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**EXECUTIVE SUMMARY:
THE CASE FOR ATTORNEY CONDUCTED *VOIR DIRE* IN NEW JERSEY**

The right to a fair and impartial jury of one's peers is a right guaranteed to each criminal defendant by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, paragraphs 9 and 10 of the New Jersey Constitution. Picking a fair and impartial jury based upon full and candid information about potential jurors is an essential aspect of preserving a person's Constitutionally protected right to a fair trial and *Due Process*. State v. Williams, 113 N.J. 393, 409 (1988) (Williams II), *citing* Sheppard v. Maxwell, 384 U.S. 333, 362–63 (1966). The duty of our court system is to take all appropriate measures to ensure a defendant is afforded fair trial. That system of achieving justice, begins with the questioning of potential jurors during *voir dire*. *Voir dire* provides the court and the attorneys involved in the case the ability to gather essential information about potential jurors as it pertains to each's conscious beliefs and implicit biases. A thorough and searching *voir dire*, is necessary to probe the minds of prospective jurors to ascertain whether they hold any biases that could interfere with their ability to decide a case fairly and impartially. State v. Erazo, 126 N.J. 112, 129 (1991). A thorough *voir dire* that addresses not only legal principles, but also those issues particular to the specific case is necessary to provide each party the type of unfiltered information necessary to enable the informed use by litigants of both challenges for cause and peremptory challenges.



Systems of Questioning Potential Jurors

The format of *voir dire* is paramount to any discussion about attorney participation in the questioning of jurors. There are several systems of jury selection:

1. Judge conducted *voir dire*: Judge conducted questioning is when the judge controls most of the questioning of potential jurors, with little to no participation by the attorneys. This system is the one currently in place in New Jersey.
2. The hybrid system: In this system, judges and attorneys share the responsibility for questioning potential jurors.¹ Judges focus on questioning jurors about legal principles which potential jurors indicate they will or will not follow. Attorneys will then question potential jurors on issues which are relevant to the particular case at hand (e.g., sexual assault case, identification issues, thoughts about guns, etc.).
3. Attorney conducted *voir dire*: The attorney-conducted system is where the attorneys handle all if not most of the questioning of potential jurors. It is important to note that attorney-conducted *voir dire* far different from the individual *voir dire* used in New Jersey death penalty cases. The system calls for jurors to be *voir dired* in a panel setting rather than individually and is, thus, far more efficient.

Current Status of Judge Controlled *Voir Dire*

During the 1980 and early 90s, there was a shift by several states to move towards the judge conducted system. This shift was premised upon the thought that this system would:

1. move more quickly;
2. lead to more honest responses by potential jurors;
3. protect potential jurors from embarrassment from being asked personal information; and
4. protect potential jurors from being indoctrinated into supporting one party's position to the bias of the other party litigant.

The system accomplished none of these goals. Courts discovered that there were limitations to judge controlled *voir dire* that interfered with the defendant's ability to select an unbiased jury.



These limitations stemmed from the lack of relevant information provided by potential jurors during the selection process. Studies found that jurors would provide less information during judge-controlled questioning.ⁱⁱ Further, research found that jurors were less forthright in providing answers regarding potential biases when questioned by judges as opposed to attorneys.ⁱⁱⁱ The lack of forthright and honest answers being provided by potential jurors undermines a defendant's ability to have her fate decided by fair and representative jury as guaranteed by the United States and New Jersey Constitutions. Courts also found that the move to judge controlled *voir dire* did not significantly reduce the amount of time needed to select a jury, as opposed to a system in which attorneys participate in the questioning process.^{iv}

Due to limitations found in judge controlled jury selection, there was a shift back to increased attorney involvement in *voir dire*. Currently, New Jersey is one of only eight (8) States and the District of Columbia that employs the judge conducted system.^v New Jersey is one of only nine (9) jurisdictions out of fifty-one (51), (less than eighteen (18) percent) in which the attorneys to the litigation are little to no involvement in the questioning of potential jurors. Nineteen (19) States employ the hybrid system.^{vi} Twenty-three (23) States use the attorney conducted system.^{vii}

New Jersey is one of only eight (8) States and the District of Columbia which employ the Judge Conducted system.

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The Myths about Attorney-Conducted *Voir Dire*

The primary concerns raised about attorneys questioning jurors are that it will:

1. cause the selection process to last longer;
2. result in a decrease in the amount of relevant information received from the jurors;
3. embarrass jurors by exposing personal information; and
4. indoctrinate jurors.

“The facts about how the *voir dire* process works in 42 jurisdictions that employ the hybrid and attorney conducted systems, demonstrate that these concerns are unfounded.”

The facts about how the *voir dire* process works in 42 jurisdictions that employ the hybrid and attorney conducted systems demonstrate that these concerns are unfounded. Massachusetts is the most recent state to move from a system like New Jersey’s to another system, the hybrid system. All the above concerns were raised when the transition process began. Impact on the efficiency and quality of jury selection was carefully studied by the Massachusetts Supreme Judicial Court. Studies that tracked the impact of the changes in Massachusetts demonstrated that none of the feared impacts occurred. After approximately one year, the Court concluded:

- There was consensus among judges that attorney participation in *voir dire* improved the *voir dire* process. Judges’ perceptions that the number of challenges for cause granted increased in the new system were consistent with the findings of the Data Collection Working Group. Judges had some reservations about the quality of lawyers’ questions (e.g., characterizing them as “inartful” and “clumsy”), but recognized that attorney participation

is new to the practicing bar as well as the Superior Court bench, and expressed expectations that the quality of lawyer questions would improve over time. They also explained that lawyers were not necessarily asking different questions than judges would have asked, but they were asking questions in ways that appeared to elicit more meaningful information for determining each juror’s impartiality.^{viii}



- Several judges also reported that attorney participation has affected attorneys' use of peremptory challenges. That is, attorneys told the judges they are striking jurors that they would not have struck before and leaving jurors on the panel that they would have struck, suggesting that attorney participation may be providing a basis for more informed use of peremptory challenges, and ostensibly for greater attorney confidence in the fairness of the jury that is ultimately empaneled.^{ix}
- Overall, the judges tend to agree that the transition to the new system has been smoother than expected. The consensus is that inclusion of attorneys in the process has improved jury selection.^x
- Judges and attorneys should have greater confidence that the jurors who are ultimately empaneled are more likely to be impartial. None of the judges expressed concern that attorneys are abusing the process or that jurors are offended or embarrassed by attorney questions.^{xi}

Benefits of Attorney Participation in Voir Dire

1. More Meaning and Forthright Information Provided by Potential Jurors

Voir dire is an Anglo-Norman phrase meaning “speak the truth.” It refers to an oath taken by jurors to tell the truth; to say what is true, what is objectively accurate or even subjectively honest. The goal of *voir dire* is to garner accurate, forthright, and honest information from jurors about their potential biases and feelings that could affect their ability to be fair and impartial. Honesty and openness by potential jurors about their biases and prejudices are essential to achieving the constitutional guarantee of a fair and impartial jury. This goal is best achieved by the participation attorneys in the questioning process.

Attorney participation in questioning potential jurors, improves the jury selection process. It leads to increased impartiality and fairness of jurors who are ultimately seated to deliberate on the case. The increase in impartiality is the result of two important factors.



First, the attorneys involved on both sides of the matter are more familiar with issues which will become prevalent in the case. Attorneys can, therefore, structure questions to address those issues in a way which enables the lawyers to understand if a potential juror has an underlying bias or prejudice which could interfere with their ability to decide the case. These questions can be

Proven Benefits

1. More meaningful and forthright information provided by potential jurors.
2. No significant increase in time to choose a jury.
3. No unnecessary exposure of private information.
4. No juror indoctrination.

*Final Report to the Justices,
Supreme Judicial Court
Committee on Juror Voir Dire*

developed to address important case specific issues in a manner that does not call for jurors to prejudge the case. Judges, on the other hand, do not know the facts of a case intimately and are often unable to adequately probe the issues. The use of three open ended questions currently employed by New Jersey does not adequately provide this information because this form of information gathering requires follow up questions from the attorney to gain a full understanding from the potential jurors. Many times, the process can require five to six follow up questions based upon the juror's response if the Court so permits. Juror questions are not one-size-fits-all.

The "open-ended" questions cannot satisfy the needs of each case. Moreover, many of the so-called "open-ended" questions are not open-ended at all and call for yes or no responses that serve only to lock a witness into a position before their feelings and biases can be adequately explored.

Second, Jurors tend to be more honest and open when exposing their true personal beliefs and opinions when questioned by attorneys as opposed to judges.^{xiii} This difference in the way



jurors answer limits the sincerity and honesty of the information provided. Without accurate and honest information, attorneys are severely limited in their ability to make for cause and peremptory challenges.

In Massachusetts, the courts noted an increase in the number of for cause challenges after attorneys became involved in questioning.^{xiii} This increased use of for cause removals demonstrates that, with judge only questioning, constitutionally disqualified, and biased jurors were being allowed to decide criminal cases. This lack of honesty and candor in answering, resulted from how jurors perceive the parties who were questioning them. Potential jurors were more honest and forthright with their responses when questioned by attorneys who they see as peers, as opposed to judges, who they perceive to be authority figures.^{xiv} Studies have shown that attorneys are more effective than judges in eliciting candid self-disclosure from potential jurors.^{xv} These studies found potential jurors tend to provide answers to questions posed by judges based upon what they believe the questioner wants to hear.^{xvi} In contrast, potential jurors were more forthright and honest about their belief systems when questioned by lawyers.^{xvii}

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2. No Significant Increase in the Time Needed to Select a Jury

The format of juror questioning by attorneys played an important factor in limiting the amount of time spent overall on the *voir dire* process. There are two forms of questioning which



were studied: individual and panel questioning. Both were employed in Massachusetts during the first year following the change in systems.

- a. Panel questioning includes placing a certain number of potential jurors “in the box” and allowing an attorney for each party to question the jurors for a period. The number of jurors placed in the box or on the panel, ranges anywhere from ten (10) to twenty-one (21). In numerous jurisdictions, judges place time limits when each attorney questions the panel—ranging to as low as fifteen minutes (15) per panel. When questioning the panel is complete and challenges (both for cause and peremptory) have been made, if enough “seated jurors” do not remain, a new set of potential jurors are placed “in the box”. A “seated juror” is a venireperson who has passed through questioning on a panel and has not been removed either for cause or by a peremptory challenge. In the panel method, the process of questioning jurors in the panels and exercising challenges, continues until enough jurors are seated—between thirteen (13) and eighteen (18), depending upon how many alternate jurors the judge prefers to seat.
- b. Individual juror questioning involves the attorneys questioning jurors one by one, either at side bar or in a separate room, from the remainder of the jury venire.

Panel questioning significantly reduced the amount of time spent on the jury selection process. The study of the transition in Massachusetts found there was no undue impact on court operations jury selection process in Massachusetts following the addition of attorney participation in *voir dire*.^{xviii} This study included courts which used both individual as well as panel questioning of potential jurors. Eliminating the data from the courts that employed individual questioning of jurors would invariably result in a finding that the overall time for jury selection decreased when attorneys conducted the questioning.

“Many such [true attorney conducted] jurisdictions set time limitations depending on case type and complexity and juries in routine cases are often picked in hours rather than days.”

For example, in the hybrid system, the Committee found the difference in the time spent during judge conducted *voir dire* and attorney participation was less than one minute per juror.^{xix}

Attorney-conducted jurisdictions yield greater efficiency. Many such jurisdictions set time



limitations depending on case type and complexity and juries in routine cases are often picked in hours rather than days.^{xx}

3. No Undue Embarrassment of Jurors or Unnecessary Exposure of Private Information

A survey of jurors found that attorneys and judges were equally committed to preserving their dignity and privacy.^{xxi} Jurors overwhelmingly indicated they felt procedures were implemented to protect them.^{xxii} The vast majority of jurors responded they did not feel the attorneys' questions were too personal, irrelevant, or made them uncomfortable.^{xxiii} Jurors perceived proper precautions were taken when questions were asked which addressed private and uncomfortable subjects, which were relevant to the issues in the case—e.g., being a victim of sexual abuse, racial bias, and personal criminal history or of family members.^{xxiv}

4. No Juror Indoctrination Resulting from Attorney Questioning

The concerns about juror indoctrination have no merit. Addressing issues relevant to the case allows each party to explore the potential juror's personal feelings and possible biases. In the process, attorneys are not permitted to express personal beliefs or opinions, make speeches, or pose hypotheticals too close to the facts at hand. The judge is, as always, the gatekeeper. Any concern about indoctrination can be controlled by limiting the scope and type of attorney questions, entertaining objections and ruling on them. There is, therefore, no possibility that a potential juror will indoctrinated because of attorney conducted *voir dire*.

ⁱ THE STATE OF THE STATE SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT, National Center for State Courts (NCSC) (April 2007), *hereinafter* JURY IMPROVEMENT (NCSC)

ⁱⁱ Jones, Susan, *Judge Versus Attorney Conducted Voir Dire*, 11 LAW AND HUMAN BEHAVIOR, vol 2 (1987)

ⁱⁱⁱ *Id.*



^{iv} This writer has participated in over 100 jury selections in New York, which employs the Hybrid System. The longest time it has taken to select a jury in my experience has been three days—that case involved a complex set of issues in a highly emotional child sex allegation, which caused many jurors to eliminate themselves for cause. Most juries were selected in one day. Even in complex murder trials, where each side possessed 18 peremptory challenges, we were able to select a jury in little more than one and one-half days.

^v JURY IMPROVEMENT (NCSC), at 28

^{vi} *Id.*

^{vii} *Id.*

^{viii} IMPLEMENTING ATTORNEY PARTICIPATION IN VOIR DIRE IN THE SUPERIOR COURT OF MASSACHUSETTS: A JUDICIAL EDUCATION PROJECT, NSCS (April 2016), at p. 6., *hereinafter*, “Judicial Education Project”

^{ix} *Id.*

^x Judicial Education Project, p. 9

^{xi} *Id.*

^{xii} Jones, Susan, *Judge Versus Attorney Conducted Voir Dire: An Empirical Investigation of Juror Candor*, LAW AND HUMAN BEHAVIOR, (vol. 11, no. 2, 1987), *hereinafter*, “ACVD Study”.

^{xiii} Judicial Education Project, p. 6

^{xiv} ACVD Study, p. 132.

^{xv} *Id.*

^{xvi} *Id.*, p. 143

^{xvii} *Id.*

^{xviii} *Final Report to the Justices*, SUPREME JUDICIAL COURT COMMITTEE ON JUROR VOIR DIRE (12 July 2016), *hereinafter*, Final Report

^{xix} Final Report, p. 8

^{xx} The New Jersey Office of the Public Defender conducted an informal study among a wide-range of jurisdictions. The Office is currently retabulating the data to focus on true attorney-conducted jurisdictions and will provide the information as soon as it becomes available.

^{xxi} Final Report, p. 9

^{xxii} *Analysis of Attorney, Clerk, Judge and Juror Voir Dire Surveys Pertaining to the Implementation of Chapter 254 of the Acts of 2014 “An Act Relative to Certain Judicial Procedures in Superior Court”*, DATA COLLECTION WORKING GROUP SUBMITTED TO THE SUPREME JUDICIAL COURT VOIR DIRE COMMITTEE, (1 June 2016), p. 9

^{xxiii} *Id.* at pp. 9–10

^{xxiv} *Id.* at p. 10