New Jersey Courts

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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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ATTACHMENTS

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.

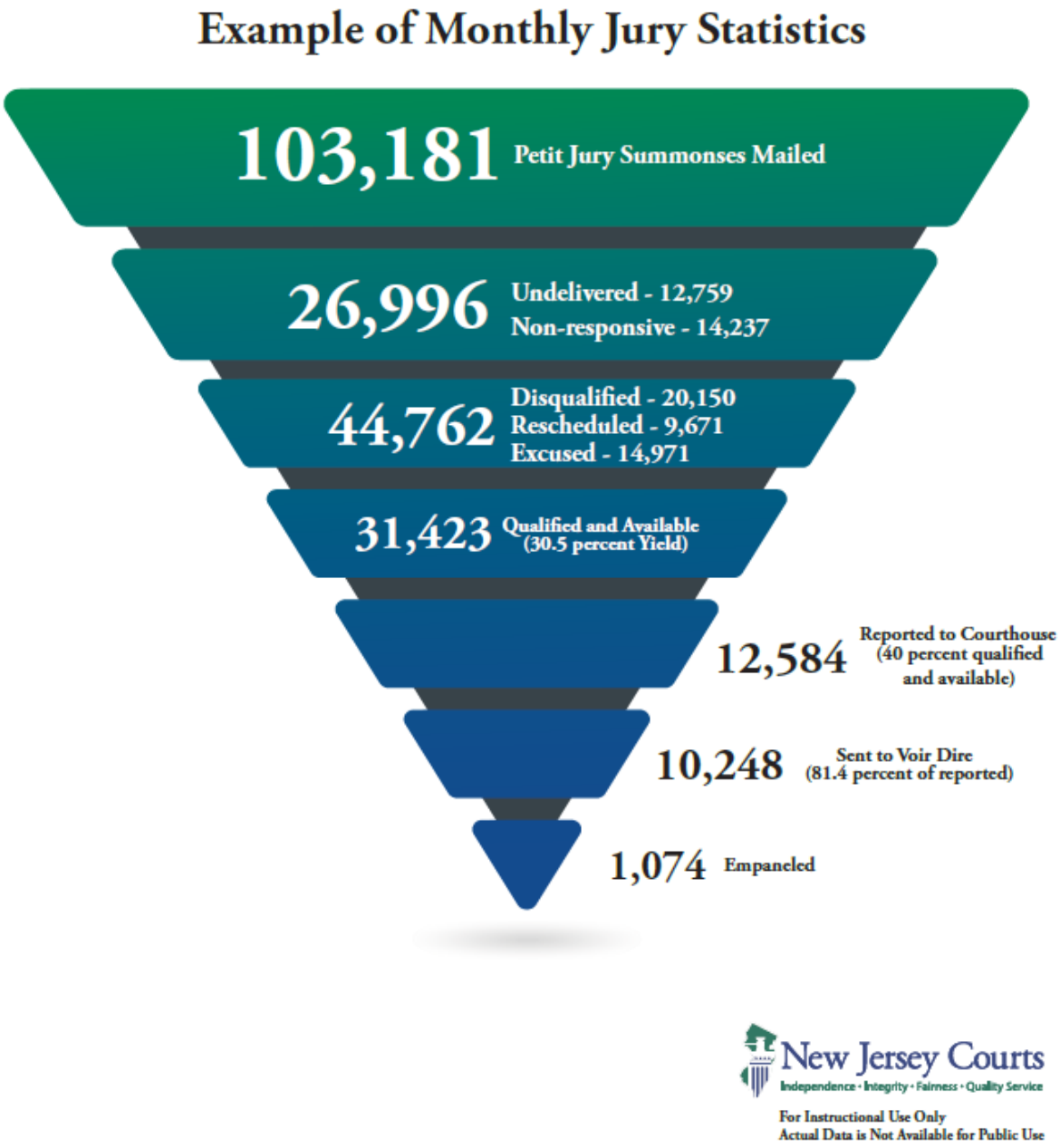
4. Juror Utilization

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.



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

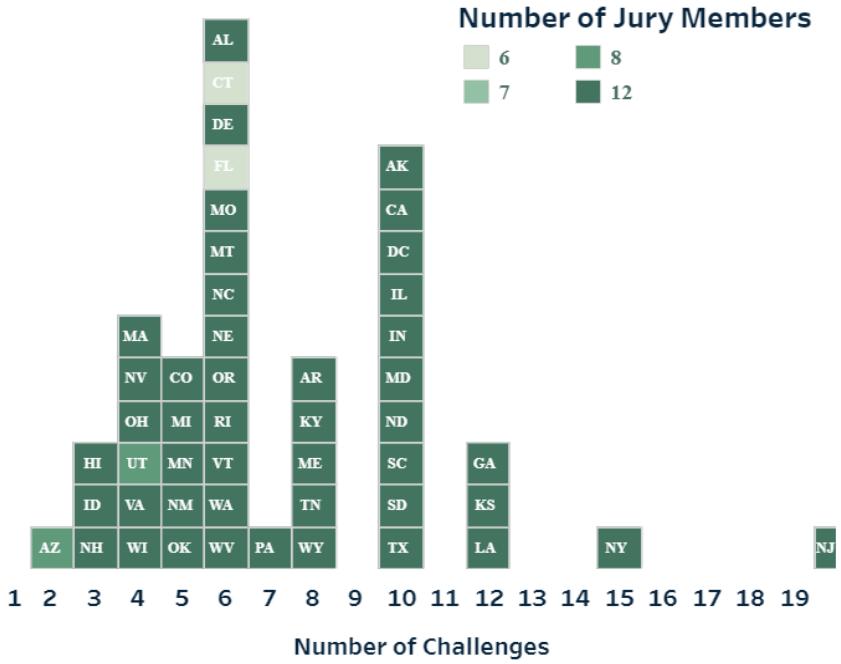
Andujar involved the capacity of peremptory challenges to inject implicit bias into the jury selection process, jeopardizing the guarantee of trial by a jury that constitutes a fair cross-section of the community. And the materials cited in Attachments C and D, discussed above, confirm the widespread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



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 under-represented 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 under-representation 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.

ADMINISTRATIVE OFFICE OF THE COURTS

STUART RABNER
CHIEF JUSTICE

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

NOVEMBER 2021