unconscious Racial Bias Affect Trial Judges?, 84 Notre Dame L. Rev. 1195 (2009).

PLEASE NOTE: Listed articles may be available at [Judicial Conference on Jury Selection \(njcourts.gov\)](http://JudicialConferenceonJurySelection.njcourts.gov) with the kind permission of the journals in which they appeared and/or the authors. The collection of online resources will be expanded on a rolling basis; therefore, articles beyond those listed here may be or become available online.

# Attachment C

## The Evolution of Peremptory Challenges

### 1. Common Law through Swain v. Alabama, 380 U.S. 202 (1965)

Peremptory challenges took root in England during the thirteenth century, when the Crown had unlimited discretion to challenge jurors and, in response, “courts began to permit defendants to exercise some peremptories in capital cases.” Hon. Morris B. Hoffman, Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective, 64 U. Chi. L. Rev. 809, 819 (1997). “Unlike the United States, England never extended peremptory challenges to civil trials.” April J. Anderson, Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies As Seen in Practitioners’ Trial Manuals, 16 Stan. J. C.R. & C.L. 1, 16 (2020).

By 1300, just thirty to eighty years after prosecutorial peremptory challenges first sprouted in England, it was settled as a matter of common law that in all capital cases the Crown had an unlimited number of peremptory challenges and the defendant had thirty-five. Although most felonies in this period were punishable by death, there is also some indication that peremptory challenges may have been permitted in the rare non-capital felony case as well.

[Hoffman, 64 U. Chi. L. Rev. at 819-20 (footnotes omitted).]

The turn of the fourteenth century marked the high point of peremptory challenges in England:

From 1305 forward, the number of peremptory challenges allowed in English criminal trials steadily decreased. A defendant’s peremptories were reduced from thirty-five to twenty in 1530, to seven in 1948, to three in 1977, and were eliminated entirely in 1989. Although the Crown’s right to ask jurors to stand aside remained theoretically available until 1989, it is clear

that the standing aside procedure was just as rare, and perhaps rarer, than the defendant's exercise of peremptory challenges.

[Id. at 822 (footnotes omitted).]

And several other countries have likewise abolished peremptory challenges: “In England and Wales, the right to ‘challenge without cause shown,’ known as peremptory challenge, was abolished completely in 1988, in Scotland in 1995 and in 2007 in Northern Ireland.” Fiona Gartland, Bringing the Dark Art of Jury Selection into the Open, The Irish Times (Oct. 14, 2013), <https://www.irishtimes.com/news/crime-and-law/bringing-dark-art-of-jury-selection-into-the-open-1.1557902>. Canada abolished peremptories two years ago. See Hassan Kanu, Arizona Breaks New Ground in Nixing Peremptory Challenges, Reuters (Sept. 1, 2021), <https://www.reuters.com/legal/legalindustry/arizona-breaks-new-ground-nixing-peremptory-challenges-2021-09-01/> (“England abolished peremptory strikes in 1988, and Canada did so in 2019, for example, without any chaos in the courts[.]”).

“Peremptory challenges have fared much better in this country than in England.” Hoffman, 64 U. Chi. L. Rev. at 823. Most colonies granted criminal defendants some peremptory challenges, though not all provided for prosecutorial peremptories. See ibid. And although the Framers created “no constitutional right to peremptory challenges,” “Congress quite early on codified portions of the English practice regarding peremptory challenges.” See id. at 823-25.

“In 1790, [Congress] directed that a federal criminal defendant would be given thirty-five peremptories in treason cases and twenty in all other capital cases.” Id. at 825.

In 1865, . . . Congress specified that in all non-capital felony cases the defendant would have ten peremptory challenges and the prosecution two. In this same statute Congress decreased the number of defense peremptories in capital cases from thirty-five to twenty, and granted the prosecution five. In 1872, the number of prosecution challenges in non-treason, non-capital felony cases was increased from two to three. In the same statute, Congress for the first time extended the

notion of peremptory challenges to federal civil cases (three for each side) and to federal misdemeanor cases (three for each side). In 1911, the numbers were again revised: twenty for the defendant and six for the prosecution in treason and other capital cases; ten for the defendant and six for the prosecution in other felony cases; three each in misdemeanor and civil cases. When the Federal Rules of Criminal Procedure were adopted in 1946, Rule 24(b) increased the prosecution's peremptories in capital cases to equal the defendant's at twenty. This is the current federal scheme.

[Id. at 826 (footnotes omitted).]

Judge Hoffman explains that “[t]he evolution of the peremptory challenge in the various states has generally paralleled federal developments,” with every state -- now, every state other than Arizona -- “recogniz[ing] some form of peremptory challenges for both sides in criminal and civil cases.” See id. at 827.

With respect to the vitality of peremptories in the United States, in comparison with England, Judge Hoffman notes that,

[l]ike so many things in the United States, the marked difference between the American peremptory challenge and the English peremptory challenge can be traced to the agonies of slavery, civil war, and Reconstruction. While the English version of the peremptory challenge was withering from disuse, the American version was vigorously and comprehensively being applied in attempts to stem the inevitable tide of civil rights.

[Ibid.]

April J. Anderson likewise observes that

[t]he most important reason for the transatlantic divergence, . . . and the one most clearly captured in trial practice guides, is a nature of American venires. . . . American society was heterogeneous, and a greater

cross-section of citizens qualified for jury service in American jurisdictions. Because of this, venire panels were more mixed, and perceived differences among jurors drove challenge strategies.

[Anderson, 16 Stan. J. C.R. & C.L. at 24.]

Judge Hoffman explains how peremptories came to be used to minimize jury diversity:

Despite the presence of comprehensive patent and latent exclusion mechanisms (not to mention widespread physical intimidation) some southern blacks trickled through the system and ended up as prospective jurors. Indeed, as early as 1870, integrated venires -- that is, panels of prospective jurors with at least one black person in them -- were not uncommon in several southern states. Prosecutors were then forced to turn to the peremptory challenge to eliminate the new black faces appearing for jury duty.

From Reconstruction through the civil rights movement, the peremptory challenge was an incredibly efficient final racial filter. When Mr. Swain, of Swain v. Alabama fame, [380 U.S. 202 (1965),] was convicted by his all-white Talladega County jury in the early 1960s, no black person had sat on any Talladega County trial jury, civil or criminal, in living memory. No black person sat on any criminal jury in Talladega County, trial jury or grand jury, for the thirteen years immediately preceding Swain. In 1963, the Alabama Supreme Court itself summed up with chilling simplicity the Jim Crow effectiveness of the peremptory challenge: “Negroes are commonly on trial venires but are always struck by attorneys in selecting the trial jury.” [Swain v State, 156 S.2d 368, 375 (Ala. 1963), aff’d, 380 U.S. 202 (1965).] The systematic exclusion of black jurors was not limited to the Deep South. For example, as late as 1880, no black person had ever served as a juror in Delaware.

It was against this backdrop of comprehensive and unabashed racial exclusion that the Supreme Court began its attempts to defang the peremptory challenge as a tool of racial segregation.

[Hoffman, 64 U. Chi. L. Rev. at 829-30.]

In the late nineteenth century, the United States Supreme Court struck down as violative of equal protection principles a West Virginia statute that prohibited black people from serving on juries. See Strauder v. West Virginia, 100 U.S. 303, 312 (1879), abrogated by Taylor v. Louisiana, 419 U.S. 522, (1975), as to dicta concerning the permissibility of excluding women from jury service).] The Court wrote that

[I]t is hard to see why the statute of West Virginia should not be regarded as discriminating against a colored man when he is put upon trial for an alleged criminal offence against the State. It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice, a right, a legal right, under the constitutional amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?

[Id. at 309.]

Yet, despite that stark repudiation of exclusionary **juror qualification rules**, the Court upheld the exclusion of all black jurors **through peremptory challenges** nearly a century later -- in Swain.

When the Court described the peremptory challenge in Swain it waxed eloquent on the peremptory's "very old credentials" and described it as "one of the most important of the rights secured to the accused" and "a necessary part of trial by jury." The Court was reluctant to take any steps that would hamper a party's free exercise of its peremptory challenges. Although the Court was disturbed that prosecutors might be using the peremptory to strike African-Americans from petit juries in case after case, and suggested that if this were true "it would appear that the purposes of the peremptory challenge are being perverted," it chose to believe that prosecutors were not acting in this manner.

[Nancy S. Marder, Justice Stevens, the Peremptory Challenge, and the Jury, 74 Fordham L. Rev. 1683, 1692 (2006).]

In a later decision, the Court described its holding in Swain as follows:

Swain required the Court to decide, among other issues, whether a black defendant was denied equal protection by the State's exercise of peremptory challenges to exclude members of his race from the petit jury. The record in Swain showed that the prosecutor had used the State's peremptory challenges to strike the six black persons included on the petit jury venire. While rejecting the defendant's claim for failure to prove purposeful discrimination, the Court nonetheless indicated that the Equal Protection Clause placed some limits on the State's exercise of peremptory challenges.

The Court sought to accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control, and the constitutional prohibition on exclusion of persons from jury service on account of race. While the Constitution does not confer a right to peremptory challenges, those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased



jury. To preserve the peremptory nature of the prosecutor's challenge, the Court in Swain declined to scrutinize his actions in a particular case by relying on a presumption that he properly exercised the State's challenges.

The Court went on to observe, however, that a State may not exercise its challenges in contravention of the Equal Protection Clause. It was impermissible for a prosecutor to use his challenges to exclude blacks from the jury "for reasons wholly unrelated to the outcome of the particular case on trial" or to deny to blacks "the same right and opportunity to participate in the administration of justice enjoyed by the white population." Accordingly, a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system was "being perverted" in that manner. For example, an inference of purposeful discrimination would be raised on evidence that a prosecutor, "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries." Evidence offered by the defendant in Swain did not meet that standard. While the defendant showed that prosecutors in the jurisdiction had exercised their strikes to exclude blacks from the jury, he offered no proof of the circumstances under which prosecutors were responsible for striking black jurors beyond the facts of his own case.

A number of lower courts following the teaching of Swain reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause. Since this interpretation of Swain has placed on defendants a crippling burden of proof, prosecutors'

peremptory challenges are now largely immune from constitutional scrutiny.

[Batson, 476 U.S. at 90-93 (citations, all to Swain, omitted).]

Twenty years later, the Court revisited the “crippling burden of proof” established in Swain. The Batson Court aimed to curtail the discriminatory exercise of peremptory challenges to exclude qualified jurors from service.

## 2. Batson v. Kentucky, 476 U.S. 79 (1986), Rejects Swain

The Batson Court described the case before it in this way:

Petitioner, a black man, was indicted in Kentucky on charges of second-degree burglary and receipt of stolen goods. On the first day of trial in Jefferson Circuit Court, the judge conducted voir dire examination of the venire, excused certain jurors for cause, and permitted the parties to exercise peremptory challenges. The prosecutor used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury before it was sworn on the ground that the prosecutor’s removal of the black veniremen violated petitioner’s rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws. Counsel requested a hearing on his motion. Without expressly ruling on the request for a hearing, the trial judge observed that the parties were entitled to use their peremptory challenges to “strike anybody they want to.” The judge then denied petitioner’s motion, reasoning that the cross-section requirement applies only to selection of the venire and not to selection of the petit jury itself.

The jury convicted petitioner on both counts. On appeal to the Supreme Court of Kentucky, petitioner pressed, among other claims, the argument concerning the prosecutor's use of peremptory challenges. . . .

The Supreme Court of Kentucky affirmed. . . . The court observed that it recently had reaffirmed its reliance on Swain, and had held that a defendant alleging lack of a fair cross section must demonstrate systematic exclusion of a group of jurors from the venire.

[Id. at 82-84.]

The Court reversed the Supreme Court of Kentucky's decision, holding that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." Id. at 84, 89. "[R]ejecting [the] evidentiary formulation [established in Swain] as inconsistent with standards that have been developed since Swain for assessing a prima facie case under the Equal Protection Clause," id. at 93, the Court remanded the matter for reconsideration under the new, three-part standard adopted in Batson, see id. at 100.

That standard -- which gave its name to the Batson challenge -- is as follows:

**[FIRST STEP:]** [A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those

to discriminate who are of a mind to discriminate.” Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a “pattern” of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor’s questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor’s use of peremptory challenges creates a prima facie case of discrimination against black jurors.

**[SECOND STEP:]** Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor’s explanation need not rise to the level justifying exercise of a challenge for cause. But the prosecutor may not rebut the defendant’s prima facie case of discrimination by stating merely that he challenged jurors of the defendant’s race on the assumption -- or his intuitive judgment -- that they would be partial to the defendant because of their shared race. Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to

serve as jurors, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race. Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or "affirm[ing] [his] good faith in making individual selections." [(alterations in original).] If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause "would be but a vain and illusory requirement." The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. **[THIRD STEP:]** The trial court then will have the duty to determine if the defendant has established purposeful discrimination.

[Id. at 96-98 (citations omitted).]

The majority opinion in Batson acknowledged that peremptory challenges had the capacity to be -- and had been -- used for discriminatory purposes, but it expressed optimism that the new standard for challenging peremptory strikes would result in a more equitable system of justice:

The reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.

[Id. at 99.]

Yet even as Batson was decided, it was called into question. Justice Powell's opinion for the Court was accompanied by four concurring opinions and two dissents. The dissents by Chief Justice Burger and Justice Rehnquist challenged as unsupported the Court's (1) departure from Swain and (2) undermining of the time-honored tradition of peremptory challenges.

Justice Stevens, joined by Justice Brennan, concurred to explain why joining Batson was not inconsistent with a vote in another matter. Justice O'Connor concurred to express the view that Batson's holding should not apply retroactively. Justice White explained why it was appropriate to overturn Swain and also opined that the holding should not apply retroactively.

Justice White joined the Court's decision in full but predicted, accurately, that "[m]uch litigation will be required to spell out the contours of the Court's equal protection holding today, and the significant effect it will have on the conduct of criminal trials cannot be gainsaid." Id. at 102 (White, J., concurring). Some of the key cases in which the Court has explained -- or adjusted -- the contours of the Batson framework include:

- Hernandez v. New York, 500 U.S. 352 (1991), in which the Court found that the asserted race-neutral reason for the striking of all prospective Latinx jurors -- difficulty following the interpreter -- passed constitutional muster in that case but nevertheless stressed that "a policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination."
- Powers v. Ohio, 499 U.S. 400 (1991), in which the Court held that defendants have standing to challenge the exclusion of jurors -- and that they do not need to be of the same race as excluded jurors to challenge the exclusion of those jurors.
- Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991), in which the Court extended Batson to civil jury trials.
- Georgia v. McCollum, 505 U.S. 42 (1992), in which the Court held that defendants' peremptory strikes are also subject to challenge under Batson.

- J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994), in which the Court extended Batson to strikes based on gender.
- Purkett v. Elem, 514 U.S. 765 (1995), in which the Court distinguished between the scrutiny a court should apply to asserted race-neutral reasons for a strike in steps two and three of a Batson challenge, explaining that “[t]he second step of [the Batson] process does not demand an explanation that is persuasive, or even plausible,” but that at the third “stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.” The Court opined that

to say that a trial judge may choose to disbelieve a silly or superstitious reason at step three is quite different from saying that a trial judge must terminate the inquiry at step two when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

Applying that reasoning, the Purkett Court concluded that “[t]he prosecutor’s proffered explanation in this case -- that he struck juror number 22 because he had long, unkempt hair, a mustache, and a beard -- is race neutral and satisfies the prosecution’s step two burden of articulating a nondiscriminatory reason for the strike.”

Justice Stevens dissented in Purkett:

In my opinion, preoccupation with the niceties of a three-step analysis should not foreclose meaningful judicial review of prosecutorial explanations that are entirely unrelated to the case to be tried. I would adhere to the Batson rule that such an explanation does not satisfy step two. Alternatively, I would hold that, in the absence of an explicit trial court finding on the issue, a reviewing court may hold that such an explanation is pretextual as a matter of law. The Court’s unnecessary tolerance of silly, fantastic, and implausible explanations, together with its assumption that there is

a difference of constitutional magnitude between a statement that “I had a hunch about this juror based on his appearance,” and “I challenged this juror because he had a mustache,” demeans the importance of the values vindicated by our decision in Batson.

- Miller-El v. Cockrell, 537 U.S. 322 (2003), in which the Court stressed that the third-stage review of a Batson challenge requires a searching analysis. The Court found in that case that the district court, on habeas review, “did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case. Instead, it accepted without question the state court’s evaluation of the demeanor of the prosecutors and jurors in petitioner’s trial.” In the Court’s view,

the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors. The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members, and only one served on petitioner’s jury. In total, 10 of the prosecutors’ 14 peremptory strikes were used against African-Americans. Happenstance is unlikely to produce this disparity.

And the Court cited evidence beyond those statistics that should have been considered at the third stage, namely the fact that three of the State’s asserted race-neutral explanations applied equally to some white jurors who were not challenged; the prosecutor’s selective use of Texas’s “jury shuffle” procedure, whereby the order in which prospective jurors are questioned in voir dire can be changed; and the history of racial discrimination by the relevant prosecutor’s office.

- Johnson v. California, 545 U.S. 162 (2005), in which the Court held that “an appropriate yardstick” for determining whether a party challenging a peremptory strike had satisfied the first step of the Batson framework was that “the objector must show that it is more likely than not the other party’s peremptory challenges, if unexplained, were based on impermissible group bias.”



- Flowers v. Mississippi, 139 S. Ct. 2228 (2019), in which the Court explained that “Batson’s holding raised several important evidentiary and procedural issues” and underscored three of those issues:

First, what factors does the trial judge consider in evaluating whether racial discrimination occurred? Our precedents allow criminal defendants raising Batson challenges to present a variety of evidence to support a claim that a prosecutor’s peremptory strikes were made on the basis of race. For example, defendants may present:

- statistical evidence about the prosecutor’s use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
- evidence of a prosecutor’s disparate questioning and investigation of black and white prospective jurors in the case;
- side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
- a prosecutor’s misrepresentations of the record when defending the strikes during the Batson hearing;
- relevant history of the State’s peremptory strikes in past cases; or
- other relevant circumstances that bear upon the issue of racial discrimination.

Second, who enforces Batson? As the Batson Court itself recognized, the job of enforcing Batson rests first and foremost with trial judges. America’s trial judges operate at the front lines of American justice. In criminal trials, trial judges possess the primary responsibility to enforce Batson and prevent

racial discrimination from seeping into the jury selection process.

As the Batson Court explained and as the Court later reiterated, once a prima facie case of racial discrimination has been established, the prosecutor must provide race-neutral reasons for the strikes. The trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties. The trial judge's assessment of the prosecutor's credibility is often important. The Court has explained that "the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge." "We have recognized that these determinations of credibility and demeanor lie peculiarly within a trial judge's province." The trial judge must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race. The ultimate inquiry is whether the State was "motivated in substantial part by discriminatory intent."

Third, what is the role of appellate review? An appeals court looks at the same factors as the trial judge, but is necessarily doing so on a paper record. "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." The Court has described the appellate standard of review of the trial court's factual determinations in a Batson hearing as "highly deferential." "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous."

[(emphases in original; citations omitted.)]

After setting forth both the types of evidence that may be presented in Batson challenges and the respective principles that should guide trial- and appellate-court review of Batson challenges, the Flowers Court reversed the Mississippi Supreme Court's affirmance of the trial court's rejection of the defendant's Batson challenge, explaining that

the State's pattern of striking black prospective jurors persisted from Flowers' first trial through Flowers' sixth trial. In the six trials combined, the State struck 41 of the 42 black prospective jurors it could have struck. At the sixth trial, the State struck five of six. At the sixth trial, moreover, the State engaged in dramatically disparate questioning of black and white prospective jurors. And it engaged in disparate treatment of black and white prospective jurors, in particular by striking black prospective juror Carolyn Wright.

To reiterate, we need not and do not decide that any one of those four facts alone would require reversal. All that we need to decide, and all that we do decide, is that all of the relevant facts and circumstances taken together establish that the trial court at Flowers' sixth trial committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not motivated in substantial part by discriminatory intent. In reaching that conclusion, we break no new legal ground. We simply enforce and reinforce Batson by applying it to the extraordinary facts of this case.

Although the Flowers Court thus stressed its fidelity to Batson, the cases discussed above reveal that, as predicted in Justice White's concurrence, the Batson test has required substantial clarification and boundary-setting over the years.

Justice Marshall, who also filed a concurring opinion in Batson, likewise penned a prediction: "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process." 476 U.S. at 102-03 (Marshall, J., concurring).

In his concurrence, Justice Marshall “applaud[s] the Court’s holding that the racially discriminatory use of peremptory challenges violates the Equal Protection Clause” but expresses the view that “only by banning peremptories entirely can such discrimination be ended.” Id. at 108.

Justice Marshall explains that, after the Court invalidated a statute that prohibited black citizens from serving as jurors in Strauder v. West Virginia, 100 U.S. 303 (1880), “[s]tate officials then turned to somewhat more subtle ways of keeping blacks off jury venires” and that “[m]isuse of the peremptory challenge to exclude black jurors has become both common and flagrant.” Id. at 103. Justice Marshall observes, “Black defendants rarely have been able to compile statistics showing the extent of that practice, but the few cases setting out such figures are instructive.” Id. at 103-04 (collecting cases). And, Justice Marshall writes, the “[e]xclusion of blacks from a jury, solely because of race, can no more be justified by a belief that blacks are less likely than whites to consider fairly or sympathetically the State’s case against a black defendant than it can be justified by the notion that blacks lack the ‘intelligence, experience, or moral integrity’ to be entrusted with that role.” Id. at 104-05 (citation omitted).

Although “wholeheartedly concur[ring] in the Court’s conclusion that use of the peremptory challenge to remove blacks from juries, on the basis of their race, violates the Equal Protection Clause,” Justice Marshall “would go further . . . in fashioning a remedy adequate to eliminate that discrimination.” Id. at 105.

Justice Marshall observes that experiences in Massachusetts and California, which already employed, under state law, an “[e]videntiary analysis similar to that set out by the Court,” have shown that “[m]erely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge.” Ibid. Justice Marshall explains that requiring a defendant to establish a prima facie case “means, in those States, that where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race” -- “[p]rosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an ‘acceptable’ level.” Ibid.

Second, “[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons.” Id. at 105-06. In Justice Marshall’s view, “[i]f such easily generated explanations are sufficient to discharge the prosecutor’s obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.” Id. at 106.

And Justice Marshall notes that prosecutors and judges may act based on “conscious or unconscious racism” manifested in the form of “seat-of-the-pants” instincts.” Ibid. Justice Marshall expresses skepticism that “[e]ven if all parties approach the Court’s mandate with the best of conscious intentions,” they will be able to meet the challenge of “confront[ing] and overcom[ing] their own racism on all levels.” Ibid.

Justice Marshall posits that peremptories should be banned entirely, rejecting proposals that defendants should be able to retain their peremptories on the ground that “[o]ur criminal justice system “requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.”” Ibid. (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1887)). Despite the fact that “[m]uch ink has been spilled regarding the historic importance of defendants’ peremptory challenges,” Justice Marshall reasons that “[t]he potential for racial prejudice . . . inheres in the defendant’s challenge as well” and concludes that, “[i]f the prosecutor’s peremptory challenge could be eliminated only at the cost of eliminating the defendant’s challenge as well, I do not think that would be too great a price to pay.” Id. at 108.

\* \* \* \* \*

The next attachment -- Attachment D -- provides a bibliography of judicial opinions and empirical and legal analyses. Those works reveal that Justice Marshall’s concern about Batson’s inability to eliminate the discriminatory exercise of peremptory challenges was well-founded. Although there is great dispute as to why that is true and what should be done about it, there is widespread consensus that it is, indeed, true.

Before turning to those works, however, it is appropriate to consider Batson’s New Jersey contemporary: State v. Gilmore.

### 3. State v. Gilmore

Just as Batson rejected the approach set forth in Swain, so Gilmore rejected both Swain and State v. Smith, in which the Supreme Court of New Jersey cited Swain in holding against a black defendant's challenge to the prosecutor's exclusion of black jurors through peremptory strikes. See 55 N.J. 476, 483-84 (1970). The Smith Court wrote:

We find no merit in the defendant's fifth point which asserts that the prosecutor's use of peremptory challenges to exclude Negroes (the defendant was a Negro) from the petit jury violated his constitutional rights. The prosecutor and defense counsel each had ten peremptory challenges to use generally as they pleased. They were not called upon to express any reasons and both of them exercised their peremptory challenges freely and without any indications whatever as to their reasons. "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." The defendant sets forth, as a fact, that only three Negroes were called on the Voir dire and that the prosecutor exercised peremptory challenges with respect to all three. But that fact without more does not establish any practice of systematic exclusion of Negroes, nor does it establish, as the defendant contends, that the three prospective jurors were excused "solely because of their race"; indeed our examination of the Voir dire suggests that in at least one of the three instances there was an obvious affirmative reason, wholly unrelated to race, for the prosecutor's exercise of his peremptory challenge.

[Ibid. (quoting Swain).]

Gilmore overturned that line of analysis, replacing it with a three-part inquiry that, like the Batson framework, reaches the reasons for the exercise of a peremptory strike. There were three notable decisions in State v. Gilmore, the first two of which preceded Batson.

**In Gilmore I**, 195 N.J. Super. 163, 163 (App. Div. 1984), the Appellate Division considered “whether the defendant’s Federal and State Constitutional rights to a trial by an impartial jury were violated by the prosecutor’s use of peremptory challenges to exclude all prospective black jurors apparently on the basis of race.” Noting that “[t]he trial judge relied heavily on [Swain] in rejecting defendant’s constitutional argument,” the court declared itself “persuaded that New Jersey courts should become ‘laboratories’ to reexamine the use of peremptory challenges to exclude blacks, or other cognizable groups, from serving on petit juries solely because of their group association.” Id. at 165 (quoting McCray v. New York, 461 U.S. 961, 963 (1983)). The court remanded the matter, directing the trial court “to conduct a hearing to establish the identity of the black prospective jurors and to afford the assistant prosecutor an opportunity to establish his motive or reasons for excusing each of the seven prospective black jurors.” Id. at 166.

**In Gilmore II**, 199 N.J. Super. 389, 405-06 (App. Div. 1985), aff’d, 103 N.J. 508 (1986), the Appellate Division considered the case again after the record was developed on remand; the court relied on the State Constitution to determine whether the prosecutor’s exercise of peremptory challenges had violated the defendant’s constitutional rights.

The court explained that

Article I of the New Jersey Constitution, paragraph 5 provides “[n]o person shall be denied the enjoyment of any civil . . . right, nor be discriminated against in the exercise of any civil . . . right . . . because of . . . race, color, ancestry or national origin.” Paragraph 9 provides “[t]he right of trial by jury shall remain inviolate; . . . .” Finally, paragraph 10 provides “[i]n all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; . . . .” Read together, these paragraphs of Article I guarantee that a defendant in a criminal case is entitled to a jury trial by a fair and impartial jury without discrimination on the basis of race, color, ancestry or national origin.

[Id. at 397-98.]

From that state constitutional guarantee, the court derived a “procedure to be followed where an unconstitutional use of peremptory challenges is alleged[,] . . . plac[ing] substantial reliance upon the trial judges for enforcement.” Id. at 407.

Applying the standard it adopted to the reasons asserted for the peremptory strikes in Gilmore’s case, the Appellate Division found that

[t]he assistant prosecutor’s admission that he excluded Blacks because he assumed they were predominately Baptist and would tend to favor the defense is a clear illustration of group bias. He further admitted that [black] women’s maternal instincts would make them favor the defendant. This too was an indication of group bias . . . . Not only did he exclude a disproportionate number of Blacks, but he excluded all of them. Hence, we are satisfied that a prima facie case of improper exercise of peremptory challenges was established under today’s guidelines by defense counsel at the time he made the motion for a mistrial. The presumption of proper use of the peremptory challenges now gives way and the burden shifts to the assistant prosecutor to justify the use of his seven peremptory challenges on nonracial grounds.

Relying on the evidence produced at the remand hearing, the State argues that Rodgers, a laboratory technician, lived in Hillside which is near Newark. It argues that this prospective juror was excused because he might be influenced by the testimony of defendant’s father who is a Baptist minister. Boykin was excused because he was related to a person who had been convicted of a crime and because he might know a potential defense witness, defendant’s girlfriend. Overby, a truck driver who also resided in Hillside, was excused because he was a truck driver -- not the professional or intellectual type -- as well because he lived close to Newark and might be influenced by the testimony of defendant’s father. . . . The State had urged that Rawlins would not look at the assistant



prosecutor or if he did, he looked at him with a “mean face.”

Dedon, a housewife, was excused because of her perceived maternal instincts for believing the alibi evidence. Another female, Margaret Daniels, was also excused because of her maternal instincts and her employment as a clerk typist. Interestingly, the assistant prosecutor permitted three white housewives, Jane Hoffman, Alsa Musta and Gloria Dultz, to remain on the jury. Also, two white female secretaries, Ellen Bergland and Loretta Rake, were not excused by the prosecutor. They, presumably, had the same “maternal instincts” and were not the “professional or intellectual type.”

Bailey, a window washer from Plainfield, was excused because the State wanted a more professional type juror and the assistant prosecutor thought he knew a mutual friend. Finally, Bryant, a Plainfield resident employed by the State of New York as a therapist, was excused because he was the “counsellor-type” person who tends to sympathize with defendants.

The assistant prosecutor was undoubtedly aware that the State had a substantial case. In these circumstances, we find the assistant prosecutor’s explanation that only the intellectual type was suitable for jury duty lacks genuineness. We perceive no reasonable relevancy between the issues to be resolved by the jury and the high intellectual achievement of jurors. Moreover, the record does not suggest that the assistant prosecutor insisted on intellectual achievement from white jurors. The real issue in each of the robberies was essentially one of identification of defendant as the perpetrator; that was not a very complicated issue.

Also, all black males and females were eliminated regardless of education, occupation, place of residence, or social or economic conditions.

Additionally, no real attempts were made to bring out on voir dire whether the Blacks harbored any specific bias. The assistant prosecutor never endeavored to find out whether Boykin really knew defendant's girlfriend. Even though possible bias may have been established as to Boykin, we are convinced from our review of the record made on the remand that the assistant prosecutor has failed to demonstrate that he did not use his peremptory challenges to exclude the remaining six Blacks from the jury based solely on their group membership rather than individual bias. . . .

Hence, we are persuaded that the assistant prosecutor's reasons or explanations were "sham excuses belatedly contrived to avoid admitting acts of group discrimination against all the black prospective jurors." We hold that defendant sustained his burden of proving that the State used its peremptory challenges to engage in invidious racial discrimination in violation of N.J. Const. (1947), ¶ 5, ¶ 9 and ¶ 10. While we do not rest our decision on a violation of the Sixth Amendment to the federal constitution, we have no doubt that the assistant prosecutor's conduct also deprived defendant of an impartial jury trial under the Sixth Amendment . . . .

[Id. at 410-13 (citations omitted; some alterations in original).]

In The Evolution of Race in the Jury Selection Process, 48 Rutgers L. Rev. 1105, 1108 (1996), Justice James H. Coleman, Jr., stressed the groundbreaking nature of Gilmore, decided in 1985, given that the Supreme Court of New Jersey had, as late as 1970 -- and the Appellate Division as late as 1973 -- "found that a prosecutor's use of peremptory challenges to excuse all prospective African-American jurors did not" run afoul of the Fourteenth Amendment, in keeping with Swain.

Noting that Swain had "essentially closed the federal courthouse door to claims of invidious racial discrimination in the exercise of peremptory challenges absent a showing that was all but impossible to satisfy," id. at 1120,

Justice Coleman explains that, in the 80s, states began looking to the protections afforded in their state constitutions, id. at 1120-29.

Justice Coleman shares that he volunteered to write Gilmore as an Appellate Division judge but initially found reliance on a state constitution rather than federal law difficult to accept, “[h]aving grown up in the Old South, where reliance on state autonomy as a major source of individual rights permitted the separate but unequal doctrine to be established and perpetuated, and where all-white juries had become a way of life.” Id. at 1107. Ultimately, Gilmore held that the New Jersey Constitution offered protection against discrimination through peremptory challenges.

Justice Coleman emphasizes that, even though Batson issued while the petition for certification in Gilmore II was pending, the New Jersey Supreme Court nevertheless relied on the State Constitution in affirming Gilmore II. Id. at 1129. “Together, Gilmore and Batson represent a constitutional revolution that transformed the jury selection system.” Ibid.

**In Gilmore III**, 103 N.J. 508, 545 (1986), the Court summarized as follows the test for challenges to peremptory strikes:

We begin with the rebuttable presumption that the prosecution has exercised its peremptory challenges on grounds permissible under Article I, paragraphs 5, 9, and 10 of the New Jersey Constitution.

....

This presumption may be rebutted . . . upon a defendant’s prima facie showing that the prosecution exercised its peremptory challenges on constitutionally-impermissible grounds. To make out such a case, the defendant initially must establish that the potential jurors wholly or disproportionately excluded were members of a cognizable group within the meaning of the representative cross-section rule. The defendant then must show that there is a substantial likelihood that the peremptory challenges resulting in the exclusion were based on assumptions about group

bias rather than any indication of situation-specific bias.

....

If the trial court finds that the defendant has established a prima facie case, this in effect gives rise to a presumption of unconstitutional action that it is the burden of the prosecution to rebut. . . . To carry this burden, the State must articulate “clear and reasonably specific” explanations of its “legitimate reasons” for exercising each of the peremptory challenges. . . .

....

In deciding whether the prosecutor has rebutted the inference, the trial court must be sensitive to the possibility that “hunches,” “gut reactions,” and “seat of the pants instincts” may be colloquial euphemisms for the very prejudice that constitutes impermissible presumed group bias or invidious discrimination.

In the final analysis, the trial court must judge the defendant’s prima facie case against the prosecution’s rebuttal to determine whether the defendant has carried the ultimate burden of proving, by a preponderance of the evidence, that the prosecution exercised its peremptory challenges on constitutionally-impermissible grounds of presumed group bias.

[Id. at 534-39 (footnotes and citations omitted).]

In adopting that standard, the Court

[made] no claim that the framework that this opinion sets forth will ferret out, let alone cure, all possible abuses of peremptory challenges. Eliciting a prosecutor’s grounds for exercising such challenges will be awkward and difficult. We offer our trial judges no bright-line for distinguishing between permissible grounds of situation-specific bias and impermissible

reasons evincing presumed group bias, nor should they want one. Here as in other contexts we ultimately must depend on the judge's sense of fairness and impartial judgment. Although our decision thus is no panacea, it nevertheless is an important step toward insuring that in all criminal prosecutions in New Jersey, the defendant will be afforded his or her right to trial by an impartial jury drawn from a representative cross-section of the community, without discrimination on the basis of religious principles, race, color, ancestry, national origin, or sex.

[Id. at 545.]

Twenty-three years after Gilmore III, the Court softened the first step of that Gilmore-Batson test from requiring a "substantial likelihood" of discrimination to requiring "evidence sufficient to draw an inference that discrimination has occurred," in keeping with a shift in federal law. State v. Osorio, 199 N.J. 486, 502 (2009) (quoting Johnson v. California, 545 U.S. 162, 170 (2005)).

And Andujar further clarified the test, holding that it applies in equal force to all peremptories challenged on the basis of bias -- whether explicit or implicit -- reflecting that "our understanding of bias and discrimination has evolved considerably" over time. 247 N.J. at 285.

# Attachment D

## Batson Questioned; Peremptories Challenged

### 1. Judicial Opinions

In the decades since Batson, judges seeking to follow Supreme Court precedent have repeatedly expressed frustration with the Batson test's inefficacy.

In People v. Randall, 671 N.E.2d 60 (Ill. App. Ct. 1996), for example, an appellate court expressed dismay at the ease with which the second step -- the assertion of a race-neutral explanation -- could be overcome. The footnotes have been omitted from the passage below, but each explanation offered is a real example taken from an actual case:

[W]e now consider the charade that has become the Batson process. The State may provide the trial court with a series of pat race-neutral reasons for exercise of peremptory challenges. Since reviewing courts examine only the record, we wonder if the reasons can be given without a smile. Surely, new prosecutors are given a manual, probably entitled, "Handy Race-Neutral Explanations" or "20 Time-Tested Race-Neutral Explanations." It might include: too old, too young, divorced, "long, unkempt hair," free-lance writer, religion, social worker, renter, lack of family contact, attempting to make eye-contact with defendant, "lived in an area consisting predominantly of apartment complexes," single, over-educated, lack of maturity, improper demeanor, unemployed, improper attire, juror lived alone, misspelled place of employment, living with girlfriend, unemployed spouse, spouse employed as school teacher, employment as part-time barber, friendship with city council member, failure to remove hat, lack of community ties, children same "age bracket" as defendant, deceased father and prospective juror's aunt receiving psychiatric care.

Recent consideration of the Batson issue makes us wonder if the rule would be imposed only where the prosecutor states that he does not care to have an African-American on the jury. We are reminded of the musing of Justice Cardozo, “We are not to close our eyes as judges to what we must perceive as men.” People v. Knapp, 129 N.E. 202, 208 (1920).

[Id. at 65-66 (footnotes omitted).]

Judge Constance Baker Motley, confronted with similarly unpersuasive race-neutral explanations, banned the use of peremptory challenges in her courtroom in Minetos v. City University of New York, 925 F. Supp. 177 (S.D.N.Y. 1996).

In Minetos, Judge Motley “[held] that judicial experience with peremptory challenges proves that they are a cloak for discrimination and, therefore, should be banned.” Id. at 185. In that case, the plaintiff sought a new trial on the discrimination claims she had brought against her employer in part on the basis of the defendants’ Batson error. In Judge Motley’s view, Minetos “illustrate[d] the bedeviling problems associated with peremptory challenges which, by their very nature, invite corruption of the judicial process.” Id. at 183.

The plaintiff in Minetos succeeded in her Batson challenge against the defendants, whom she argued to be “using their peremptory challenges to strike African-American and Hispanic venirepersons based on their race and ethnicity.” Id. at 181. After the court found the plaintiff had “made a prima facie showing that defendants were exercising their peremptory challenges in a race-based fashion,” the court considered the defendants’ proffered race-neutral justifications, which were as follows: “Eddie Rosa indicated that he didn’t feel that people necessarily needed to speak English on the job,” which was tied to plaintiff’s claim that she “was identified as Hispanic on account of her accent”; “the black woman, her name was Victoria Simmons, and she was a teacher in the New York City public school system which is exactly what the plaintiff is”; and “Mr. Judd is a blue collar worker with no office experience whatsoever, which is a factor for us. People who have never worked in an office we feel would have difficulty understanding the office dynamics which are very important to this case.” Id. at 181-82.

Noting that “defendants struck exclusively Hispanic and African-American venirepersons,” Judge Motley “determined that their race-neutral explanations hid discriminatory intent.” Id. at 182.

But the defendants then objected “that plaintiff had likewise committed Batson error by striking only white male members from the prospective jury.” Ibid. Judge Motley agreed, noting that “[t]his court does not find plaintiff’s proffered reason for striking the white males credible. In New York City the business community is overwhelmingly and disproportionately white. Thus the ‘pro-management’ excuse offers easy cover for those with discriminatory motives in jury selection.” Ibid. Judge Motley explained that “plaintiff’s discriminatory use of her peremptory challenges defies the only reason for having them and violates each excluded juror’s rights, irrespective of the final racial makeup of the jury.” Id. at 183. Ultimately, Judge Motley denied the plaintiff’s motion “given plaintiff’s own Batson error.” Id. at 185.

Judge Motley also offered a firm repudiation of Batson:

A brief review of the case law shows that judicial interpretations of Batson are all over the map. This is particularly true of Batson’s requirement that courts guess at what facially race-neutral reasons are, in fact, pretextual for discriminatory motives. See, e.g., Hernandez v. New York, 500 U.S. 352 (1991) (striking all Spanish-speaking Latino venirepersons because they would not accept court interpreter’s translation of Spanish-speaking witnesses was not pretextual); United States v. Alvarado, 951 F.2d 22 (2d Cir. 1991) (striking African-American and Hispanic venirepersons for being young or for being social workers was not pretextual); Polk v. Dixie Ins. Co., 972 F.2d 83 (5th Cir. 1992) (striking African-American venirepersons for lack of “eyeball contact” was not pretextual), cert. denied, 506 U.S. 1055 (1993); United States v. Clemons, 843 F.2d 741 (3d Cir.) (striking all African-American venirepersons for being single and young was not pretextual), cert. denied, 488 U.S. 835 (1988); United States v. Tucker, 836 F.2d 334 (7th Cir. 1988) (striking all African-American venirepersons for lack of education and business experience was not



pretextual); but cf. Garrett v. Morris, 815 F.2d 509 (8th Cir.) (striking all African-American venirepersons for lack of education and knowledge was pretextual), cert. denied, 484 U.S. 898 (1987); Splunge v. Clark, 960 F.2d 705 (7th Cir. 1992) (striking African-American venireperson based on “feelings . . . that she would not be a good juror” was pretextual); United States v. Bishop, 959 F.2d 820 (9th Cir. 1992) (striking African-American venirepersons for living in low-income neighborhood was pretextual).

It is even possible to defeat a Batson claim where the attorney has stated on the record that race was a factor in the decision to strike a prospective juror, if that attorney can show that he or she would have struck the individual for “race-neutral” reasons anyway. See Howard v. Senkowski, 986 F.2d 24 (2d Cir. 1993).

In an effort to lend method to the madness, the New York Appellate Courts have drawn up some “Guidelines” to help trial courts apply Batson’s second step. Under these guidelines, certain reasons for striking jurors, offered in response to a challenge of Batson error, will be presumed pretextual on their face and certain reasons will be presumed not pretextual. . . .

. . . .

Subjective reasons offered by counsel to justify peremptory challenges (such as the juror’s hairstyle, bad facial expression, body language, or over-responsiveness to opposing counsel) will be evaluated by the trial court and the peremptory challenge will be sustained if the trial court confirms there is a sound and credible basis for it. Of course, listing in this manner has the unfortunate effect of creating a how-to guide for defeating Batson challenges. Such guidelines do not ensure that juror strikes are not racially motivated -- only that advocates are on notice of which reasons will

best survive judicial review. Further, as observed by Mr. Justice Marshall ten years ago:

“It is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal.” A prosecutor’s own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is “sullen” or “distant,” a characterization that would not have come to his mind if a white juror had acted identically. A judge’s own conscious or unconscious racism may lead him to accept such an explanation as well supported. . . . Even if all parties approach the Court’s mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels -- a challenge I doubt all of them can meet. It is worth remembering that “114 years after the close of the War Between the States and nearly 100 years after Strauder, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole.”

It took twenty years of judicial experience with the Supreme Court’s decision in Swain v. Alabama, 380 U.S. 202 (1965), for the Supreme Court to realize that its decision regarding peremptory challenges placed a “crippling burden of proof” on defendants. See Batson, 476 U.S. at 91-92. And while the Supreme Court has often recognized that peremptory challenges can be exercised in a manner contravening the equal protection clause of the Fourteenth Amendment, the Court has never explicitly considered whether peremptory challenges per se violate equal protection. This court holds that they do.

It is time to put an end to this charade. We have now had enough judicial experience with the Batson test to know that it does not truly unmask racial discrimination. In short, lawyers can easily generate facially neutral reasons for striking jurors and trial courts are hard pressed to second-guess them, rendering Batson and Purkett's protections illusory. After ten years, this court joins in Justice Marshall's call for an end to peremptory challenges and the racial discrimination they perpetuate.

[Id. at 183-85 (footnotes and some internal citations omitted) (quoting Batson, 476 U.S. at 106-07 (Marshall, J., concurring)).]

\* \* \* \* \*

Attachment J below features resources related to the systemic jury reforms that the Supreme Courts of Arizona, Connecticut, and Washington have undertaken, in part in response to deficiencies in the Batson test.

California has likewise reformed the use of peremptory challenges through the California Legislature's enactment of Cal. Civ. Proc. Code § 231.7 (eff. Jan. 1, 2021). Among other reforms, the new statute adopts an "objectively reasonable person standard" for assessing challenges. The California Legislature incorporated the following findings in 2020 Cal. Legis. Serv. Ch. 318 (A.B. 3070):

SECTION 1. (a) It is the intent of the Legislature to put into place an effective procedure for eliminating the unfair exclusion of potential jurors based on race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, through the exercise of peremptory challenges.

(b) The Legislature finds that peremptory challenges are frequently used in criminal cases to exclude potential jurors from serving based on their race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups,

and that exclusion from jury service has disproportionately harmed African Americans, Latinos, and other people of color. The Legislature further finds that the existing procedure for determining whether a peremptory challenge was exercised on the basis of a legally impermissible reason has failed to eliminate that discrimination. In particular, the Legislature finds that requiring proof of intentional bias renders the procedure ineffective and that many of the reasons routinely advanced to justify the exclusion of jurors from protected groups are in fact associated with stereotypes about those groups or otherwise based on unlawful discrimination. Therefore, this legislation designates several justifications as presumptively invalid and provides a remedy for both conscious and unconscious bias in the use of peremptory challenges.

(c) It is the intent of the Legislature that this act be broadly construed to further the purpose of eliminating the use of group stereotypes and discrimination, whether based on conscious or unconscious bias, in the exercise of peremptory challenges.

And jurists in other states have filed separate opinions calling for the reform or abolition of peremptories, including:

State v. Veal, 930 N.W.2d 319, 359-61 (Iowa 2019) (Appel, J., concurring in part and dissenting in part) (expressing the views that (1) “our system’s approach to achieving a fair cross section of the community in the jury pool and in ensuring African-Americans receive a fair trial is in need of an overhaul”; (2) “the experience of over thirty years demonstrates not that Batson is worthless, but rather that it is very ineffective”; (3) “[g]iven all the problems of Batson, it may well be that an adjustment here and there may not be enough”; (4) “[t]he elimination of peremptory challenges . . . is a substantial proposition and no one has asked for it in this case”; and (5) “we should be giving the elimination of the last minority juror through a peremptory challenge greater scrutiny than other Batson challenges ordinarily require”);

Commonwealth v. Maldonado, 788 N.E.2d 968, 975 (Mass. 2003) (Marshall, C.J., concurring) (“This case illustrates, once again, the difficulties confronting defense counsel and prosecutors, . . . trial judges and appellate courts, who struggle to give meaning to the constitutional mandate ‘that a jury be drawn from a fair and representative cross-section of the community.’ Despite vigilant efforts to eliminate race-based and other impermissible peremptory challenges, it is all too often impossible to establish whether a peremptory challenge has been exercised for an improper reason. I am therefore persuaded that, ‘rather than impose on trial judges the impossible task of scrutinizing peremptory challenges for improper motives,’ it is time either to abolish them entirely, or to restrict their use substantially.” (citations omitted));

Smulls v. State, 71 S.W.3d 138, 160-61 (Mo. 2002) (Wolff, J., concurring) (“The only way to eliminate completely racial profiling in jury selection is to eliminate the peremptory challenge . . . a drastic remedy, and one that I am reluctant to espouse. Instead of complete elimination, the legislature might consider at least a drastic curtailment of the number of peremptory challenges. Section 494.480 allows nine peremptory challenges per side in death penalty cases. These strikes occur after the challenges for cause remove any prospective jurors who would not impose capital punishment. . . . Then, from that “death penalty qualified” group, the state is permitted to strike nine of the prospective jurors for no reason. This may eliminate just about everyone who might even look like they could give a capital defendant the benefit of a reasonable doubt. Does the state really need to strike nine of its citizens in order for the state to receive a fair trial, even after a jury panel is “death penalty qualified”? A system that allows many peremptory challenges is open to manipulation by the defense as well. . . . In a death penalty case, at least 18 citizens show up and undergo voir dire examination and are sent away for no stated reason. This is a waste of time. For a juror to discern that his or her race may have been a factor is to add insult to the waste-of-time injury. This is not a proper way for the state to treat its citizens, especially those who come when summoned for service. If we, as a democratic society, believe the jury system is essential, then we ought to foster respect for this service. . . . [H]ow many safety valves are needed for a fair trial? Nine or even six peremptory challenges seem wildly excessive. On challenges for cause, as in many other trial events, the correctness of trial court rulings is appropriately assumed. One or two peremptory challenges should be enough. If the number of peremptory challenges were reduced to one or two, juries in racially diverse

counties would more likely be representative of the community. More importantly, such a move would drastically reduce the often subtle yet always insidious racial discrimination inherent in many peremptory challenges.”);

Wamget v. State, 67 S.W.3d 851, 867 (Tex. Crim. App. 2001) (Meyers, J., concurring) (“Batson claims will inevitably grow in number, compelling hour upon hour of inquiry into venirepersons’ ethnic backgrounds and heritage and further inquiry into the supposed thoughts and impulses of the proponent of the strike, issues that are irrelevant to juror impartiality. Moreover, peremptory challenges do not further the goal of an impartial jury, there is no historical rationale supporting their continued use and there is no constitutional right to them. The continued viability of peremptory challenges is not before this Court today. But I would urge the legislature to take a serious look at this issue.”);

United States v. Chaney, 53 M.J. 383, 386 (C.A.A.F. 2000) (Sullivan, J., concurring) (“[T]he military justice system should eliminate the peremptory challenge. The peremptory challenge in the military, as it stands in the current of present Supreme Court and our Court’s case law, may have outlived its usefulness and benefit. Congress and the President should relook this long established right to strike off a juror without a judicially sanctioned cause. Real and perceived racial and gender abuses lie beneath the surface of the sea of peremptory challenges.” (citations omitted));

Thorson v. State, 653 So. 2d 876, 897 (Miss. 1994) (Sullivan, J., concurring) (“An otherwise qualified citizen should not be excluded from a jury based on a “gut” feeling of one side or the other. To allow exclusion of the juror without giving cause too easily provides the opportunity for racism or other impermissible bases to taint jury selection. If, as the law now exists, selection of jurors may be challenged when impermissible motives are suspected it is in the best interests of justice and efficiency to eliminate peremptory challenges completely, for both sides, and require that cause be given.”);

Gilchrist v. State, 627 A.2d 44, 55-56 (Md. Ct. Spec. App. 1993) (Wilner, C.J., concurring) (“Occasionally, the Supreme Court starts a march that, years later, it realizes has led it into a swamp, and it reverses course. It may be too early

yet to know whether that will happen here, but I suspect that it will not. We then may have to face the prospect that, in a seriously contested case, no peremptory challenge will go unchallenged, that counsel will be called upon to explain the basis of every one, that the court will then have to consider (1) whether the reason advanced by counsel falls within the dramatically reduced scope of allowable ones, and (2) even if, facially, it does, whether the reason asserted is merely pretextual. A whole new area of appellate review will blossom; indeed, the buds are already growing. I recognize that the abolition of peremptory challenges would mark a dramatic change in the way our jury system has traditionally operated, and, if we were to do that, we would need to be more liberal in allowing challenges for cause and in permitting voir dire examination for the purpose of making those challenges. The question is whether that would be more, or less, efficient and whether it would produce a more fair, or less fair, result than the hoops we need to jump through now under Batson and its children. I don't know the answer to that, but I think it is a question we urgently need to address.”);

People v. Bolling, 591 N.E.2d 1136 (N.Y. 1992) (Bellacosa, J., concurring) (noting that “[p]eremptories have outlived their usefulness and, ironically, appear to be disguising discrimination -- not minimizing it, and clearly not eliminating it,” and adding that “[t]he proliferation of Batson-generated trial court colloquies, counterproductive diversions and appellate cases have confirmed William Pizzi’s observation: ‘If one wanted to understand how the American trial system for criminal cases came to be the most expensive and time-consuming in the world, it would be difficult to find a better starting point than Batson’” (quoting Pizzi, Batson v. Kentucky: Curing the Disease but Killing the Patient, 1987 Sup .Ct. Rev. 97, 155));

Alen v. State, 596 So. 2d 1083, 1086 (Fla. Dist. Ct. App. 1992) (Hubbard, J. concurring) (discussing state law and opining that, “[r]ather than engage in a prolonged case-by-case strangulation of the peremptory challenge over a period of many years which in the end will effectively eviscerate the peremptory challenge or, at best, result in a convoluted and unpredictable system of jury selection enormously difficult to administer -- I think the time has come, as Mr. Justice Marshall has urged, to abolish the peremptory challenge as inherently discriminatory. I would, however, attempt to salvage the best of the peremptory challenge system by expanding the unduly narrow grounds for challenging a prospective juror for cause, so as to embrace the

type of objective reasons which are presently recognized for properly exercising a peremptory challenge [under the relevant state law test]. This latter result could, I think, be accomplished by some appropriate rule or statutory changes.” (citation omitted)).

And judges have also considered -- and critiqued -- peremptory challenges in law reviews, calling for the elimination of peremptory challenges and other reforms:

- Hon. Mark W. Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problem of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions, 4 Harv. L. & Pol’y Rev. 149 (2010);
- Hon. Morris B. Hoffman, Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective, 64 U. Chi. L. Rev. 809 (1997); and
- Hon. Theodore McMillian, Batson v. Kentucky: A Promise Unfulfilled, 58 UMKC L. Rev. 361 (1990).

PLEASE NOTE: Listed cases and articles are available at [Judicial Conference on Jury Selection \(njcourts.gov\)](https://www.njcourts.gov/judicial-conference-on-jury-selection) with the kind permission of Thomson Reuters (for cases) and the journal and/or author (for articles). The collection of online resources will be expanded on a rolling basis; therefore, items beyond those listed here may be or become available online.

## 2. Empirical & Legal Analyses

In addition to judicial critiques, a number of empirical studies, drawing data from actual trials or from controlled experiments, have shown that jurors of color have frequently been excluded through peremptory challenges.

For example, the Equal Justice Initiative’s comprehensive 2010 report, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy, available at <https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf>, chronicles the discriminatory exercise of



peremptory challenges in a number of states, as well as the far-reaching consequences of that discrimination on parties, prospective jurors, and the public perception of our system of criminal justice. The report also notes other avenues through which discrimination may infect the jury selection process during the creation of jury pools and the excusal of jurors for cause.

Professor Bryan Stevenson’s Executive Summary describes the scope of the report, its findings, and its conclusions:

Today in America, there is perhaps no arena of public life or governmental administration where racial discrimination is more widespread, apparent, and seemingly tolerated than in the selection of juries. Nearly 135 years after Congress enacted the 1875 Civil Rights Act to eliminate racially discriminatory jury selection, the practice continues, especially in serious criminal and capital cases.

The staff of the Equal Justice Initiative (EJI) has looked closely at jury selection procedures in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee. We uncovered shocking evidence of racial discrimination in jury selection in every state. We identified counties where prosecutors have excluded nearly 80% of African Americans qualified for jury service. We discovered majority-black counties where capital defendants nonetheless were tried by all-white juries. We found evidence that some prosecutors employed by state and local governments actually have been trained to exclude people on the basis of race and instructed on how to conceal their racial bias. In many cases, people of color not only have been illegally excluded but also denigrated and insulted with pretextual reasons intended to conceal racial bias. African Americans have been excluded because they appeared to have “low intelligence”; wore eyeglasses; were single, married, or separated; or were too old for jury service at age 43 or too young at 28. They have been barred for having relatives who attended historically black colleges; for the way they walk; for chewing gum; and, frequently, for living in predominantly black neighborhoods. These “race-neutral” explanations and the tolerance of racial bias by court officials have made jury selection for people of

color a hazardous venture, where the sting of exclusion often is accompanied by painful insults and injurious commentary.

While courts sometimes have attempted to remedy the problem of discriminatory jury selection, in too many cases today we continue to see indifference to racial bias in jury selection. Too many courtrooms across this country facilitate obvious racial bigotry and discrimination every week when criminal trial juries are selected. The underrepresentation and exclusion of people of color from juries has seriously undermined the credibility and reliability of the criminal justice system, and there is an urgent need to eliminate this practice. This report contains recommendations we believe must be undertaken to confront the continuing problem of illegal racial bias in jury selection. We sincerely hope that everyone committed to the fair administration of law will join us in seeking an end to racially discriminatory jury selection. This problem has persisted for far too long, and respect for the law cannot be achieved until it is eliminated and equal justice for all becomes a reality.

Earlier this year, the Equal Justice Initiative released another report on discrimination in jury selection practices, Race and the Jury: Illegal Discrimination in Jury Selection (2021), available at <https://eji.org/report/race-and-the-jury/>. That new report distills research from around the country and includes decisions and developments from the past ten years, which reveal that many of the problems identified in the earlier report persist today.

The 2021 report recounts the history of discriminatory jury selection practices and exposes current modes of discriminatory exclusion in the creation of juror pools, the establishment of juror qualifications, the exercise of for-cause and peremptory challenges, and the election of grand jury forepersons. It identifies the ways in which courts and both prosecutors and defense attorneys may contribute to the selection of non-representative juries, as well as the diverse harms that flow from a failure to achieve meaningful representation on juries.

Finally, the report offers four concrete recommendations for achieving greater representation: “remov[ing] procedural barriers to reviewing claims of racial bias in jury selection”; “commit[ting] to fully representative jury pools”;

“creat[ing] accountability for decision makers who engage in racially discriminatory jury selection”; and “adopt[ing] a meaningful presumption of discrimination” “when faced with clear evidence of racial bias.”

Other studies on the use of peremptory challenges include:

- April J. Anderson, Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies as Seen in Practitioners’ Trial Manuals, 14 Stan. J. C.R. & C.L. 1 (2020);
- David C. Baldus et al., The Use of Peremptory Challenges in Capital Murder Trials: A Legal & Empirical Analysis, 3 J. Const. Law 1 (2001);
- Aliza Plener Cover, Hybrid Jury Strikes, 52 Harv. C.R.-C.L. L. Rev. 357 (2017);
- Whitney DeCamp & Elise DeCamp, It’s Still About Race: Peremptory Challenge Use on Black Prospective Jurors, J. of Res. in Crim. & Delinq. 57 (2020), <https://journals.sagepub.com/doi/full/10.1177/0022427819873943>;
- Daniel Edwards, The Evolving Debate Over Batson’s Procedures for Peremptory Challenges, National Association of Attorneys General (Apr. 14, 2020), <https://www.naag.org/attorney-general-journal/the-evolving-debate-over-batsons-procedures-for-peremptory-challenges/>;
- Ann M. Eisenberg, Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997-2012, 9 Ne. U. L. Rev. 299 (2017);
- Roger Enriquez & John W. Clark III, The Social Psychology of Peremptory Challenges: An Examination of Latino Jurors, 13 Tex. Hisp. J. L. & Pol’y 25 (2007);
- Thomas Ward Frampton, The Jim Crow Jury, 71 Vand. L. Rev. 1593 (2018);

- Catherine M. Grosso & Barbara O'Brien, A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials, 97 Iowa L. Rev. 1531 (2012);
- Nancy S. Marder, Criminal Justice: Justice Stevens, the Peremptory Challenge, and the Jury, 74 Fordham L. Rev. 1683 (2006);
- Caren Myers Morrison, Negotiating Peremptory Challenges, 104 J. Crim. L. & Criminology 1 (2014);
- Samuel R. Sommers & Michael I. Norton, Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure, 31 L. & Hum. Behav. 261 (2007);
- Ronald F. Wright et al., The Jury Sunshine Project: Jury Selection Data as a Political Issue, 2018 U. Ill. L. Rev. 1409;
- Hans Zeisel & Shari Seidman Diamond, The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court 30 Stan. L. Rev. 491 (1978).

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# Attachment E

## Overview -- Jury Selection in New Jersey

### An Overview of the Jury Selection Process

The jury selection process begins with the creation of the master jury list. As provided by N.J.S.A. 2B:20-2, the Judiciary receives and compiles source records from the Division of Taxation, Motor Vehicle Commission, and Board of Elections. The Administrative Office of the Courts sorts and merges the source records to eliminate duplicate names and create a single list comprised of prospective jurors in each county.

Court staff complete that process on at least an annual basis to maintain a master list that is as comprehensive and non-duplicative as possible. In conjunction with that annual process, the Judiciary regularly updates the master jury list through use of the National Change of Address database maintained by the United State Postal Service. The use of multiple lists is one way to reach more members of the community than would be represented in a single source, such as Motor Vehicle records.

New Jersey, like most state and local jurisdictions, uses a one-step summoning process. Accordingly, the first document mailed to a prospective juror directs the recipient to complete the qualification process either online, using the eResponse system, or by returning a hardcopy questionnaire. That first summons notice also informs the recipient of the date or term of their jury service. The summons notice includes basic information, including a contact number and email address for the local jury management office, as well as a link to the eResponse system.

If the recipient does not complete the online questionnaire within three weeks, the Judiciary automatically sends a hardcopy questionnaire. Statewide, around 85% of respondents complete the qualification process using the online eResponse system. The remaining 15% mail back a hardcopy questionnaire.

Eligibility to serve as a juror is set by N.J.S.A. 2B:20-1. That statute provides that, to qualify as a juror, an individual must:

- be 18 years of age or older;
- be able to read and understand the English language;
- be a citizen of the United States;
- be a resident of the county in which summoned;
- not have been convicted of any indictable offense under state or federal law; and
- not have any mental or physical disability that will prevent the person from properly serving as a juror.

The summons notice directs the recipient to complete the qualification process (either online or in hardcopy) even if not qualified to serve.

Consistent with statewide policies, jury management may request documentation to confirm that an individual does not meet the qualification criteria. The Judiciary maintains records of all such dismissed jurors, including the categorical reason for their dismissal.

A person who qualifies for jury service may request a pre-reporting excusal. N.J.S.A. 2B:20-10 lists grounds for such excusals, which include being 75 years or older; recent jury service; severe hardship, including medical inability, financial hardship, and caregiving or specialized employment responsibilities; or service as a volunteer firefighter or on a first aid squad. Individuals can request to be excused only for the listed statutory reasons.

To be excused before reporting on any grounds other than those listed in section -10, the prospective juror must submit documentation for review by the Assignment Judge or their designee, pursuant to N.J.S.A. 2B:20-9. Standard forms are posted on the Judiciary's public website. The Judiciary maintains records of all jurors who are excused before reporting, including the reason for their excusal.

An individual who meets the qualification criteria set forth in N.J.S.A. 2B:20-1 and who does not seek a pre-reporting excusal may request to defer jury service to a future date. Requests for an initial deferral to a date selected

by the juror within the coming year are liberally granted to maximize participation by eligible jurors. Requests for repeated deferrals are subject to heightened scrutiny and may be granted or denied at the direction of the Assignment Judge or designee. The Judiciary maintains records of all jurors who are deferred, including the reason for their deferral.

In New Jersey and all jurisdictions, some juror summonses do not generate a response, either because they do not reach the intended recipient or because the recipient does not complete the qualification process. Around 10% of summons notices are returned as undeliverable. Another 15% of delivered notices yield no response. In follow-up with non-responsive jurors, some individuals report that they did not respond because they believed that they are not eligible to serve as a juror.

Jurors who complete the qualification process and indicate they are available to report when summoned are confirmed for service. Some or all confirmed jurors may be “called off” (advised not to report by text message, email, web posting, and phone message) because they are not needed until later in a multiday term or because all scheduled trials have resolved.

### The Statutes & Court Rules that Govern Jury Selection

- N.J.S.A. 2B:20-1. Qualifications of jurors.
- N.J.S.A. 2B:20-2. Preparation of juror source list.
- N.J.S.A. 2B:20-9. Excuses and deferrals by Assignment Judge.
- N.J.S.A. 2B:20-10. Grounds for excuse from jury service.
- N.J.S.A. 2B:23-13. Peremptory challenges.
- Rule 1:8-3. Examination of Jurors; Challenges.
- Rule 1:8-5. Availability of Petit Jury List.

**2B:20-1. Qualifications of jurors.**

Every person summoned as a juror:

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

L.1995, c. 44, § 1; amended, L. 1997, c. 127.



**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: registered voters, licensed drivers, filers of State gross income tax returns and filers of homestead rebate or credit application forms. The county election board, the Division of Motor Vehicles and the State Division of Taxation shall provide these lists annually to the Assignment Judge of the county. The 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.
- b. The juror source list shall be compiled once a year or more often as directed by the Assignment Judge,
- c. The juror source list may be expanded by the Supreme Court as it deems appropriate.

Amended, L. 2007, c. 62, § 41.

**2B:20-9. Excuses and deferrals by Assignment Judge.**

- a. A person may be excused from jury service or may have jury service deferred only by the Assignment Judge of the county in which the person was summoned, or by the Assignment Judge's designee.
- b. The Assignment Judge may require verification of any of the facts supporting the grounds for a request for excuse or deferral. Records shall be kept of all requests for excuses and deferrals, and of the granting of excuses and deferrals.

Source: 2A:78-1

L. 1995, c. 44, § 1.

## **2B:20-10. Grounds for excuse from jury service.**

An excuse from jury service shall be granted only if:

- a. The prospective juror is 75 years of age or older;
- b. The prospective juror has served as a juror within the last three years in the county to which the juror is being summoned;
- c. Jury service will impose a severe hardship due to circumstances which are not likely to change within the following year. Severe hardship includes the following circumstances:
  - (1) The prospective juror has a medical inability to serve which is verified by a licensed physician.
  - (2) The prospective juror will suffer a severe financial hardship which will compromise the juror's ability to support himself, herself, or dependents. In determining whether to excuse the prospective juror, the Assignment Judge shall consider:
    - (a) the sources of the prospective juror's household income; and
    - (b) the availability and extent of income reimbursement; and
    - (c) the expected length of service.
  - (3) The prospective juror has a personal obligation to care for another, including a dependent who is sick, is elderly, or has an infirmity or a minor child, who requires the prospective juror's personal care and attention, and no alternative care is available without severe financial hardship on the prospective juror or the person requiring care.
  - (4) The prospective juror provides highly specialized technical health care services for which replacement cannot reasonably be obtained.

(5) The prospective juror is a health care worker directly involved in the care of a person with a mental or physical disability, and the prospective juror's continued presence is essential to the personal treatment of that person.

(6) The prospective juror is a member of the full-time instructional staff of a grammar school or high school, the scheduled jury service is during the school term, and a replacement cannot reasonably be obtained. In determining whether to excuse the prospective juror or grant a deferral of service, the Assignment Judge shall consider:

(a) the impact on the school considering the number and function of teachers called for jury service during the current academic year; and

(b) the special role of certified special education teachers in providing continuity of instruction to students with disabilities;

d. The prospective juror is a member of a volunteer fire department or fire patrol; or

e. The prospective juror is a volunteer member of a first aid or rescue squad.

Amended L. 2017, c. 131, § 3.

### **2B:23-13. Peremptory challenges.**

Upon the trial of any action in any court of this State, the parties shall be entitled to peremptory challenges as follows:

- a. In any civil action, each party, 6.
- b. Upon an indictment 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 subsection b. of N.J.S.2C:21-1, or perjury, the defendant, 20 peremptory challenges if tried alone and 10 challenges if tried jointly and the State, 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded the defendants if tried jointly.
- c. Upon any other indictment, defendants, 10 each; the State, 10 peremptory challenges for each 10 challenges allowed to the defendants. When the case is to be tried by a jury from another county, each defendant, 5 peremptory challenges, and the State, 5 peremptory challenges for each 5 peremptory challenges afforded the defendants.

Amended, L. 2007, c. 204, § 5.

**Rule 1:8-3. Examination of Jurors; Challenges.**

**(a) Examination of Jurors.** For the purpose of determining whether a challenge should be interposed, the court shall interrogate the prospective jurors in the box after the required number are drawn without placing them under oath. The parties or their attorneys may supplement the court's interrogation in its discretion.

**(b) Challenges in the Array; Challenges for Cause.** Any party may challenge the array in writing on the ground that the jurors were not selected, drawn or summoned according to law. A challenge to the array shall be decided before any individual juror is examined. 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 challenges shall be tried by the court.

**(c) Peremptory Challenges in Civil Actions.** In civil actions each party shall be entitled to 6 peremptory challenges. Parties represented by the same attorney shall be deemed 1 party for the purposes of this rule. Where, however, multiple parties having a substantial identity of interest in one or more issues are represented by different attorneys, the trial court in its discretion may, on application of counsel prior to the selection of the jury, accord the adverse party such additional number of peremptory challenges as it deems appropriate in order to avoid unfairness to the adverse party.

**(d) Peremptory Challenges in Criminal Actions.** Upon indictment 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, the defendant shall be entitled to 20 peremptory challenges if tried alone and to 10 such challenges when tried jointly; and the State shall have 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded defendants when tried jointly. In other criminal actions each defendant shall be entitled to 10 peremptory challenges and the State shall have 10 peremptory challenges for each 10 challenges afforded defendants. When the case is to be tried by a foreign jury, each defendant shall be entitled

to 5 peremptory challenges, and the State 5 peremptory challenges for each 5 peremptory challenges afforded defendants.

**(e) Order of Exercising of Peremptory Challenges.**

**(1)** In any case in which each side is entitled to an equal number of challenges, those challenges shall alternate one by one, with the State in a criminal case and the plaintiff in a civil case exercising the first challenge.

**(2)** In any case in which there is more than one defendant and/or an uneven number of peremptory challenges, the court shall establish the order of challenge, which shall be set forth on the record prior to the commencement of the jury selection process.

**(3)** The passing of a peremptory challenge by any party shall not constitute a waiver of the right thereafter to exercise the same against any juror, unless all parties pass successive challenges.

**(f) Conference Before Examination.** Prior to the examination of the prospective jurors, the court shall hold a conference on the record to determine the areas of inquiry during voir dire. Attorneys shall submit proposed voir dire questions in writing in advance. If requested, the court shall determine whether the attorneys may participate in the questioning of the prospective jurors and, if so, to what extent. During the course of the questioning, additional questions of prospective jurors may be requested and asked as appropriate under the circumstances. The judge shall rule on the record on the proposed voir dire questions and on any requested attorney participation.

**(g) Jury Selection Must be Conducted in Open Court.** Subject to (1) and (2) below, the public must be provided reasonable access to the courtroom during the jury selection portion of the trial.

**(1) Exclusion of Public from Courtroom; Compelling Reasons; Alternatives.** The trial judge may not exclude the public from the courtroom unless there is a compelling need to do so. In making that determination, the trial judge shall first consider reasonable alternatives, such as holding jury selection in a larger courtroom, if one is available. If there are compelling reasons to exclude the public from the courtroom, the judge shall consider alternative ways to permit

observation, including electronic means. The trial judge shall issue a statement of reasons for limiting or denying public access to jury selection.

**(2) Voir Dire of Individual Jurors.** The requirement of public access to the courtroom during jury selection does not preclude the court from conducting the voir dire of any individual juror on the record at sidebar, or in writing.

Note: Source-R.R. 3:7-2(b)(c), 4:48-1, 4:48-3. Paragraphs (c) and (d) amended July 7, 1971 to be effective September 13, 1971; paragraph (d) amended July 21, 1980 to be effective September 8, 1980; paragraph (a) amended September 28, 1982 to be effective immediately; paragraph (d) amended July 22, 1983 to be effective September 12, 1983; paragraph (d) amended July 26, 1984 to be effective September 10, 1984; paragraph (d) amended November 5, 1986 to be effective January 1, 1987; paragraph (c) amended November 7, 1988 to be effective January 2, 1989; paragraph (e) added July 14, 1992 to be effective September 1, 1992; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (f) added July 5, 2000 to be effective September 5, 2000; paragraph (f) amended July 27, 2006 to be effective September 1, 2006; new paragraph (g) adopted July 9, 2013 to be effective September 1, 2013; paragraphs (a) and (d) amended July 27, 2018 to be effective September 1, 2018.



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

The list of the general panel of petit jurors 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.

Note: Source-R.R. 3:7-2(a). Amended July 16, 1979 to be effective September 10, 1979; amended September 28, 1982 to be effective immediately; amended July 27, 2018 to be effective September 1, 2018.

# **Attachment F**

## **Judiciary Jury Forms**

- Summons Questionnaire
- Certification in Support of Request for Excuse from Jury Service: Personal Obligation to Provide Care for Minor Child(ren)
- Physician Certification in Support of Medical Excuse Request
- Certification in Support of Request to be Excused from Jury Service Due to Severe Financial Hardship

Camden County Jury Mgmt  
101 South Fifth Street Suite L-10  
Camden, NJ 08103

Lean Mcrae  
2424 S 12Th St  
Camden, NJ 08104-2616



Candidate ID: 0007300961

Juror No: 00048

Respond online at [njcourts.gov/myjury/service/Questions](http://njcourts.gov/myjury/service/Questions)? Go to [jcourts.gov/jurors/index.html](http://jcourts.gov/jurors/index.html)

DRAFT



Independence • Integrity  
Fairness • Quality Service

Deborah Silverman Katz  
Assignment Judge

Colleen Lore  
Trial Court Administrator

Charles Welch  
Jury Manager  
Superior Court of New Jersey  
Camden County Hall of Justice

101 South Fifth Street Suite L-10  
Camden, NJ 08103

Office  
(856) 650 - 9085 ext \_\_\_\_

Fax  
(856) 379 - 2275

Email  
camjury.mbx@njjudlab.njcourts.gov

If qualified to serve, you must check for updated reporting instructions after 5:30 p.m. on the night before you are to report by calling (856) 650 - 9090 or going to njcourts.gov/myjuryservice

Your petit jury service will begin online on: Sep. 10, 2021.

If you are selected to report in-person for a trial, you will report on a subsequent day to:

Camden County Hall of Justice  
101 South Fifth Street Suite L-10, Camden, NJ

Your Term of Service is 4 days or 1 trial.

By Order of the Court,  
Deborah Silverman Katz,  
Assignment Judge.

The Judiciary will, with advance notice, provide accommodations consistent with the Americans with Disabilities Act.

# Petit Juror Questionnaire

Please check njcourts.gov/jurors or contact the jury management office for current information about jury reporting, including whether you are required to log in to a virtual session or come in person to a courthouse.

The Judiciary will provide you with technology needed to participate if you need it.

LEAN MCRAE

Juror No: 00048



Si usted no comprende ingles, debe solicitar ayuda llenar el cuestionario  
If possible, please complete this questionnaire online at  
[www.njcourts.gov/myjuryservice](http://www.njcourts.gov/myjuryservice)

## Qualifying Information

- 1. Are you a resident of Camden County?  YES  NO
- 2. Are you a citizen of the United States?  YES  NO
- 3. Can you read and understand English?  YES  NO
- 4. Are you 18 years of age or older?  YES  NO
- 5. Are you over the age of 75?  YES  NO
- 6. If you answer YES to question 5, do you wish to be excused permanently from jury service.  YES  NO

If you checked any answer in bold text, you are not qualified to serve as a juror. You may be contacted by the Jury Management Office for more information concerning the responses.

- 7. Have you been convicted of or pleaded guilty to an indictable criminal offense? Do not include traffic or disorderly person offenses. State the charge and the year.  YES  NO
- 8. Are you mentally and physically able to perform the functions of a juror? The judiciary will, with advance notice, provide accommodations consistent with the Americans with Disabilities Act. If no, provide a doctor's note stating the length of time that you are able to serve.  YES  NO
- 9. Telephone: \_\_\_\_\_
- 10. Email: \_\_\_\_\_
- 11. Date of birth: \_\_\_\_/\_\_\_\_/\_\_\_\_
- 12. Employer: \_\_\_\_\_
- 13. Occupation: \_\_\_\_\_
- 14. Do you employ full-time by the State of N.J., or any county, municipality, public school or college, or any N.J. government agency, commission, entity, etc.?  YES  NO

## Other Information

Check only those that apply

- I request to reschedule my summons date.  
Reason: \_\_\_\_\_  
Provide other dates that we will try to accommodate: \_\_\_\_\_
- I wish to request a hardship excuse. (For permissible excuses, please go to [www.njcourts.gov/jurors](http://www.njcourts.gov/jurors) and click on Frequently Asked Questions tab.)
- I need to correct my name or address  
\_\_\_\_\_

## Mandatory Name and Signature

I hereby certify that the answers on this form are true and correct. I understand that if I submit a knowingly false answer I can be subject to punishment for contempt of court.

Signature of Juror or person completing form \_\_\_\_\_ Date \_\_\_\_\_

Print Name Here \_\_\_\_\_



**Superior Court of New Jersey**

**Certification in Support of Request for Excuse from Jury Service:  
Personal Obligation to Provide Care for Minor Child(ren)**

Name	County	Candidate ID
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Phone _____ or Email _____	Summons Date
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I, \_\_\_\_\_, of full age, hereby certifies as follows:

This certification is made by me in support of my request to be excused from jury service on \_\_\_\_\_, in \_\_\_\_\_ County.

A person may be excused from jury service for particular reasons, including:

c. Jury service will impose a severe hardship due to circumstances which are not likely to change within the following year. Severe hardship includes the following circumstances:

3. The prospective juror has a personal obligation to care for another, including...a minor child, who requires the prospective juror’s personal care and attention, and no alternative care is available without severe financial hardship on the prospective juror or the person requiring care. *N.J.S.A. § 2B:20-10(c)(3)*.

I am personally obligated to care for the following minor child/ren (attach additional sheets as necessary):

	Child’s Name	Child’s Age
1.	_____	_____
2.	_____	_____
3.	_____	_____
4.	_____	_____

I understand that I may be required to provide further information and/or financial documentation for review by the court in support of this request.

I hereby certify and say that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print Name



# New Jersey Judiciary Physician Certification in Support of Medical Excuse Request

Practice Name and Address	Physician's Name	
	Physician's Office Telephone Number	
	Physician's License Number	
Patient (Juror) Full Name	County	Candidate ID
Patient (Juror) Telephone Number	Patient (Juror) Email Address	Summons Date

I have examined the above named patient and attest that he/she is unable to serve when summoned. At this time, this patient is unable to serve for:

- |                |                      |
|----------------|----------------------|
| _____ 3 months | _____ 12 months      |
| _____ 6 months | _____ Over 12 months |
| _____ 9 months | _____ Other*         |

*\*The Judiciary relies on disability determinations made by the Social Security Administration and Department of Veteran Affairs to permanently excuse a juror from their service obligation. Please contact the Jury Management Office if you have additional questions on medical excusals and disqualifications. The New Jersey Judiciary will, with advanced notice, provide accommodations consistent with the Americans with Disabilities Act. ADA contacts for each county can be found at: [https://www.njcourts.gov/forms/12134\\_adatitleIIcontacts.pdf](https://www.njcourts.gov/forms/12134_adatitleIIcontacts.pdf)*

**NOTE:** Please do not write, attach, or otherwise provide any private health information about the patient. The Jury Management Office will *never* request this information.

If this patient is employed, please explain why it would be more detrimental for them to serve their term of jury service than their normal employment.

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I hereby certify and say that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Date	Name of Physician (Print Name)
	Signature of Physician



## New Jersey Judiciary Certification in Support of Request to be Excused from Jury Service Due to Severe Financial Hardship

Name	County	Candidate ID
Phone	Email	Summons Date

I, \_\_\_\_\_, of full age, hereby certify the following:

This certification is made by me in support of my request to be excused from jury service on (date) \_\_\_\_\_, in \_\_\_\_\_ County.

New Jersey law permits an excuse from jury service based upon severe financial hardship, as follows:

Jury service will impose a severe financial hardship, which will compromise the juror's ability to support himself, herself, or dependents. In determining whether to excuse the prospective juror, the Assignment Judge shall consider:

- (a) the sources of the prospective juror's household income; and
  - (b) the availability and extent of income reimbursement; and
  - (c) the expected length of service.
- [N.J.S.A. § 2B:20-10(c)(2)]

As to part (a): How many people are in your household? \_\_\_\_\_  
What was your gross **household** income during the prior year? \$ \_\_\_\_\_

As to part (b): Are you employed?     full-time     part-time     unemployed  
Will you be paid at all during jury service? Explain.  
If No, please provide a letter from your employer stating you will not be paid for jury service.

\_\_\_\_\_  
\_\_\_\_\_

As to part (c): If at all, how many day(s) could you report (or be on call) without a severe financial hardship? \_\_\_\_\_

Explain why jury service would present a severe financial hardship, as defined by law:

\_\_\_\_\_  
\_\_\_\_\_

- I have read and understood the instructions on the following page.
- I understand that I may be required to provide documentation for review in support of this request.

I hereby certify and say that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print Name

## Juror Financial Hardship Request Information

- Jury service is a civic responsibility, as well as an opportunity to participate in the court process. If qualified, all persons should serve as jurors to ensure that juries reflect the community.
- A jury summons may be received at a time that is inconvenient, whether for financial or other reasons. All persons summoned for jury service may be rescheduled once without explanation and a second time upon request to the local jury management office.
- This form is designed for persons who are requesting to be excused from reporting at all – meaning that to report or to be on call even briefly is a severe financial hardship.
- Even if you do not qualify to be excused prior to reporting for service, you may always request an excuse if the anticipated length of a trial would create a severe financial hardship.
- A person requesting a pre-reporting excuse based upon severe financial hardship must be prepared, upon request, to provide supporting documentation such as a prior year's redacted tax return or proof of eligibility for public assistance or Social Security Disability benefits. Employed persons may also be required to provide a letter from their employer or official human resources documentation regarding income reimbursement policy.
- Authority to excuse a juror on the basis of severe financial hardship is vested in the Assignment Judge, and there is no single formula. For example, an unemployed person receiving public assistance could be required to report if reporting does not compromise employment opportunities. On the other hand, a juror with greater household income may be excused if reporting would compromise the juror's ability to provide for himself, herself, or dependents.
- Submitting the completed certification form is required but is only the first step in requesting an excuse. **The Assignment Judge may always request additional information and/or documentation in support of any excuse request, including a request based upon severe financial hardship.**

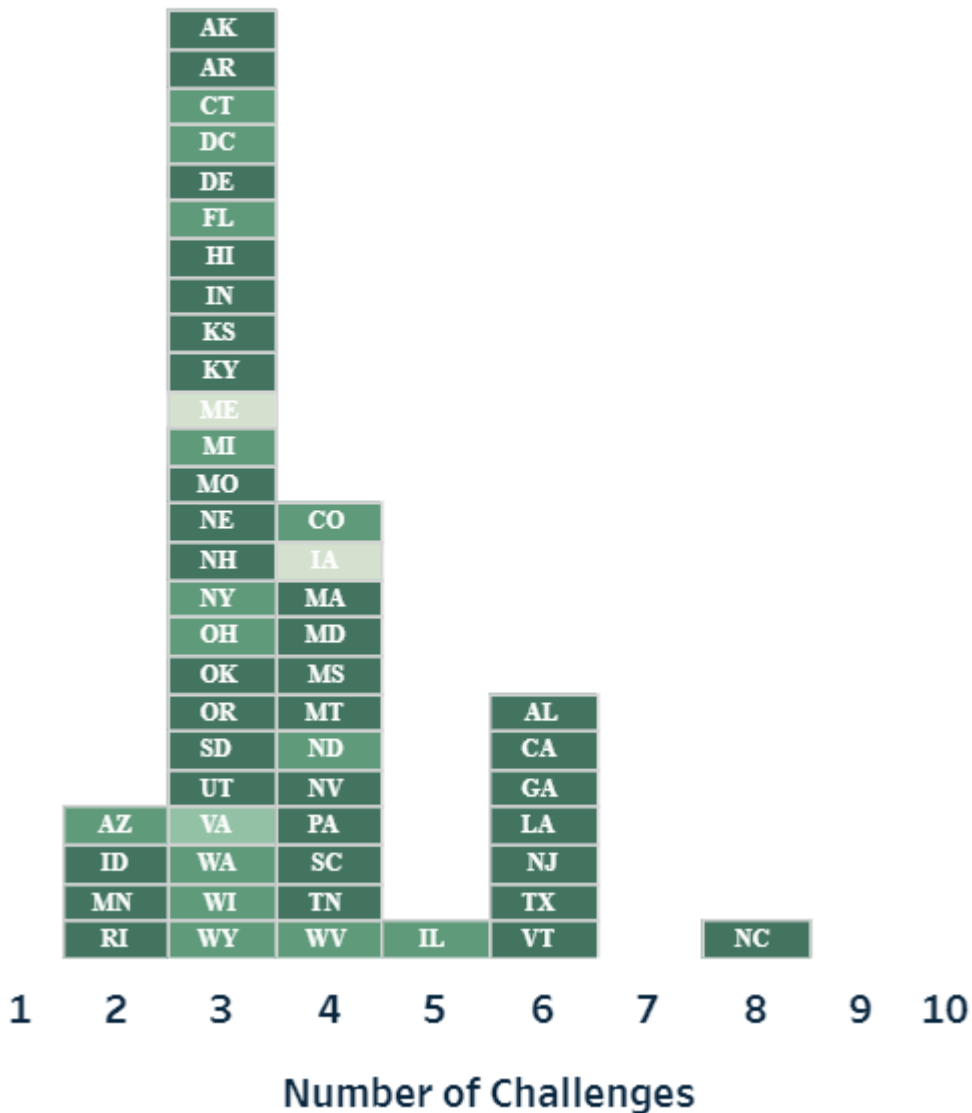


# Attachment G

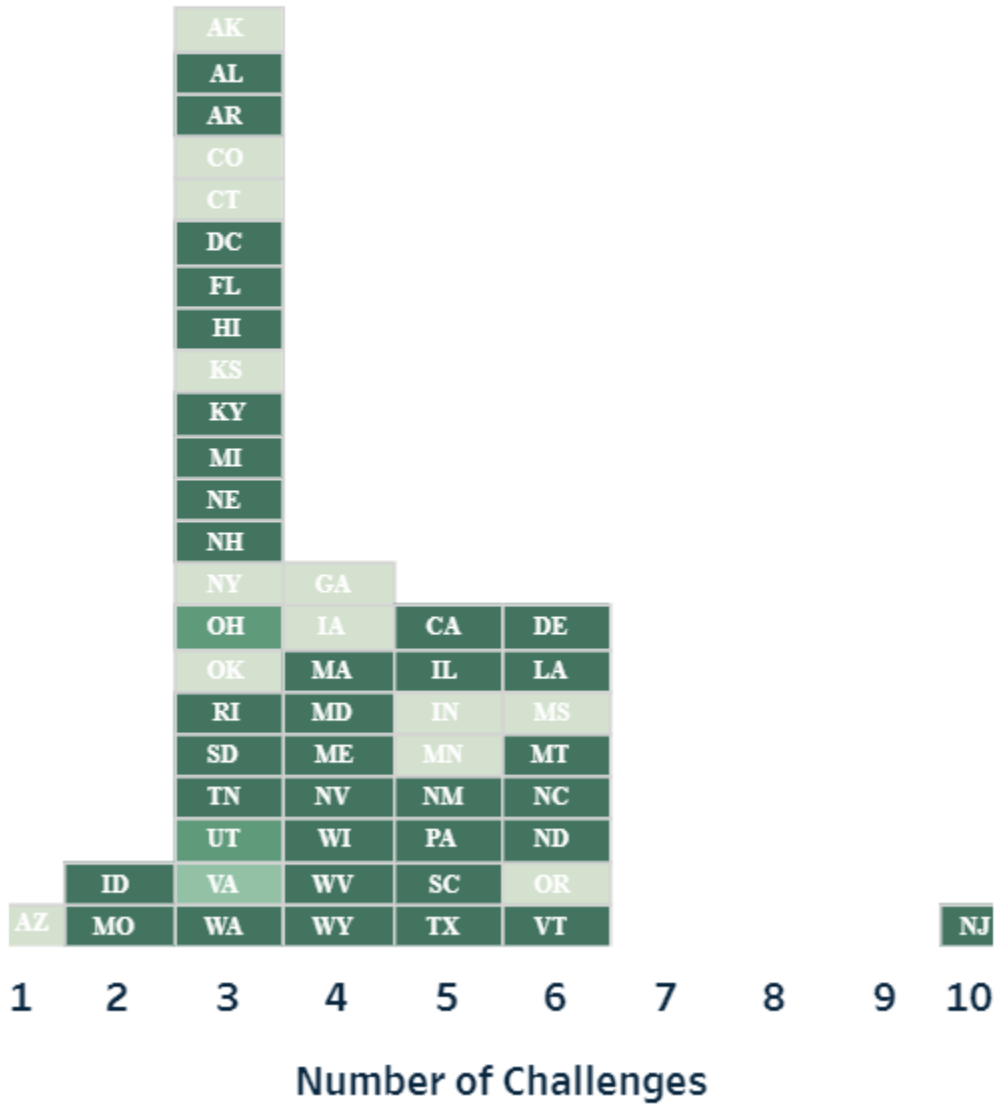
## Peremptory Challenges -- Nationwide Data

National Center for State Courts, Center for Jury Studies, available at <https://www.ncsc-jurystudies.org/state-of-the-states/jury-data-viz>.

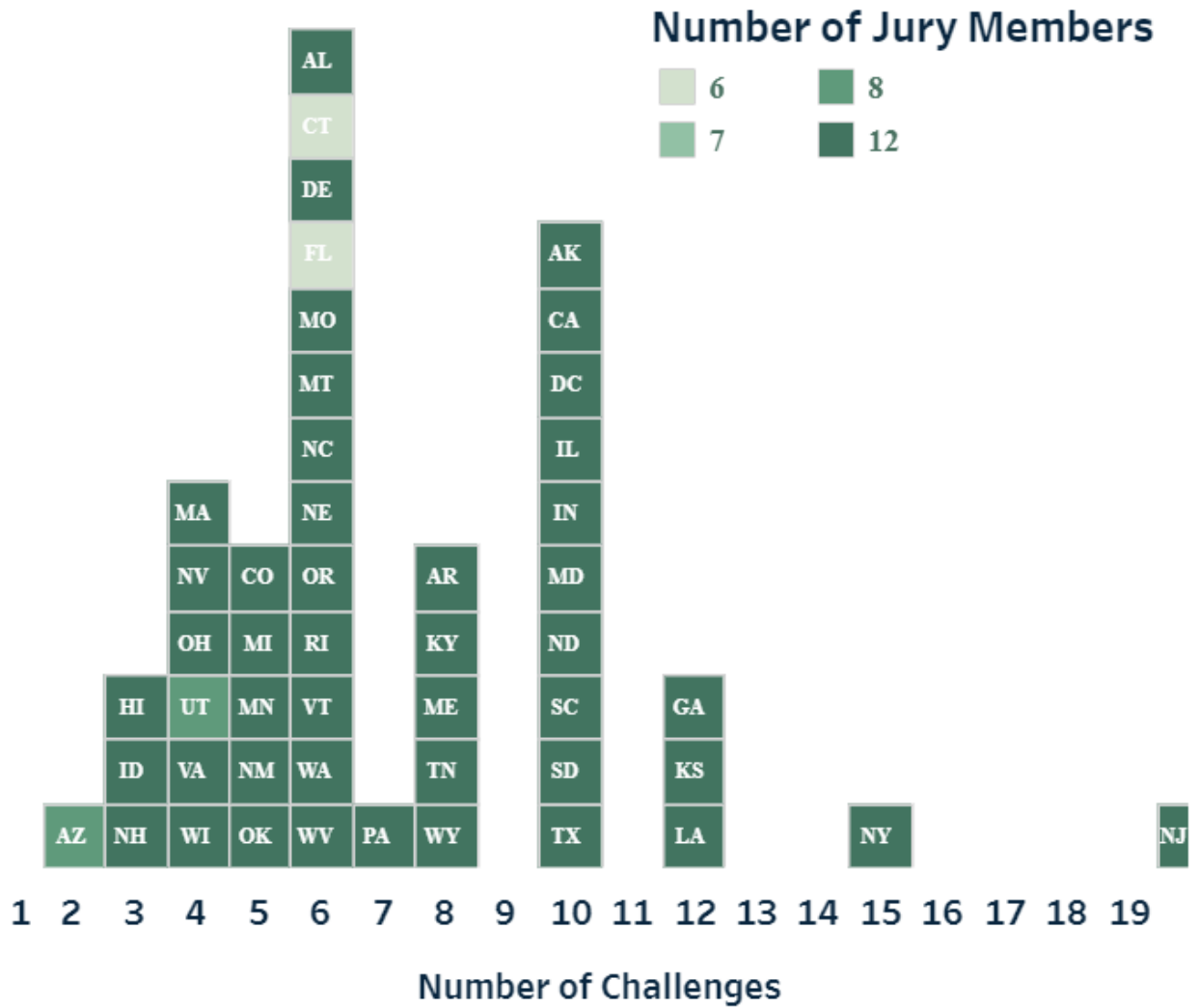
### Civil



# Misdemeanor



# Non-Capital Felony



# Attachment H

## Statewide Data re the Exercise of Peremptory Challenges

An internal analysis of statewide data for 3,012 criminal trials conducted between 2011 and 2015 -- data maintained in the legacy Jury Automated System (JAS) and cross-referenced with Promis/Gavel -- showed that prosecutors on average used six or fewer peremptory challenges while defense attorneys in most cases exercised 10 or fewer challenges.

In the below table, the column on the left indicates the number of peremptory challenges exercised by the prosecution, ranging from 0 to 19. The next four columns show challenges by year. The bolded columns on the far-right showcase the percentage of trials in which each quantity of peremptory challenges was exercised. The far-right column shows cumulative percentages.

Peremptory Challenges Exercised by Prosecution: Statewide 2011-2015								
Prosecution PCs	2011	2012	2013	2014	2015	Grand Total	% of Total	Cumulative %
0	49	62	60	53	36	260	8.63%	8.63%
1	50	52	47	46	36	231	7.67%	16.30%
2	73	73	64	75	57	342	11.35%	27.66%
3	76	78	77	74	70	375	12.45%	40.11%
4	78	80	96	67	77	398	13.21%	53.32%
5	61	75	61	78	59	334	11.09%	64.41%
6	65	63	61	62	52	303	10.06%	74.47%
7	47	50	55	45	47	244	8.10%	82.57%
8	32	40	27	28	37	164	5.44%	88.01%
9	34	37	36	19	30	156	5.18%	93.19%
10	25	16	17	22	19	99	3.29%	96.48%
11	14	10	10	6	11	51	1.69%	98.17%
12	5	7	4	9	5	30	1.00%	99.17%
13	4	1	2	1	1	9	0.30%	99.47%
14		3			1	4	0.13%	99.60%
15		1	2		1	4	0.13%	99.73%
16			2	1		3	0.10%	99.83%
17		1	1			2	0.07%	99.90%
18		1		1		2	0.07%	99.97%
19		1				1	0.03%	100.00%
Criminal Trials	613	651	622	587	539	3012	100.00%	

As shown just above the red line, the prosecution exercised six (6) peremptory challenges in 10.06% of cases. In 74.47% of criminal trials, the prosecution exercised six (6) or fewer peremptory challenges.

Peremptory Challenges Exercised by Defense: Statewide 2011-2015								
Defense PCs	2011	2012	2013	2014	2015	Grand Total	% of Total	Cumulative %
0	40	43	26	37	28	174	5.78%	5.78%
1	24	23	15	26	22	110	3.65%	9.43%
2	29	40	36	31	32	168	5.58%	15.01%
3	45	37	53	47	43	225	7.47%	22.48%
4	40	57	48	57	45	247	8.20%	30.68%
5	61	56	52	68	51	288	9.56%	40.24%
6	61	55	47	49	46	258	8.57%	48.80%
7	53	43	64	43	63	266	8.83%	57.64%
8	43	51	55	53	46	248	8.23%	65.87%
9	35	54	48	44	35	216	7.17%	73.04%
10	46	45	42	32	30	195	6.47%	79.52%
11	15	26	19	15	12	87	2.89%	82.40%
12	20	14	22	14	13	83	2.76%	85.16%
13	15	19	15	19	9	77	2.56%	87.72%
14	22	10	12	11	16	71	2.36%	90.07%
15	12	15	13	7	8	55	1.83%	91.90%
16	8	10	8	4	7	37	1.23%	93.13%
17	10	10	10	8	11	49	1.63%	94.75%
18	8	13	4	5	4	34	1.13%	95.88%
19	10	8	15	4	9	46	1.53%	97.41%
20	6	15	7	8	4	40	1.33%	98.74%
21	4	1	1	1	1	8	0.27%	99.00%
22	2		1	2	2	7	0.23%	99.24%
23	1	1				2	0.07%	99.30%
24		2	1	1		4	0.13%	99.44%
26	2	1			1	4	0.13%	99.57%
27			1			1	0.03%	99.60%
28			2	1		3	0.10%	99.70%
29			1		1	2	0.07%	99.77%
30			1			1	0.03%	99.80%
31			1			1	0.03%	99.83%
32		1				1	0.03%	99.87%
34		1				1	0.03%	99.90%
35			1			1	0.03%	99.93%
41			1			1	0.03%	99.97%
47	1					1	0.03%	100.00%
Criminal Trials	613	651	622	587	539	3012	100.00%	

Data is presented in the same format as in the preceding prosecution chart. The numbers of peremptory challenges are listed in the left column with the frequency of occurrence given year by year. Cumulative percentages are provided in the far-right column. As shown above the red line, in 79.52% of trials, the defense exercised ten (10) or fewer peremptory challenges.

# Attachment I

## Juror Engagement & Participation

Studies have focused on the causes and negative consequences of non-representative juries, including:

- Shamena Anwar et al., Unequal Jury Representation and its Consequences (Nat'l Bureau of Econ. Rsch., Working Paper No. 28572, 2021);
- Thomas Ward Frampton, For Cause: Rethinking Racial Exclusion and the American Jury, 118 Mich. L. Rev. 785 (2020);
- Mary R. Rose et al., Jury Pool Underrepresentation in the Modern Era: Evidence from Federal Courts, 15 J. Empirical Legal Stud. 1 (2018).

And the importance of accessible jury selection data is explained in:

- Nina Chernoff, No Records; No Right: Discovery & the Fair Cross-Section Guarantee, 101 Iowa L.R. 1719;
- Catherine M. Grosso & Barbara O'Brien, A Call to Criminal Courts: Record Rules for Batson, 105 Kentucky L.J. 651 (2016-2017);
- Liz McCurry Johnson, Accessing Jury Selection Data in a Pre-Digital Environment, 41 Am. J. Trial Advoc. 45 (2017).

One source of juror exclusion is disqualification from service based on a criminal conviction. James M. Binnall argues in favor of rethinking felony disqualification in Twenty Million Angry Men: The Case for Including Convicted Felons in Our Jury System (2021).

And the following Prison Policy Initiative materials, available at <https://www.prisonpolicy.org/reports/juryexclusion.html>, reveal that New

Jersey is among the five states with the most stringent disqualification policies:

**50 States: What triggers exclusion from serving on a jury?**

Current incarceration	Current incarceration & some past felony convictions	Current incarceration & all past felony convictions	Current incarceration, all past felony convictions, & some past misdemeanor convictions
<p><b>No legal exclusion, but incarcerated jurors excused</b> Maine</p> <p><b>No exclusion after incarceration ends</b> Indiana North Dakota</p> <p><b>No exclusion after incarceration ends (although attorneys may request dismissal by the court)</b> Colorado Illinois Iowa</p>	<p><b>Forever</b> Alabama</p>	<p><b>Forever</b> Arizona Arkansas Delaware Florida Georgia Hawaii Kentucky Louisiana Michigan Mississippi Missouri Nebraska New Hampshire New York Oklahoma Tennessee Utah Vermont Virginia West Virginia Wyoming</p> <p><b>For a fixed period of time</b> Connecticut District of Columbia Kansas Massachusetts Nevada</p> <p><b>Until sentence completed (including parole and probation)</b> Alaska California (certain offenses lead to permanent exclusion) Idaho Minnesota Montana New Mexico North Carolina Ohio Rhode Island South Dakota Washington Wisconsin</p>	<p><b>Forever</b> Maryland New Jersey Pennsylvania South Carolina Texas</p> <p><b>For a fixed period of time</b> Oregon</p>

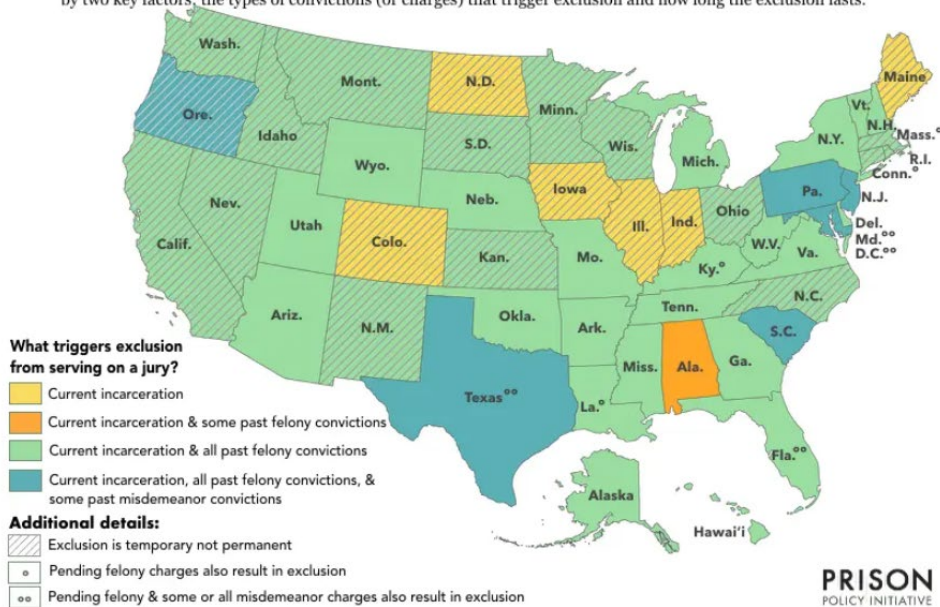
**Pending criminal charges also result in exclusion**

Connecticut, Kentucky, Louisiana, and Massachusetts also exclude anyone currently facing felony charges. Florida, Maryland, Texas, and D.C. also exclude anyone currently facing felony charges or facing (some or all) misdemeanor charges.

**Table 1.** This table (which focuses on trial or "petit" juries; "grand" juries, which examine the validity of accusations before trial, often have different rules) was compiled through our own legal analysis and interviews with court staff in numerous states, but it also benefited from reference to several great resources, including the Restoration of Rights Project's [50-State Comparison](#), the [National Inventory of Collateral Consequences of Conviction](#), and [this 2004 article](#) by Professor Brian Kalt. To be sure, many states have rights restoration processes (e.g., executive pardons, expungement) that can restore rights to individuals who would otherwise be barred, but such relief is generally rare and therefore not addressed here. For other nuances, exceptions, and the relevant statutes for each state, see our [appendix table](#).

## Every state has some form of jury exclusion

State laws barring people with criminal convictions—or pending charges—from serving on juries vary greatly by two key factors; the types of convictions (or charges) that trigger exclusion and how long the exclusion lasts.



*The state laws that bar people with criminal convictions (or pending criminal charges) from serving on juries are complex. In Arizona, for example, exclusion becomes permanent upon conviction of a second felony; in Nevada, the duration of exclusion is different for civil and criminal jury service; and in Iowa, automatic exclusion ends when incarceration ends, but attorneys may ask judges to dismiss potential jurors because of prior felony convictions (no matter how old the conviction). For more detail, see our [appendix table](#).*

As the Prison Policy Initiative explains, see *ibid.*,

[J]ury exclusion statutes contribute to a lack of jury diversity across the country. A 2011 study found that in one county in Georgia, 34% of Black adults -- and 63% of Black men -- were excluded from juries because of criminal convictions. In New York State, approximately 33% of Black men are excluded from the jury pool because of the state's felony disqualification law. Nationwide, approximately one-third of Black men have a felony conviction; thus, in most places, many Black jurors (and many Black male jurors in particular) are barred by exclusion statutes long before any prosecutor can strike them in the courtroom.

The Prison Policy Initiative lauds California's recent legislation "largely ending the permanent exclusion of people with felony convictions" and urges that "[o]ther states can and should follow suit." The organization recommends other reforms as well, including "draw[ing] potential jurors from [sources beyond voting rolls]"; "more frequent address checks to decrease rates of undeliverable jury notices"; or "requir[ing] that a replacement summons be sent to the same zip code from which an undeliverable notice was returned." Ibid.



The Prison Policy Initiative also notes that “Louisiana recently increased jury compensation, a small change that the American Bar Association notes makes it possible for “a broader segment of the population to serve.” (links omitted).

Juror compensation levels are a potential avenue of exclusion, as the Supreme Court of Washington observed in Rocha v. King County, 460 P.3d 624, 635 (Wash. 2020). The Rocha Court found, in response to a class action challenging juror compensation, that the jury service statute’s provision that “[a] citizen shall not be excluded from jury service in this state . . . on account of economic status” did not create a cause of action, but elected to

take this opportunity to comment that low juror reimbursement is a serious issue that has contributed to poor juror summons response rates. The concerns raised by amici and petitioners as to the impact of low juror reimbursement on juror diversity, low-income jurors, and the administration of justice as a whole are valid points. While we should continue to cooperate with the other branches of government in an effort to address the long-standing problems identified by petitioners and amici, these concerns are best resolved in the legislative arena.

Sonali Chakravarti argues in favor of increased juror compensation and other reforms in Radical Enfranchisement in the Jury Room and Public Life (2020). Dr. Chavravarti also emphasizes the civic importance of jury service.

The Juror Project aims to promote responsiveness to jury summons. As founder William Snowden explains,

The Juror Project (has) two main goals. The first goal is to increase diversity of the jury panels. The second is to improve people’s perspective of jury duty because not everybody loves jury duty. Many people try to get out of jury duty. What this project is trying to do is to remind the community of the power that we have in that jury deliberation room. It was a power given to us for a reason -- to keep the system honest, to keep the system fair.

Anitra D. Brown, Local Public Defender Looks to the Jury Box for Criminal Justice Reform, The New Orleans Tribune, <https://theneworleanstribune.com/local-public-defender-looks-to-the-jury-box-for-criminal-justice-reform/>.



THE JUROR  
PROJECT

[www.thejurorproject.org](http://www.thejurorproject.org)

[thejurorproject@gmail.com](mailto:thejurorproject@gmail.com)

   [@jurorproject](https://twitter.com/jurorproject)

## What is a **critical** yet commonly **overlooked** piece in our justice system? **THE JURY SELECTION PROCESS**

Today's juries lack diversity. Not just diversity in color, but also diversity in thought and socioeconomic background. This is partially due to the strategic removal of minority groups from juries during the selection process, as well as cultural misconceptions about jury duty that discourages participation. Our mission is to affirm the power community members have as jurors.

**The Juror Project** is a direct response to the lack of diversity present on juries and the negative stigma associated with jury service. To combat these issues, The Juror Project invites you to support us in creating more informed juries that are representative of the communities they serve. Learn how you can host our next discussion panel.

*Change begins with you.*

### OUR IMPACT ON JURIES



More objective decision making during deliberation



Produce more informed, unbiased trial outcomes



Decrease controversial acquittals



# Attachment J

## Jury Reforms in Other Jurisdictions

**Arizona.** Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure (Filed August 30, 2021, effective January 1, 2022)

- Further materials available:

<https://www.azcourts.gov/Rules-Forum/aft/1208>

**Connecticut.** P.A. No. 21-170. An Act Concerning the Recommendations of the Jury Selection Task Force (Approved July 12, 2021)

- Further materials available:

[https://jud.ct.gov/Committees/jury\\_taskforce/](https://jud.ct.gov/Committees/jury_taskforce/)

**Washington.** Washington General Rule 37. Jury selection (2018)

- Further materials available:

<https://www.courts.wa.gov/?fa=home.sub&org=mjc&page=symposium&layout=2>



TO:

Rule 28 Distribution  
Peter B Swann  
Paul J McMurdie  
Timothy J Casey  
Brian Snyder  
James M Schoppmann  
Charles W Gurtler Jr  
William H Sandweg III  
Kip Anderson  
Hon John David Napper, Presiding Judge  
Victor A Aronow  
Paul J McGoldrick  
Benjamin Taylor  
Hon Bruce R Cohen, Judge  
Jay M Polk  
Elizabeth Burton Ortiz  
Lisa M Panahi  
Mikel Steinfeld  
Andrew Jacobs  
Marsha Cotton  
Michael E Bradford  
Cory E Tyszka  
J Russell Skelton  
Kent J Hammond  
Nicholas Klingerman  
Kenneth N Vick  
Claudia E Stedman  
Barry D Halpern  
Brett William Johnson  
Tracy Olson  
David J Euchner

## ATTACHMENT<sup>1</sup>

### RULES OF CRIMINAL PROCEDURE

#### Rule 18.4. Challenges

(a) [No change]

(b) **Challenge for Cause.** ~~On motion or on its own, the court must~~ The court, on motion or on its own, must excuse a prospective juror or jurors from service in the case if there is a reasonable ground to believe that the juror or jurors cannot render a fair and impartial verdict. A challenge for cause may be made at any time, but the court may deny a challenge if the party was not diligent in making it.

~~(c) Peremptory Challenges.~~

~~(1) Generally. The court must allow both parties the following number of peremptory challenges:~~

~~(A) 10, if the offense charged is punishable by death;~~

~~(B) 6, in all other cases tried in superior court; and~~

~~(C) two, in all cases tried in limited jurisdiction courts.~~

~~(2) If Several Defendants Are Tried Jointly. If there is more than one defendant, each defendant is allowed one half the number of peremptory challenges allowed to one defendant. The State is not entitled to any additional peremptory challenges.~~

~~(3) Agreement Between the Parties. The parties may agree to exercise fewer than the allowable number of peremptory challenges.~~

#### COMMENT [No change]

#### Rule 18.5. Procedure for Jury Selection

(a) [No change]

(b) **Calling Jurors for Examination.** The court may call to the jury box a number of prospective jurors equal to the number to serve plus the number of alternates ~~plus the number of peremptory challenges that the parties are permitted.~~ Alternatively, and at the court's discretion, all members of the panel may be examined.

(c)-(d) [No change]

(e) **Scope of Examination.** The court must ensure the reasonable protection of the prospective jurors' privacy. Questioning must be limited to inquiries designed to elicit

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<sup>1</sup> Additions to the text of the rule are shown by underscoring and deletions of text are shown by ~~strike through~~.

information relevant to asserting a possible challenge for cause ~~or enabling a party to intelligently exercise the party's peremptory challenges.~~

**(f) Challenge for Cause.** Challenges for cause must be on the record and made out of the hearing of the prospective jurors. The party challenging a juror for cause has the burden to establish by a preponderance of the evidence that the juror cannot render a fair and impartial verdict. If the court grants a challenge for cause, it must excuse the affected prospective juror. If insufficient prospective jurors remain on the list, the court must add a prospective juror from a new panel. ~~All challenges for cause must be made and decided before the court may call on the parties to exercise their peremptory challenges.~~

**(g) Stipulation to Remove a Prospective Juror.** The parties may stipulate to the removal of a juror. ~~**Exercise of Peremptory Challenges.** After examining the prospective jurors and completing all challenges for cause, the parties must exercise their peremptory challenges on the list of prospective jurors by alternating strikes, beginning with the State, until the peremptory challenges are exhausted or a party elects not to exercise further challenges. Failure of a party to exercise a challenge in turn operates as a waiver of the party's remaining challenges, but it does not deprive the other party of that party's full number of challenges. If the parties fail to exercise the full number of allowed challenges, the court will strike the jurors on the bottom of the list of prospective jurors until only the number to serve, plus alternates, remain.~~

**(h) Selection of Jury; Alternate Jurors.**

(1) *Trial Jurors.* ~~After the completion of the procedures in (g) the court has resolved any challenges for cause,~~ the prospective jurors remaining in the jury box or on the list of prospective jurors constitute the trial jurors.

(2)-(3) [No change]

**(i) Deliberations in a Capital Case. [No change]**

**COMMENT [as amended 2022]**

**Rule 18.5(b). [No change to the first two paragraphs of the comment]**

The struck method calls for all of the jury panel members to participate in voir dire examination by the judge and counsel. Following disposition of the for cause challenges, ~~the juror list is given to counsel for the exercise of their peremptory strikes. When all the peremptory strikes have been taken and the court has resolved all related issues under *Batson v. Kentucky*, 476 U.S. 79 (1986), the clerk calls the first 8 or 12 names, as the law may require, remaining on the list, plus the number of alternate jurors thought necessary by the judge, who become the trial jury.~~

**Rule 18.5(d). [No change to comment]**

## RULES OF CIVIL PROCEDURE

### Rule 47. Jury Selection; Voir Dire; Challenges

(a)-(b) [No change]

(c) **Voir Dire Oath and Procedure.**

(1)-(2) [No change]

(3) *Extent of Voir Dire.*

(A) [No change]

(B) *Extent of Questioning.* Voir dire questioning of a jury panel is not limited to the grounds listed in Rule 47(d) and may include questions about any subject that might disclose a basis for the exercise of a for cause ~~peremptory~~ challenge.

(d) [No change]

~~(e) **Peremptory Challenges.**~~

~~(1) *Procedure.* When the voir dire is finished and the court has ruled on all challenges for cause, the clerk will give the parties a list of the remaining prospective jurors for the exercise of peremptory challenges. The parties must exercise their challenges by alternate strikes, beginning with the plaintiff, until each party's peremptory challenges are exhausted or waived. If a party fails to exercise a peremptory challenge, it waives any remaining challenges, but it does not affect the right of other parties to exercise their remaining challenges.~~

~~(2) *Number.* Each side is entitled to 4 peremptory challenges. For this rule's purposes, each action—whether a single action or two or more actions consolidated for trial—must be treated as having only two sides. If it appears that two or more parties on a side have adverse or hostile interests, the court may allow them to have additional peremptory challenges, but each side must have an equal number of peremptory challenges. If the parties on a side are unable to agree on how to allocate peremptory challenges among them, the court must determine the allocation.~~

~~(f) **(e) Alternate Jurors.**~~

~~(1)-(4) [No change]~~

~~(5) *Additional Peremptory Challenges.* In addition to the peremptory challenges otherwise allowed by law, each side is entitled to one peremptory challenge if one or two alternate jurors will be impaneled, two peremptory challenges if 3 or 4 alternate jurors will be impaneled, and 3 peremptory challenges if 5 or 6 alternate jurors will be impaneled.~~



**COMMENT [as amended 2022]**

**1995 Amendment to Rule 47(a) and (e)  
[Formerly Rule 47(a)]**

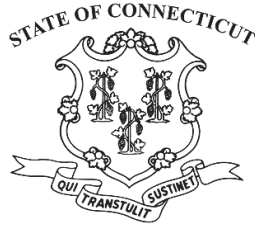
**[No change to the first two paragraphs of the comment]**

The “struck” method calls for all of the jury panel members to participate in voir dire examination by the judge and counsel. Although the judge may excuse jurors for cause in the presence of the panel, challenges for cause are usually reserved until the examination of the panel has been completed and a recess taken. Following disposition of the for cause challenges, ~~the juror list is given to counsel for the exercise of their peremptory strikes. When all the peremptory strikes have been take, and all legal issues arising therefrom have been resolved,~~ the clerk calls the first eight names remaining on the list, plus the number of alternate jurors thought necessary by the judge, who shall be the trial jury.

**COMMENT**

~~**1961 Amendment to Rule 47(c)  
[Formerly Rule 47(a) (3)]**~~

~~[Rule 47(c) (formerly Rule 47(a)(3)] now compels the plaintiff to exercise all of his peremptory challenges prior to the defendant. The amended rule provides that the parties shall exercise their peremptory challenges alternately. Under the present rule, while the plaintiff receives the same number of peremptory challenges as the defendant, the order of exercising them resulted in an obvious inequity. The purpose of the proposed rule is to eliminate the inequity by giving both parties peremptory challenges which are not only equal in number but also in practical weight and value.~~



**Substitute House Bill No. 6548**

**Public Act No. 21-170**

**AN ACT CONCERNING THE RECOMMENDATIONS OF THE JURY  
SELECTION TASK FORCE.**

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section 51-217 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2021*):

(a) All jurors shall be electors, individuals lawfully admitted for permanent residence, as defined in 8 USC 1101(a)(20), as amended from time to time, or citizens of the United States, who are residents of this state having a permanent place of abode in this state and appear on the list compiled by the Jury Administrator under subsection (b) of section 51-222a, who have reached the age of eighteen. A person shall be disqualified to serve as a juror if such person: (1) Is found by a judge of the Superior Court to exhibit any quality which will impair the capacity of such person to serve as a juror, except that no person shall be disqualified because the person is deaf or hard of hearing; (2) has been convicted of a felony within the past [seven] three years or is a defendant in a pending felony case or is in the custody of the Commissioner of Correction; (3) is not able to speak and understand the English language; (4) is the Governor, Lieutenant Governor, Secretary of the State, Treasurer, Comptroller or Attorney General; (5) is a judge of the Probate Court, Superior Court, Appellate Court or Supreme

***Substitute House Bill No. 6548***

Court, is a family support magistrate or is a federal court judge; (6) is a member of the General Assembly, provided such disqualification shall apply only while the General Assembly is in session; (7) is a registrar of voters or deputy registrar of voters of a municipality, provided such disqualification shall apply only during the period from twenty-one days before the date of a federal, state or municipal election, primary or referendum to twenty-one days after the date of such election, primary or referendum, inclusive; (8) is [seventy] seventy-five years of age or older and chooses not to perform juror service; (9) is incapable, by reason of a physical or mental disability, of rendering satisfactory juror service; or (10) for the jury year commencing on September 1, 2017, and each jury year thereafter, has served in the United States District Court for the District of Connecticut as (A) a federal juror on a matter that has been tried to a jury during the last three preceding jury years, or (B) a federal grand juror during the last three preceding jury years. Any person claiming a disqualification under subdivision (9) of this subsection shall submit to the Jury Administrator a letter from a licensed health care provider stating the health care provider's opinion that such disability prevents the person from rendering satisfactory juror service. In reaching such opinion, the health care provider shall apply the following guideline: A person shall be capable of rendering satisfactory juror service if such person is able to perform a sedentary job requiring close attention for six hours per day, with short work breaks in the morning and afternoon sessions, for at least three consecutive business days. Any person claiming a disqualification under subdivision (10) of this subsection shall supply proof of federal jury service satisfactory to the Jury Administrator.

(b) The Jury Administrator may determine, in such manner and at such times as the Jury Administrator deems feasible, whether any person is qualified to serve as juror under this section and whether any person may be excused for extreme hardship.

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(c) The Jury Administrator shall have the authority to establish and maintain a list of persons to be excluded from the summoning process, which shall consist of (1) persons who are disqualified from serving on jury duty on a permanent basis due to a disability for which a licensed physician or an advanced practice registered nurse has submitted a letter stating the physician's or advanced practice registered nurse's opinion that such disability permanently prevents the person from rendering satisfactory jury service, (2) persons [seventy] seventy-five years of age or older who have requested not to be summoned, (3) elected officials enumerated in subdivision (4) of subsection (a) of this section and judges enumerated in subdivision (5) of subsection (a) of this section during their term of office, and (4) persons excused from jury service pursuant to section 51-217a who have not requested to be summoned for jury service pursuant to said section. Persons requesting to be excluded pursuant to subdivisions (1) and (2) of this subsection must provide the Jury Administrator with their names, addresses, dates of birth and federal Social Security numbers for use in matching. The request to be excluded may be rescinded at any time with written notice to the Jury Administrator.

Sec. 2. Section 51-220 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective July 1, 2023*):

(a) The number of jurors to be chosen from each town shall be equal to a percentage of the town's population rounded off to the nearest whole number, such percentage to be determined by the Jury Administrator [Such population figures shall derive from the last published census of the United States government.] in accordance with the provisions of this section and section 51-220a, as amended by this act. The number of jurors chosen from each town shall reflect the proportional representation of the population of each town within the judicial district. The Jury Administrator shall calculate such percentage by determining each town's proportional share of the population of the

***Substitute House Bill No. 6548***

judicial district and dividing that proportional share by the town's yield ratio. A town's yield ratio shall be calculated by dividing the number of jurors from such town who, when summoned during the previous court year, complied with the summons to appear for jury service, by the product that results when the town's proportional share of the population of the judicial district is multiplied by the total number of jurors summoned in the judicial district in the previous court year. For purposes of this subsection, "court year" means a one-year period beginning on September first and ending on August thirty-first of the following year.

(b) The Jury Administrator shall derive population figures from the most recent decennial census.

Sec. 3. Section 51-220a of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2022*):

(a) Electronic data processing and similar equipment may be used in the selection, drawing and summoning of jurors under this chapter. At [his] the Jury Administrator's election, the Jury Administrator may enter into a computerized data processing file the names of persons appearing on the list compiled under subsection (b) of section 51-222a, in order to perform any of the duties prescribed in this chapter.

(b) In carrying out the duties prescribed in section 51-220, as amended by this act, the Jury Administrator annually shall compile the number of jurors summoned from each town who complied with the summons and appeared for jury service.

Sec. 4. Section 51-232 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective July 1, 2022*):

(a) The Jury Administrator shall send to each juror drawn, by first class mail, a notice stating the place where and the time when he or she is to appear and such notice shall constitute a sufficient summons unless

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a judge of said court directs that jurors be summoned in some other manner.

(b) Such summons or notice shall also state the fact that a juror has a right to one postponement of the juror's term of juror service for not more than ten months and may contain any other information and instructions deemed appropriate by the Jury Administrator. If the date to which the juror has postponed jury service is improper, unavailable or inconvenient for the court, the Jury Administrator shall assign a date of service which, if possible, is reasonably close to the postponement date selected by the juror. Such notice or summons shall be made available to any party or to the attorney for such party in an action to be tried to a jury. The Jury Administrator may grant additional postponements within or beyond said ten months but not beyond one year from the original summons date.

(c) The Jury Administrator shall send to a prospective juror a juror confirmation form and a confidential juror questionnaire. Such questionnaire shall include questions eliciting the juror's name, age, race and ethnicity, occupation, education and information usually raised in voir dire examination. The questionnaire shall inform the prospective juror that information concerning race and ethnicity is required solely to enforce nondiscrimination in jury selection, that the furnishing of such information is not a prerequisite to being qualified for jury service and that such information need not be furnished if the prospective juror finds it objectionable to do so. Such juror confirmation form and confidential juror questionnaire shall be signed by the prospective juror under penalty of false statement. Copies of the completed questionnaires shall be provided to the judge and counsel for use during voir dire or in preparation therefor. Counsel shall be required to return such copies to the clerk of the court upon completion of the voir dire. Except for disclosure made during voir dire or unless the court orders otherwise, information inserted by jurors shall be held in confidence by

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the court, the parties, counsel and their authorized agents. Such completed questionnaires shall not constitute a public record.

(d) The number of jurors in a panel may be reduced when, in the opinion of the court, such number of jurors is in excess of reasonable requirements. Such reduction by the clerk shall be accomplished by lot to the extent authorized by the court and the jurors released shall be subject to recall for jury duty only if and when required.

(e) In each judicial district, the Chief Court Administrator shall designate one or more courthouses to be the courthouse to which jurors [shall] originally shall be summoned. The court may assign any jurors of a jury pool to attend any courtroom within the judicial district.

(f) On and after July 1, 2022, and until June 30, 2023, for each jury summons the Jury Administrator finds to be undeliverable, the Jury Administrator shall cause an additional randomly generated jury summons to be sent to a juror having a zip code that is the same as to which the undeliverable summons was sent.

Sec. 5. Subsection (c) of section 51-232 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2022*):

(c) (1) The Jury Administrator shall [send] provide to a prospective juror a juror confirmation form and a confidential juror questionnaire. Such questionnaire shall include questions eliciting the juror's name, age, race and ethnicity, gender, occupation, education, [and] information usually raised in voir dire examination and such other demographic information determined appropriate by the Judicial Branch. The questionnaire shall inform the prospective juror that information concerning race and ethnicity is required solely to enforce nondiscrimination in jury selection, that the furnishing of such information is not a prerequisite to being qualified for jury service and

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that such information need not be furnished if the prospective juror finds it objectionable to do so. Such juror confirmation form and confidential juror questionnaire shall be signed by the prospective juror under penalty of false statement. Copies of the completed questionnaires shall be provided to the judge and to counsel for use during voir dire or in preparation therefor. Counsel shall be required to return such copies to the clerk of the court upon completion of the voir dire. Except for disclosure made during voir dire or unless the court orders otherwise, information inserted by jurors shall be held in confidence by the court, the parties, counsel and their authorized agents. Such completed questionnaires shall not constitute a public record.

(2) The Judicial Branch shall compile a record of the demographic characteristics of all persons who: (A) Are summoned for jury service, (B) participated in a panel, (C) are subject to a peremptory challenge, (D) are subject to challenge for cause, and (E) serve on a jury. Such record shall exclude personally identifiable information and shall be maintained in a manner that provides free and open access to the information on the Internet. As used in this subdivision, "personally identifiable information" means any identifying information that is linked or linkable to a specific individual.

Approved July 12, 2021



## **Rule 37. Jury selection**

**(a) *Policy and Purpose.*** The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.

**(b) *Scope.*** This rule applies in all jury trials.

**(c) *Objection.*** A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.

**(d) *Response.*** Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons that the peremptory challenge has been exercised.

**(e) *Determination.*** The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

**(f) *Nature of Observer.*** For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.

**(g) *Circumstances Considered.*** In making its determination, the circumstances the court should consider include, but are not limited to, the following:

- (i)** the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;
- (ii)** whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror

against whom the peremptory challenge was used in contrast to other jurors;

(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

(iv) whether a reason might be disproportionately associated with a race or ethnicity; and

(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

**(h) *Reasons Presumptively Invalid.*** Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge:

(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; and

(vii) not being a native English speaker.

**(i) *Reliance on Conduct.*** The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

Adopted April 5, 2018, effective April 24, 2018.

# Attachment K

## Supporting Juror Impartiality

Implicit bias has the potential to affect jury selection at various stages, including through the deliberations of empaneled jurors. As one tool to educate jurors about implicit biases, the federal district court for the Western District of Washington developed and distributed a video on Unconscious Bias. The Connecticut state court system and other jurisdictions have explored similar approaches to juror education, either as a standalone initiative or in conjunction with other methods to support impartiality.

The New Jersey Supreme Court has preliminarily approved three interrelated initiatives to support juror impartiality: (1) a video on implicit bias, to be used as part of juror orientation; (2) additional voir dire questions on implicit bias; and (3) enhancements to standard jury charges. The proposed new video will be shown for the first time at the Judicial Conference on Jury Selection. The following summarizes the voir dire questions and jury charge enhancements.

By February 2, 2021 notice to the bar, the Supreme Court solicited public comments on two proposed model open-ended voir dire questions on implicit bias and proposed model jury instructions on implicit bias. The notice described in general the plan for a supplemental video on implicit bias, with that video to be shown to jurors as part of mandatory juror orientation. The strong majority of the comments reflected support for the goal of reducing the effects of implicit bias in the context of jury trials.

Following review and consideration of the public comments, the Court determined to add the following two voir dire questions:

- Question 1: In the juror orientation video and my introductory remarks, the concept of implicit bias was defined and discussed. Do you think you will be able to decide the case fairly and impartially and to be mindful of the potential effects of any biases you may have -- explicit or implicit? 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.

The Court further approved enhancements to three model jury charges: (1) preliminary instructions; (2) instructions after the jury is sworn; and (3) final instructions. The additional language builds on existing instructions related to the duty of impartiality. For example, the preliminary instructions would be expanded by adding the underlined text in the opening:

The first step in a jury trial is the selection of the jury. This process is important because both the State and the defendant are entitled to jurors who are impartial and agree to keep their minds open until a verdict is reached. Jurors must be as free as humanly possible from bias, prejudice, or sympathy and must not be influenced by preconceived ideas.

**Every one of us makes implicit or unconscious associations and assumptions, and has biases of which we are not consciously aware. Implicit or unconscious thinking, including implicit bias, affects what we see and hear, how we remember what we see and hear, and how we make decisions. Jurors have an obligation to judge the facts and apply the law as instructed without bias, prejudice, or partiality. To do so, jurors need to acknowledge their own implicit or unconscious biases so as to not be affected by them during the trial and jury deliberations.**

An additional reference to implicit bias would be added later in the instructions, as follows:

As we mature we all to some extent develop certain biases, prejudices, fixed opinions and views. We develop these from our families, others around us, the media, and from our everyday experiences. You are entitled to be who you are and to feel and think about things as you do. It is important

to recognize any biases, prejudices, fixed opinions and views that you may have and to disclose them to me during jury selection. **This includes recognizing and not being guided by implicit or unconscious biases.** If for any reason my questions do not cover why you would not be able to listen with an open mind to the evidence in this case or be unable to reach a fair and impartial verdict, it is necessary that you volunteer this information to me when you are questioned.

Similar enhancements would be made to the instructions provided when the jury is sworn, as follows:

Following summations you will receive your final instructions on the law from me, and you will then retire to consider your verdict. You are not to form or express an opinion on this case but are to keep an open mind until you have heard all the testimony, have heard summations, have had the benefit of my instructions as to the applicable law, and have been instructed to begin your deliberations.

**The responsibility of all jurors is to reach a fair verdict based on the law as the judge explains it and on the evidence in the case. The court's goal in every jury trial is to seat jurors who will decide the case before them without prejudice or bias because under our Constitution everyone deserves a fair trial.**

**Jurors fulfill this responsibility by remaining impartial, or neutral, until the jury reaches a verdict. Remaining impartial throughout the trial means ensuring that jurors are not guided or influenced by biases or any preconceived ideas about the case.**

It is your duty to weigh the evidence calmly, **impartially**, and without **explicit or implicit** bias, passion, prejudice, or sympathy, and to decide the issues [upon] **on** the merits.

Last, the final instruction to the jury would be amended to incorporate this underlined language:

As jurors, it is your duty to weigh the evidence calmly and without passion, prejudice or sympathy. Any influence caused by these emotions has the potential to deprive both the State and the defendant(s) of what you promised them -- a fair and impartial trial by fair and impartial jurors. Also, speculation, conjecture and other forms of guessing play no role in the performance of your duty. **As jurors, your oath requires that you not be affected or influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including implicit, or unconscious, bias. During your deliberations if you think unconscious bias is affecting your evaluation, think about the evidence again with the video and this instruction in mind.**

In combination with the new Juror Impartiality video and additional voir dire questions, the additions to the model jury charges would remind jurors of their continuing responsibility to be aware of implicit biases and to work to avoid being guided by such biases in their deliberations.

# Attachment L

## Experiences of Excluded Jurors

*Hon. James H. Coleman, Jr.:*

As a trial attorney representing plaintiffs in state courts, I observed attorneys exercise peremptory challenges to excuse African Americans from petit juries solely because of their race. Similarly, as a trial judge, I observed assistant prosecutors, defense attorneys, and attorneys for parties in civil litigation engage in the same discriminatory conduct.

As a young lawyer and judge, I became aware that few African Americans were interested in serving on juries. Because of my active participation in civic affairs in the community, I had many opportunities to ask African Americans in churches, taverns, and on street corners why they lacked interest in serving as jurors. Some people told me that it was so painful to be told, by one of the attorneys, that he or she was unfit to serve, that African Americans frequently sought to be excused in other ways. Some would first attempt to be excused prior to reporting for jury duty. If that failed, they would express a strong viewpoint during voir dire that clearly favored one of the parties in the case so that the judge would discharge them.

In 1973, during the third month of my assignment as a trial judge in the criminal division, a prominent attorney asked if I knew of a recent New Jersey case that permitted a prosecutor to use peremptory challenges in a racially discriminatory manner. With much humiliation, I informed him that on November 7, 1973, the Appellate Division had found that a prosecutor's use of peremptory challenges to excuse all prospective African-American jurors did not deny a defendant "equal protection of the law and due process under the Fourteenth Amendment." I paused, and then informed the attorney that the same viewpoint had been expressed by the Supreme Court of New Jersey in 1970 in State v. Smith. My lawyer friend asked, "As a judge, are you

going to change that rule?" My response was, "I will try my best because equal justice is one of my core values."

Whenever I saw peremptory challenges used to exclude excellent prospective jurors solely because of group bias, the defendant, the excluded prospective juror, and I believed that it reinforced group stereotypes, and we found it demeaning. We felt much like the swallow in Aesop's Fables who built her nest under the eaves of a court of justice. Before the young ones could fly, a serpent glided out of a hole and ate the newborn. When the swallow returned and found the nest empty, she began to mourn her loss. Seeing this, a dispassionate neighbor suggested, perhaps by way of comfort, that the swallow was not the first bird to have lost her young. "True," the swallow replied, "but it is not only my little ones that I mourn, but that I should have been wronged in the very place where the injured fly for justice."

Justice Blackmun expressed my feeling so eloquently when he said, "[d]iscrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice," both in terms of reality and in providing the appearance of injustice.

....

To be sure, an improper exclusion of potential jurors solely based on race not only violated the right of a defendant who belonged to the same cognizable group as the prospective juror, but it offended the potential juror's rights as well. In psychological terms, I experienced "transference." The way in which prospective jurors were treated at that time was transferred to me because, as Strauder said, such treatment became "practically a brand upon them, affixed by the law, an assertion of their inferiority." In addition, the defendant was harmed by the fear that the invidious discrimination practiced in the jury selection process would infect the entire proceeding. This, in turn, caused a loss of confidence in the judicial system.

[The Evolution of Race in the Jury Selection Process, 48 Rutgers L. Rev. 1105, 1107-09, 1127-28 (1996) (footnotes omitted).]



***Hon. Theodore McMillian & Christopher J. Petrini:***

When a prosecutor is allowed to exercise his peremptory challenges to excuse prospective jurors solely because of their race, several harms result. First, without the broad range of social experiences often found in a racially and ethnically diverse group, juries may be ill-equipped to evaluate the facts presented. For example, a minority defendant may be prejudiced because the all-white jury simply does not understand the defendant's demeanor or the language used in important testimony. Misunderstanding important testimony can create the opportunity for unconscious prejudice.

Secondly, when potential minority jurors are excluded from juries because of their race, those excluded are deprived of their basic democratic right to participate in the community's administration of justice. Along with the right to vote, participation on a jury is one of the most fundamental ways that an individual citizen can participate in democratic processes. Participation on a jury can be an empowering experience, especially for minorities who have been subjected to racial discrimination. One southern black who had grown up under segregation described being called for jury duty as "one of the proudest moments of my life. [W]hen I got my summons . . . . I got a sense of really belonging to the American community." On the other hand, when minorities are excluded from serving on juries, they are stigmatized by the implication that they are not the equal of others who presumably are able or willing to judge a defendant impartially.

Finally, discriminatory use of peremptory challenges undermines the legitimacy of and popular confidence in the fairness of the criminal justice system. Members of the excluded group will see that the law is treating them unequally and may come to believe that it will do likewise in other situations as well. In sum, eradicating discrimination from the jury selection process is a goal of the utmost importance. Fairness to the defendant, inclusion of minority jurors and maintaining the integrity of the criminal justice system all require that discrimination be identified and eradicated.

[Batson v. Kentucky: A Promise Unfulfilled, 58 UMKC L. Rev. 361, 362 (1990) (footnotes omitted) (quoting Dale R. Broeder, The Negro in Court, 1965 Duke L.J. 19, 26).]

*The Equal Justice Initiative's 2010 and 2021 Reports include reflections by a number of qualified prospective jurors who were stricken through a peremptory challenge, including **Melodie Harris**:*

Melodie Harris had lived in Lee County, Mississippi, for a decade and worked for the same local company for six years when a prosecutor claimed she had “no ties to the community” and struck her from a jury. Ms. Harris knew she and most of the other black jurors had been treated unfairly. “It was just so blatant,” she said. Instead of turning away, Ms. Harris chose to bear witness and take action. She returned to the courthouse every day for the trial of Alvin Robinson, a black man who had been chased and assaulted by a white man following a traffic altercation, then charged with murder for retaliating in fear. Ms. Harris was aghast as she watched three jurors sleep through portions of the trial, then vote guilty. A former bank teller in her 40s who has worked two jobs most of her life, Ms. Harris considered herself a supporter of law enforcement. “I like the police. I’ll dial 911 in a second,” she said. But watching the discriminatory tactics used to ensure Mr. Robinson would go to prison has shaken her faith in a system she wanted to trust. “I thought justice was supposed to be blind, and just sitting there, how could anybody vote guilty listening to the evidence with those jury instructions?” After the trial, Ms. Harris visited Mr. Robinson in prison and helped him with his appeal. Eventually, the Mississippi Court of Appeals confirmed her suspicions. The court reversed Mr. Robinson’s manslaughter conviction because of race-based strikes in selecting the jury. The reasons offered by the State were “so contrived, so strained, and so improbable,” the court found, that they were unquestionably pretexts for purposeful discrimination.

[Equal Justice Initiative, [Illegal Racial Discrimination in Jury Selection: A Continuing Legacy](https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf) 28 (2010), available at <https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf>.]

*The 2010 Report explains that, in interviews conducted by the Equal Justice Initiative,*

Excluded jurors and their families spoke about suffering shame and humiliation as a result of false inferences that criminal activity made them unfit to serve. In Montgomery County, Mississippi, Vickie Curry was illegally struck by a prosecutor who claimed her husband had a felony record. The prosecutor mistook her husband for someone else, and the falsehood resurfaces each time the case appears in media reports. Charles Curry, retired from the National Guard after 23 years of service, is deeply disturbed that the district attorney suggested he does not respect the law. This common tactic thoughtlessly tarnishes the reputations of African Americans living lives of quiet decency. A prosecutor in Talladega County, Alabama, sought to characterize Ruth Garrett, a deeply religious woman who works as a school bus driver, as unfit for jury service because she was related to criminals. In fact, Mrs. Garrett had never met the family who shared her last name, but the prosecutor never bothered to ask her.

Another common theme among illegally struck jurors is the sad recognition that their individual experiences were small pieces in the structure of racism that envelops their communities. “I’m not surprised because that’s how the system is around here,” said Gerald Mercer, who was struck from a Russell County, Alabama, jury because he had traffic tickets and expressed hesitation about the death penalty, while white jurors with similar circumstances remained on the jury. “They do a lot of stuff around here that is unequal justice.” Vickey Brown was illegally struck from a jury in Houston County, Alabama, by a prosecutor who admitted he wanted to avoid “an all-black jury.” Although Mrs. Brown had encountered racist treatment in job interviews, she was particularly offended at the district attorney’s suggestion that she would be lenient on a black defendant because she is black. “I was shocked when I found out,” she said. Alice Branham, a 31-year veteran of the Florida Department of Corrections, was illegally struck from a jury in Jefferson County, Florida. When forced to provide a race-neutral reason for excluding her, the prosecutor noted only her work for the State. Ms. Branham was so accustomed to institutional

racism that she had no idea this was a violation of her rights. After all, when she started working for the prison system, her supervisor informed her he did not like black people, and only grew to accept her after she started bringing homemade cookies and collard greens to the office.

For many excluded black jurors, the pretexts provided to refute claims of discrimination add another layer of injury. A Baldwin County, Alabama, prosecutor characterized potential juror Allen Mason as “not very well educated” and having “difficulty understanding the concepts that the state asked him” even though Mr. Mason answered every question, “Yes, sir” or “No, sir,” and clearly explained his beliefs. Nearly 20 years later, Mr. Mason grew emotional as he recalled how the prosecutor’s racist actions made him feel unworthy. Elsewhere, prosecutors have countered Batson claims by describing African Americans in the jury pool as inattentive, unresponsive, or hostile. Black men have been struck for wearing jeans or an earring. A Mobile, Alabama, prosecutor claimed he struck Carolyn Hall because “she works at a retarded place” and he did not want jurors who were sympathetic to the disadvantaged. While Mrs. Hall remains committed to the mentally disabled people she cares for, she told EJI staff that her work would not have affected her ability to be fair.

Hester Webb . . . owns a successful child care center. She was struck from a jury in Montgomery, Alabama. When asked for a race-neutral reason, the prosecutor said Ms. Webb was chewing gum and was hesitant to answer questions, which led him to suspect she had prior knowledge of the case. Ms. Webb was stunned at the suggestion she did something so wrong: “It needs to stop. It’s not right. It’s not fair.”

[Equal Justice Initiative, [Illegal Racial Discrimination in Jury Selection: A Continuing Legacy](https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf) 29-30 (2010), available at <https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf> (footnotes omitted).]

***Darren Seiji Teshima:***

When selecting a grand jury foreperson, the San Francisco deputy district attorney looked for someone with “administrative abilities, leadership and people skills” -- a “hardy handshake sort of guy.” Another court official recommended individuals with “leadership capability”: people who could “get along with other people,” “conduct a meeting,” and “act to make sure the grand jury [was] doing what it’s supposed to be doing.” Applying these criteria, San Francisco superior court judges and officials failed to select a single Chinese American or Filipino American foreperson from 1960 to 1996 -- not one in thirty-six years. Court officials testified that race had nothing to do with the selection process. Nevertheless, since Chinese Americans and Filipino Americans constituted 17.4% of grand juries during this period, the statistical chance of this exclusion occurring randomly was 3 in 8.5 million, or 0.00000035%.

In Chin v. Runnels, a Chinese American defendant petitioned for a writ of habeas corpus on the theory that the complete absence of Chinese American forepersons in San Francisco grand juries violated his right to equal protection under the Fourteenth Amendment. Petitioner Chin demonstrated that during a thirty-six year period, judges selected grand jury forepersons after conducting voir dire of randomly selected prospective grand jurors and consulting with the jury commissioner and the district attorney. Through this process, no Chinese American, Filipino American, or Latino served as a foreperson on a grand jury, including the grand jury that indicted Chin. The district court denied Chin’s petition for habeas review, upholding the state court’s finding of no intentional discrimination as a reasonable application of law. However, Judge Charles Breyer noted that had he reviewed the case de novo, he would “feel compelled to scrutinize the state court’s finding more closely,” as “the compelling pattern of exclusion suggests that there may be more to the selection process than meets the eye.”

In this paper, I argue that Chinese Americans and Filipino Americans were excluded from serving as forepersons because of the racial mythology about Asian Americans as the “model minority.” The court officials did not lie about whether they considered race; rather, I argue that they unconsciously relied upon the stereotype of Asian Americans as unassertive and passive, unaware that the stereotype affected their decision-making. Their reliance on this stereotype is not exceptional; by unconsciously relying on a stereotype to make decisions, they engaged in a cognitive process common to all human beings. Nevertheless, through this unconscious reliance on the stereotype of Asian Americans as the model minority, these court officials excluded Chinese Americans and Filipino Americans from the position of grand jury foreperson for thirty-six years. Current equal protection jurisprudence finds no constitutional violation in this racial exclusion because there is no “discriminatory intent.” This jurisprudence obscures the continued racial inequalities in our society by refusing to acknowledge that intentional bad actors are not the sole cause of racial discrimination. Instead, well-meaning individuals who nevertheless unconsciously stereotype also perpetuate racial inequalities. Racial stereotypes, such as the one about Asian Americans as the “model minority,” are triggered automatically and influence our decision-making and conduct. Thus, racial discrimination is not a problem for which only a select few intentional bad actors are responsible; rather, it is a social problem for which we all must take collective responsibility. Equal protection jurisprudence must therefore abandon the discriminatory intent requirement and learn the lessons of critical race theory and social cognition to combat racial inequalities that continue to plague our society.

In Part II, I examine the racial construction of Asian Americans, exploring my own experience as a “model minority.” According to the racial mythology about Asian Americans, we are the “good” minority -- hardworking and successful, but also unassertive and unchallenging of white racial privilege. In Part III, I provide an overview of the growing body of research on social cognition, which demonstrates that racism is a phenomenon that operates at the

unconscious and unintentional level. I examine in particular one social cognition experiment that examines the implicit associations about Asian Americans as foreigners. I then apply the lessons of social cognition to the foreperson selection process at issue in Chin, and argue that the court officials' implicit reliance on the "model minority" stereotype caused the racial exclusion of Chinese Americans and Filipino Americans. In Part IV, I propose that equal protection jurisprudence must abandon the discriminatory intent requirement and incorporate the lessons of critical race theory and social cognition to confront instances of discrimination that, while not intentional, nevertheless perpetuate racial injustice.

....

When I was in high school, my water polo teammates and I would greet each other with ever-firmer handshakes. Each greeting was a test of physical strength, some kind of expression of machismo, with neither player wanting to be the first to release his grasp. Being one of the smaller players (and the only Asian American) on the team, I self-consciously tried to assert myself through a firm grip. Although I have thankfully outgrown this competitive handshaking ritual, when I meet someone, especially a male superior, I still self-consciously extend a firm handshake. I fear, however, that no matter how firmly I grasp his hand, the other person will not see me as a "hardy handshake sort of guy."

Racism is not a thing of the past, and it is not only the intentional bad acts of a select few among us. Racism in society depends upon the unacknowledged and unchallenged racial myths that, although seemingly innocuous, maintain systems of racial privilege and subordination. . . . A just society demands that we acknowledge the operation of implicit or unconscious biases and take collective responsibility for such instances of inequality.

[A "Hardy Handshake Sort of Guy": The Model Minority and Implicit Bias About Asian Americans in Chin v. Runnels, 11 Asian Pac. Am. L.J. 122, 122-24, 140-41 (2006) (footnotes omitted).]



**ADMINISTRATIVE OFFICE OF THE COURTS**

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CHIEF JUSTICE

**GLENN A. GRANT, J.A.D.**  
ACTING ADMINISTRATIVE DIRECTOR OF THE COURTS

**NOVEMBER 2021**