NEW JERSEY STATE BAR ASSOCIATION

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

Re: Comments on Recommendations of the Committee of the Judicial Conference on Jury Selection

Dear Judge Grant:

Thank you for the opportunity provided to the New Jersey State Bar Association to participate in the work of the Committee of the Judicial Conference on Jury Selection, and to provide comments on its recommendations. Broadening participation and representativeness and reducing the effects of discrimination as well as all types of bias in the jury selection process are critical issues to the fairness and effectiveness of the judicial system. They are also of great interest and importance to the NJSBA.

We commend the Court for initiating this much-needed review process, and express our appreciation to the members of the Committee and all involved in planning and implementing the Judicial Conference for their time and efforts in discussing and debating the issues presented. Our comments are offered with the goal of crafting the best response available to admitted challenges present in the current jury selection process. We want to ensure that any procedural revisions ultimately implemented achieve positive, impactful and effective change that will result in fairer and more representative juries.

The NJSBA supports the majority of the Committee's recommendations, however it has serious concerns about the proposed pilot program recommended by the Subcommittee on Voir Dire and Peremptory Challenges, allowing for attorney conducted voir dire (ACDV) and, by consent, a reduced number of peremptory challenges in certain criminal matters.

Recommendation 13 – Pilot Program for Attorney-Conducted Voir Dire and Reduced Peremptory Challenges

The Association does not believe that a pilot program that seeks to change two important variables in the jury selection process is the path to success. A system with two variables in play at the same time will not necessarily yield accurate and reliable results about whether one or both changes are necessary and effective. While we fully support the elimination of bias in the jury selection process, we do not believe that altering both the manner in which voir dire is conducted while concurrently reducing parties' statutory rights, in the form of the elimination of peremptory challenges, is an effective way to identify the root causes of bias in the jury selection process. Rather, the NJSBA supports an approach changing single variables at a time in a controlled manner early in the jury selection process. That will allow assessments to be made on the impact of the isolated changes on the process as it progresses. To do otherwise risks a situation where cause and effect may not be easily distinguished, only further complicating the goal of eliminating bias in jury selection.

We recommend that the pilot program focus solely on expanding ACVD in all trials, not just criminal. This will allow for a broad assessment of whether that alone is effective in addressing bias in the jury selection process in all types of jury trials at all levels of the judicial system. Making this one change may result in a more effective jury selection process where peremptory challenges are used differently, but that would not be able to be measured effectively if the change were not made in isolation.

We further recommend not including the reduction of peremptory challenges as part of the pilot program. Reducing the number of peremptory challenges, even if by consent, raises a number of constitutional as well as practical issues. Obtaining the consent of a client will require an extensive discussion about the potential ramifications, will raise the question of whether a statutory right to a set number of challenges can be waived, and will require providing a client with the option of seeking separate, independent advice. It could raise the risk of a malpractice action, and even unintentionally influence an attorney to use fewer peremptory challenges so the fact that there were not more to exercise does not become an issue. We are skeptical that many private attorneys will opt to participate and, therefore, believe that any data obtained from the pilot program will not be statistically meaningful.

Before any pilot program is implemented, the NJSBA strongly recommends that clear procedures be established about how the new selection process will be used in practice. Attorneys, judges and litigants should have more than just broad concepts; they should have a clear understanding of what is expected of them and what they can expect from the process. The procedures should be subject to review and comment to ensure all concerns are addressed. Judges and attorneys should be sufficiently educated so that they can be as prepared as possible to perform their jobs. This should be a transparent process. There should also be clear criteria to measure the effectiveness of any change, and any information gathered should be publicly shared, such as the number of peremptory challenges used, the number of jurors in a particular pool used for each trial and the results of any surveys or other feedback mechanisms used. Finally, before any changes are permanently adopted, there should be clear evidence that those

changes advance the goal of reducing and eliminating discrimination and bias in the jury selection process.

The NJSBA largely supports the remainder of the recommendations, as outlined below, with a few recommendations for consideration.

Recommendations 1-12 – Addressing Systemic Barriers to Jury Service

The first 12 recommendations from the Subcommittee on Systemic Barriers to Jury Service represent aspirational goals aimed at enlarging the pool of potential jurors. Actions like expanding the rolls from which potential jurors are summoned, encouraging greater participation by the public in jury service, allowing for greater access to jury information and jury questionnaires using technology, increasing outreach and education regarding jury service and expanding juror appreciation efforts should help address and eliminate bias in the jury selection process. These recommendations have the potential to have a meaningful impact on the jury selection process by improving and diversifying the pool of prospective jurors at the outset of the process, something the NJSBA strongly advocated for at the 2021 Judicial Conference on Jury Selection.

Recommendations 14-22 – Data Collection, Analysis & Dissemination

The collection, analysis and publication of for-cause challenges, juror utilization and juror demographic data, as well as the collection of more nuanced data in connection with juror outcomes as contained in recommendations 14-22 will greatly assist attorneys, parties and the courts in analyzing the representativeness of juries in specific cases and in the aggregate. This information will help to identify specific issues and allow for more tailored improvements in the future.

The NJSBA offers an important addition to recommendation 19, which allows for the sharing of aggregate juror demographic information before selection pursuant to Rule 1:8-5. Simply providing the aggregate information will not allow the parties to make a meaningful assessment of the extent to which elimination of any individual juror or jurors through the process impairs the ability to have a representative jury. While it will enable the Court to compare aggregate demographic data before voir dire commences and when the jury is sworn, it does not assist the parties who are exercising peremptory and for-cause challenges or objecting to them, nor does it assist the judges who are ruling on the objections. We recommend that more specific information about the potential jurors in a case be shared. Sharing the answers provided by each individual juror to the demographic questions that are posed before selection begins would provide the court and the parties with objective evidence in the event there is a suggestion that the use of challenges is being employed in an impermissibly biased manner before selection begins. If there is a dispute as to the race or ethnicity of an individual juror when a party objects to a strike, having the individual demographic data will prevent a situation where an individual juror will need to be singled out and questioned further. That will avoid discomfort, save time and allow the parties and the court to begin the process with the same set of data. Overall, the provision of this information will make the process more transparent and help ensure an unbiased jury selection process including a representative array.

Recommendations 23-24 – Judge, Attorney & Juror Training

The NJSBA recognizes that there is much to be done in connection with training for judges and attorneys and presenting issues of implicit bias for jurors, as contained in recommendations 23 and 24. While the recommended action represents a starting point, the NJSBA recommends that the Court establish a permanent standing committee to monitor the effectiveness of the presentations to judges, attorneys and jurors and continually evaluate more robust options for educations, awareness and sensitivity to issues of discrimination and bias. For example, the committee might look to educational models employed in the corporate world utilizing interactive computer programs that can be accessed by jurors in advance of jury duty, or might consider engaging social science experts to work with attorneys and judges. Whatever system is employed will only be as good as the individuals working within it, so training, education and awareness will be a critical factor that will require ongoing attention.

Recommendation 25 – Court Rule on Exercise of Peremptory Challenges

Finally, Recommendation 25 urges that the Supreme Court adopt a version of a proposed new Court Rule to reduce bias in the exercise of peremptory challenges. The proposed new Rule 1:8-3A modifies the *Batson/Gilmore* analysis by eliminating the requirement of a finding of purposeful discrimination and imparts a new standard to be applied.

The NJSBA supports the modification of the *Batson/Gilmore* analysis by Court Rule. This approach will clarify the path ahead and provide practical guidance regarding the Court's findings in *State v. Andujar*. In *Andujar,* the Court stated that *Gilmore* reaches farther than purposeful discrimination as "implicit bias is no less real and no less problematic than intentional bias. The effects of both can be the same: a jury selection process that is tainted by discrimination" *State v. Andujar*, 247 N.J. at 303. The Court went on to state that "*Gilmore's* reasoning, therefore, logically extends to efforts to remove jurors on account of race either when a party acts purposely or as a result of implicit bias. In both instances, a peremptory challenge can violate the State Constitution, depending on the circumstances." *Id.*

The proposed Rule sets forth a procedure to evaluate whether a party used a peremptory challenge "to remove a prospective juror based on actual or perceived membership in a group protected under the United States or New Jersey Constitutions or the New Jersey Law Against Discrimination." Proposed Rule 1:8-3A(a), p. 37. It enunciates a "reasonable, fully informed person" standard to be applied in evaluating a peremptory challenge as follows: "[a] peremptory challenge violates paragraph (a) of this Rule if a reasonable, fully informed person would believe that a party removed a prospective juror based on the juror's actual or perceived membership in a group protected under that paragraph."

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

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

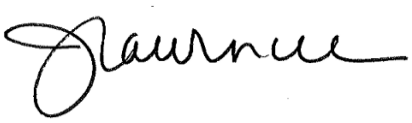
This revised wording makes it clear the court need only find that protected group membership is a reason for challenge.

The NJSBA also suggests that language be added to the Rule clarifying that any review of a trial court ruling on the use of either a for-cause or a peremptory challenge is subject to *de novo* review. While this may be implied, we believe specific reference will alleviate potential confusion and unnecessary litigation.

Finally, the proposed Rule also includes proposed Official Comments. These comments set forth presumptively invalid reasons for exercising peremptory challenges. While the NJSBA does not dispute that these reasons have been associated with improper discrimination, it is concerned that information contained in the comments carries no legal authority. This may lead to inconsistencies and other difficulties in applying the presumptions set forth in the comments, rather than the Rule itself. In light of that, the NSBA recommends that the information in the comments be incorporated in the Rule itself.

Once again, the NJSBA thanks the Court for the opportunity to participate on the Committee of the Judicial Conference on Jury Selection, and to provide comments on the recommendations of the Committee. Ensuring a jury selection process that is free from discrimination and bias is critical to a fair and representative judicial system that protects and preserves the constitutional rights of the litigants that appear before it. The NJSBA is honored to play a role in helping the Judiciary to address the important issues identified in *State v. Andujar* and debated at the Judicial Conference. We hope these comments provide meaningful and constructive feedback, and we stand ready to assist the Court in advancing these initiatives in any way we can.

Respectfully,



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