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June 8, 2022

Hon. Glenn A. Grant, J.A.D.
Administrative Director of the Courts
Hughes Justice Complex, P.O. Box 037
Trenton, New Jersey 08625-0037

Re: Recommendation 13 of the Committee of the Judicial Conference on Jury Selection ("JCJS")

Dear Director Grant:

Please accept this letter commenting on JCJS recommendation 13 to reduce the number of peremptory challenges and responding to comments by the Association of Criminal Defense Lawyers (hereinafter "ACDL") objecting to any reduction and by the New Jersey Institution for Social Justice (hereinafter "NJISJ") objecting to their retention.[1] While I concur with the JCJS majority's rejection of the ACDL's position, recommendation 13 suffers from the same defect which compromises all remedies short of elimination - it preserves the tool that facilitates continued invidious discrimination in jury selection. It is submitted that any assessment of these conflicting positions should begin with an acknowledgement that:

- peremptory challenges are, by definition, arbitrary,
- peremptory challenges are not transparent in their exercise,
- peremptory challenges facilitate conscious, strategic discrimination based on race, and
- peremptory challenges perpetuate the corrupting influence of implicit bias.

While these observations are amply supported by the exhaustive scholarly research compiled by JCJS staff and empirical studies commissioned by JCJS leadership, they are not new. They were drawn thirty-six years ago when, in his Batson v. Kentucky concurrence, Justice Thurgood Marshall called for the elimination of peremptory challenges. 476 U.S. 79, 102-03 (1986) (Marshall, J., concurring). "Enough is enough," the NJISJ recently proclaimed in its dissent from recommendation 13 which preserves

peremptory challenges. Through this letter, I join Justice Marshall and the NJISJ in their call to eliminate peremptory challenges.

A. The ADCL's position should be rejected.

In their dissent from JCJS recommendation 13, the ACDL describes the reduction of peremptory challenges as the judiciary's long-preferred "solution in search of a problem..." (JCJS II at 47). For six interrelated reasons, it is submitted that there is a problem, that peremptory challenges lie at its core, and that the ACDL's efforts to fully retain them should be rejected.

First, the ACDL's position is premised upon a nonexistent right, namely for a litigant to obtain a "favorable" jury. Second, the JCJS recommendations to expand the jury pool, to increase counsel's direct questioning of jurors, and to further encourage judicial granting of cause challenges, collectively undermine the historical justification for peremptory challenges. Third, peremptory challenges are, by definition, arbitrary and their exercise is not transparent, thereby undermining any meaningful judicial review. Fourth, peremptory challenges empower litigants to engage in unlawful "strategic" racial discrimination through their reliance upon group stereotypes in deciding which jurors to strike. Fifth, the existing Batson/Gilmore paradigm is incapable of curbing this unlawful discrimination. Sixth, the exercise of peremptory challenges completely ignores the prospective juror's right to fully participate in our democracy through jury service.

These reasons will be addressed *seriatum*.

I. Peremptory challenges enable counsel to pursue a "favorable" jury, rather than the "fair jury" to which they are entitled.

Historically, "the use of peremptory challenges had some justification in the limited numbers of persons eligible for jury duty."[2] In England, those eligible persons were limited to male property owners. Based upon this limited jury pool, it was not unusual for a potential juror to have personal animus against a litigant arising from a prior business transaction or personal interaction. Use of peremptory challenges thereby facilitated a "fair" jury by eliminating potential jurors who may harbor personal animus against a litigant. Thus, at English common law, the original purpose of peremptory challenges was to promote selection of a "fair" jury, meaning one that could decide the case based on the facts and the law, rather than based upon any personal bias for or against a litigant. (Ex. A at 3).

Over time, savvy English litigators began to use peremptory challenges strategically. More specifically, they utilized peremptory challenges to excuse potential jurors whom the lawyers perceived would not view their client's case favorably. This strategic "stacking" of the jury panel was determined to be an abuse of the jury selection system and ultimately resulted in the elimination[3] of peremptory challenges in England and in other former Commonwealth nations (Wales, Northern Ireland, and Canada). (See Ex. A at 3). This elimination occurred "without any chaos in the courts."[4]

Before 1969, trial counsel in New Jersey could pursue a "favorable" jury through a two (2) step procedure. Step one involved their participation in a voir dire process that enabled counsel to indoctrinate the entire panel on their client's position and to identify those jurors whom counsel perceived would be "favorable" to their client's position. Step two involved their exercise of peremptory challenges which enabled them to exclude jurors whom they perceived to be "unfavorable." Abuses of this system became rampant. Identifying the source of these abuses, the Supreme Court in State v. Manley observed that "[t]he impression is inescapable that the aim of counsel is no longer the exclusion of unfit or partial or biased jurors. It has become the selection of a jury favorable to the jury's point of view as indoctrination through the medium of questions on assumed facts and rule of law can accomplish." 54 N.J. 259, 281 (1969). To curb this abuse, the Manley Court ruled that voir dire shall be "conducted exclusively by or through the trial judges to the extent reasonably possible..." Id. at 282-83. Central to this ruling was the Court's determination that litigants do not have a right to a "favorable" jury, defined as one predisposed to return a verdict in that litigant's favor. Id. at 281. These litigants are entitled to a "fair" jury, defined as one comprised of jurors without "a bias relating to the particular case on trial or the parties or the witnesses thereto..." State v. Gilmore, 103 N.J. 508, 530-31 (1986). These "fair" jurors are those amenable and capable of returning a verdict based upon the evidence presented in the law as instructed. Id.

Rule amendments crafted to implement the Manley decision addressed only the first step (voir dire), leaving the second step (peremptory challenges) intact. Since these initial post-Manley Rule amendments may have unduly restricted trial counsel's participation in voir dire, JCJS recommendation 13 prudently seeks to address the first step. (See JCJS II at 4). However, it fails to adequately[5] address the second step. Through their strenuous opposition to any reduction in the number of peremptory challenges, it is submitted that the ACDL seeks to fully preserve the second step and their ability to seek a favorable jury, rather than the fair jury to which their clients are legally entitled.

II. Continued implementation of reforms recommended in the Lisa Report and implementation of JCJS recommendations 1-8, 13 (voir dire), and 14 collectively undermine the historical justification for peremptory challenges.

As previously noted, only property owners were eligible for jury duty in 18th century England and colonial America. (See 2, supra., Ex. A at 6). This limited pool provided an initial justification for peremptory challenges. Id. In New Jersey, our legislature has substantially enlarged the pool of potential jurors through methods including expansion of juror lists and elimination of virtually all occupational disqualifications.[6] Accordingly, the 1997 Weiss Report concluded that "[w]ith the broadening of representation in jury pools, the historical basis for peremptory challenges has lost its

justification."[7] Through recommendation 1 – 8, the JCJS seeks to further expand the jury pool, further undermining the historical justification of peremptory challenges. (See JCJS II at 2-3).

Through recommendation 13, the JCJS seeks to expand relevant[8] direct attorney questioning of prospective jurors. [JCJS II at 4]. This builds upon reforms recommended by the Lisa Committee[9] which recognized that, as the voir dire gets better, the need for peremptory challenges decreases. See Lisa Report at 5. Accordingly, that Committee recommended more extensive questioning and attorney participation. Id. at 1. In response, a Bench Manual was promulgated which significantly expanded the number of standardized questions and included several "open ended" questions designed to provide for a more robust voir dire process. See New Jersey Judiciary, Bench Manual on Jury Selection, 16-21 (2014). Before Batson and Gilmore were decided in 1986 and the Bench Manual was issued in 2014, trial counsel offered "incomplete information" as a reason why they rely so heavily upon group stereotypes in their exercise of peremptory challenges. (See 6, infra.) Access to this information through the expanded voir dire process contemplated by the Lisa Committee and the JCJS enables counsel to more intelligently decide whether to exercise a cause challenge and to articulate the basis for that challenge. Thus, this information also reduces counsels' need to rely upon the group stereotyping which they so extensively employed in the exercise of peremptory strikes.

Through recommendation 14, the JCJS encourages the liberal granting of cause challenges by relaxing applicable the standard. (JCJS II at 4). This recommendation responds to private bar claims that the number of peremptory challenges should not be reduced because trial courts are interpreting "cause" challenges too narrowly and inconsistently. In 2005, a similar objection was raised to the Lisa Committee. While recommending a substantial reduction in the number of peremptory challenges, the Lisa Committee also recommended that, "judges should be more liberally disposed to excusing jurors for cause where the issue is a close one." Lisa Report at 39, quoted in, Ex. A at 13-14. This latter recommendation[10] was adopted and trial courts were encouraged to more liberally excuse jurors for cause. See Jury Manual at 22.

Empirical studies commissioned by JCJS leadership reflects that trial courts have successfully implemented this recommendation. The Rose Report confirms that "the most common was for individuals to conclude their voir dire experience was through a challenge for cause..." Mary R. Rose, Ph.D., Final Report on New Jersey's Empirical Study of Jury Selection Practices and Jury Representativeness at 76, (June 1, 2021) (hereinafter "Rose Report"). Fifty-seven (57%) percent of these individual were excused for cause, "dwarfing" all other categories. Id. In view of the frequency that trial courts grant cause challenges, Dr. Rose concluded that, "the notion of 'stingy' judges seems unlikely." Id. at 78. To the contrary, the data reflects that "[j]udges in New Jersey trials use cause challenges with *remarkable frequency*." Id. at 85 (emphasis added). Building upon the remarkable frequency that trial courts now

grant cause challenges, the relaxed cause standard contained withing JCJS recommendation 14 is designed to fully assuage any legitimate concerns of narrow judicial interpretation.

III. Peremptory challenges are arbitrary and are exercised under nontransparent procedures.

The "very old credentials" of peremptory challenges date back to medieval England. See Gilmore, 103 N.J. at 532 n. 6 (1305 A.D.) As Blackstone explains "[i]n criminal cases, ... allowed the prisoner an *arbitrary and capricious* species of challenge to a certain number of jurors, without sh[o]wing any cause at all, which is called a peremptory challenge..." 4 William Blackstone, Commentaries on the Laws of England 353 (1765)(emphasis added). Tragically, this arbitrary relic of medieval England remains at the center of our current jury selection procedure. It determines the composition of deliberating juries, thereby injecting its inherent arbitrariness into that procedure. (See Ex. A. at 6-7). It also functions to deprive those prospective jurors who are statutorily eligible to serve from fully participating in our democracy through jury service. (See id. at 2 & n. 7, 10-11). Since the striking party does not have to articulate why they are excluding a juror, peremptory challenges are not exercised in a transparent manner. (See Ex. A at 8). It is submitted that this lack of transparency is exposed in the colloquy between Justice Albin and ACDL amicus counsel in Andujar. This revealing exchange is reproduced below:

Justice Albin:

> I want to ask you a question. It may be a little off the beaten track. Isn't it more likely that implicit and explicit bias is likely to be concealed under the veil of peremptory challenges and that Batson and Gilmore is not going to be able to regulate it?

ACDL Counsel:

> I'm afraid of where you're going.

Justice Albin:

> ...the defense bar, including your organization, is the biggest supporter of multiple peremptory challenges, which is actually concealing the very thing you're condemning.

ACDL Counsel:

> I was gonna say yes to the first part, but now that you're accusing me of concealing implicit racism I can't go there.

(See Ex. B. at 1). Counsel's reluctance to concede this the lack of transparency is tactically understandable, particularly in view of its nexus to the continued discrimination in jury selection suggested

within Justice Albin's question. We will now explore that nexus further supports the elimination of peremptory challenges.

IV. Peremptory Challenges are tools utilized to engage in 'strategic" racial discrimination.

Our Supreme Court has repeatedly condemned reliance upon group associations or group stereotypes in exercising peremptory challenges. See State v. Andujar, 247 N.J. at 275, 311 (2021). State v. Fuller, 182 N.J. 174, 196-97 (2004), State v. Gilmore, 103 N.J. at 531. Nevertheless, the trial bar continues to rely upon group stereotypes in their pursuit of "favorable juries." (See 9, infra.).

It is submitted that their persistence and vehemence is attributable, in part, to their ethical obligations to zealously represent their clients in a jury selection procedure governed by ambiguous and arguably contradictory language within the Gilmore decision.

This ethical obligation was clearly articulated by defendant Gilmore's legal representatives: "[d]efense counsel has an ethical duty to zealously strive for an acquittal. His responsibility in picking a jury is to procure a panel that is most likely to acquit, not one that is necessarily impartial."[11] This duty is reflected in RPC 1.3 which provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." This duty of zealous representation lies at the heart of trial attorney "culture" which is reinforced by a value system[12] which venerates the protection of the others, including criminal defendants who are members of racial or ethnic groups which have been historically marginalized.

Four years before Gilmore was decided, ABA delegate and distinguished law professor Stephen A. Saltzberg observed that trial counsel exercising peremptory challenges "naturally rely upon stereotypes..." (Saltzberg, "Peremptory Challenges and the Clash Between Impartiality and Group Representation," 41 Md. L Rev. 337, 342 (1882), quoted in, Ex. A at 1). Professor Saltzberg candidly acknowledged the invidious nature of these stereotypes: "in some cases, attorneys have made race or sex or religion the dominant, sometimes the exclusive criterion for deciding who to challenge." Id. To justify this reliance, Professor Saltzburg argues that there were no viable alternatives. Noting that jurors may be unaware of their subconscious prejudices, the author observed that the litigants "must find some other way to discover hidden predispositions." Id. at 361. He then identified "the traditional method – reliance upon stereotypes that experience indicates are accurate." Id.

Synthesizing deficiencies in the application of Batson's third step, one commentator observed that "unconscious [bias] is almost undetectable and conscious bias is too easy to hide."[13] Conscious bias is exemplified by trial counsel's use of peremptory challenge to "stack" the jury with individuals whom counsel perceives to be favorable to their side. (See 2-3, supra.). Seeking this "favorable" jury, Professor Randall Kennedy observed that "many attorneys, prosecutors as well as defense counsel, racially discriminate in their deployment of preemptory challenges because they reasonably believe that doing so

redounds to the benefit of the side they represent. Here... emerges the phenomenon of strategic... racial discrimination."[14]

As an example of this strategic racial discrimination, assume that trial counsel are privy to opinion surveys reflecting that Black citizens are more likely than White citizens to view the police with mistrust and to view themselves as targets of aggressive police investigation tactics.[15] Given these opinion surveys,

> if a prosecutor is attempting to convict a defendant in a jury trial, and his main witnesses are police officers, the prosecutor has every reason to try to strike as many black venire members as possible. When a prosecutor knows that he can statistically improve his chances of having a jury with more favorable jurors, he is likely to jump at this chance. The same can be said for the defense, who is more likely to strike white jurors in a case where police testimony is used because white jurors statistically, are likely to view police testimony more favorably.[16]

Such strategic[17] racial discrimination is a particularly egregious form of prohibited "stacking."

While this trial counsel's "experience" may support some increased statistical probability that a particular juror may or may not be "favorable" or even "fair," it is submitted that the exclusion of all prospective jurors falling within the stereotyped group or class simply a cost too great for our society to accept. This cost/benefit analysis was aptly synthesized by Professor Kennedy as follows:

> [e]ven if it were possible for judges to distinguish easily and confidently between prejudiced racial discrimination and strategic racial discrimination, the Court would still be correct in outlawing *all* racial discrimination. The benefits of permitting strategic racial discrimination are not worth the costs. When both the defense and the prosecution have used their peremptory challenges in a racially discriminatory but strategically sensible way, it may be that they have accomplished a good: removing from the trial jury extremes of predilections, thereby creating a jury more likely to agree on one verdict or another than a jury formed without the molding of racially discriminatory peremptory challenges. Assuming that to be true, however, one must balance against that good the costs of permitting lawyers to exclude prospective jurors on a racial basis. *A major cost is the public perception that the judicial system is unwilling to disentangle itself from the race line and that race not only matters but should matter in the adjudication of guilt or innocence.*

Race, Crime and the Law at 227-28 (emphasis added).

In Gilmore, the Court rejected the defense argument that a litigant has a right to a "favorable" jury. 103 N.J. at 530-31. Unfortunately, it also used ambiguous language regarding reliance upon "hunches" and group stereotyping. Seeking to describe legitimate use of peremptory challenges, the Gilmore Court stated that:

> there are any number of bases on which a party *may believe*, not unreasonably that a prospective juror may have some slight bias that would not support a challenge for cause but that would make excusing him or her *desirable*. Such reasons, if they *appear to be genuine*, should be accepted by the court, which will bear the responsibility of assessing the genuineness of the ...response and of being alert to the reasons that are pretextual.

Id. at 532 (emphasis added). Focusing upon this language, a minority of the Weiss Committee opposed both elimination and reduction of peremptory challenges. Summarizing the minority's argument, the

Weiss Report provides that "[t]he major argument of those who favor the continued use of peremptory challenges is that when a lawyer cannot sufficiently demonstrate a prospective juror's bias so as to challenge for cause, but for whom he/she nevertheless has an *intuitive feeling* that the prospective juror will not be unbiased in deciding the case, the sole remedy is the exercise of a peremptory challenge." Weiss Report at 4 (emphasis added).

Explaining operation of its burden shifting paradigm, the Gilmore Court emphasized that "[p]ermitting such questioning of the use of peremptory challenges does not destroy the "hunch" challenge. There is nothing ineffable or inscrutable about "sound" "hunches."[18] While preserving the "hunch" challenge, the Gilmore Court acknowledged the dangers inherent in such preservation: "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." 103 N.J. at 538. Thus, the Gilmore Court retained peremptory challenges, in large part, to preserve the so-called "hunch" challenge which, in turn, the Court suggests is not subject to meaningful scrutiny under the paradigm. Moreover, recent developments in cognitive science reveal that counsel's "hunches" probably reflect their own implicit biases. (See Ex. A. at 10).

Seizing upon these ambiguities, trial counsel continue to rely upon their "experience" as informing their exercise of peremptory challenges. (See Ex. B). Further analysis reveals that counsel's "experience," in turn, is premised upon their reliance upon group stereotyping, some of which may be based upon race, gender, or ethnicity. Such racial stereotyping is more clearly revealed in a scholarly article previously authored by the ACDL's counsel in Andujar.[19] In his opposition to any reduction in peremptory challenges, the author quoted Justice Scalia's contention that opponents of peremptory challenges are "...not concerned about the black criminal defendant in Bergen County New Jersey, who is going to get a trial in front of a jury where there may be two blacks in the whole venire, and the lawyer may have to use **racially conscious strikes** to get one of them on the jury." Id. at 1207 (emphasis added). To address the concerns of that Black criminal defendant, the author explained that "the peremptory is one of the few *tools* we have to try *to right the imbalance* faced by a defendant who is unpopular, who nobody likes, who jurors start out hating because of the color of his skin, or because of some other thing over which that person has no control." Id. at 1208 (emphasis added). More recently, after noting that the overwhelming majority of his clients have been Black people, counsel recounted that "[i]nvariably during jury selection these clients and their families have said *in haec verba*, 'we don't see anyone like us in the panel.' Yes, if there was a chance to use peremptories to get a more diverse jury where race would not be improperly invoked in deliberations – we took it."[20] Id. By referencing who his Black clients "see" and removing any prospective juror who is not "like us," counsel is apparently relying upon his visual observation of the immutable characteristic of race[21] to determine which jurors to strike. Alternatively stated, ACDL counsel seeks the JCJS's imprimatur for continued reliance upon group stereotypes, including those drawn on

racial grounds, by phrasing it as a "tool" to remedy their suspicions[22] that a prospective juror may harbor some implicit biases. (Id., see also JCJS II at 47). It is submitted that this effort to preserve racially conscious "hunch" challenges must be firmly rejected.

In its opposition to any reduction in the number of peremptory challenges, the ACDL suggests that any current "problems were not caused by the use – or misuse – of such challenges by defense counsel." (JCJS II at 46). This suggestion is squarely refuted by empirical evidence presented to the JCJS. More specifically, in her report to the JCJS, Professor Rose found that "of the 135 peremptory challenges exercised by criminal defense attorneys, just six were against African American venire-persons, whereas 114 were against Whites." (Rose Report at 71) These findings were consistent with her prior analysis of 13 noncapital felony trials in North Carolina. See Mary R. Rose, "The Peremptory Challenge Accused of Race or Gender Discrimination, Some Data from One County," 23 Law and Human Behavior, 695, 697 (1999). In those trials, Professor Rose found that when viewed "overall," Whites (49%) and African Americans (42%) were excused via peremptories at rates that were not statistically significant. Id. at 698. However, "overall" finding is attributable to each side "canceling out" the other: "African Americans were much more likely to be dismissed by the State: 71% of African Americans dismissed from service were excused by the prosecution. The reverse was true for Whites: 81% of White person excused were dismissed by the defendant. This association between prosecution/defense and the race of the juror who was excused was highly significant,...,'" Id. at 698 -99.

These highly statistically significant differences reflect that both prosecutors and defense counsel considered the venire- person's race when deciding whether to exercise peremptory challenges. Professor Rose also concluded that the "canceling out" effect upon the "overall" exclusion rate "masked the adversary nature of excusing African-Americans and Whites." Mary R. Rose, "A Voir Dire of Voir Dire: Listening to Jurors Views Regarding the Peremptory Challenge," 78 Chi-Kent L. Rev.1061, 1069 (2002) (discussing North Carolina study). The adversarial context in which these exclusions occurred do not detract from their discriminatory effect.

In its written comments to the JCJS, the American Civil Liberties Union ("ACLU") cited several studies yielded results fully consistent with Professor Rose's findings.[23] Understandably, the ACLU concluded that these "studies have shown that peremptory challenges are still being used in an expressly discriminatory fashion." (Id. at 3, n. 7). In view of this ongoing invidious discrimination, the ACLU opined that "[i]n a utopian world, elimination of peremptories would be ideal." Id. at 4. Conspicuous in its absence is any explanation why this ideal outcome cannot be achieved today. It is respectfully submitted that the JCJS is uniquely well-positioned to achieve this outcome through modification of recommendation 13 to abolish peremptory challenges.

V. The Baston/Gilmore paradigm is incapable of curbing invidious discrimination in the selection of a jury.

The continued use of peremptory challenges remains a hotly contested issue among JCJS members. However, there appears to be unanimous agreement among JCJS members that present Batson/Gilmore paradigm simply doesn't work. It contains crippling structural defects including its focus upon the subjective mental state of the striking party and the allocation of the burdens of both production and persuasion on an objecting party. (See Ex. A at 8-12, see JCJS I at 5, D1 – D15). Indeed, it appears that all JCJS participants seek to address these defects through some modification of the existing paradigm. (See JCJS II at 37). However, these modifications, modeled after Washington GR 37, retains these structural defects (See Ex. C (GR 37 Memo)). If peremptory challenges are eliminated, it is submitted that there would be virtually[24] no need to rely upon any form of the Batson/Gilmore paradigm. In my comments to be submitted to the JCJS on June 9, 2022, I shall propose modifications to the Batson/Gilmore paradigm which more directly address these structural defects, and which, if adopted, would effectively eliminate peremptory challenges.

VI. The exclusion of prospective jurors through the exercise of peremptory challenges completely ignores their rights to fully participate in our democracy through jury service.

In its opposition to any reduction in the number of peremptory challenges, the ACDL's focus is exclusively upon the rights of their clients. (See JCJS II at 46). The exclusion of prospective jurors through the exercise of peremptory challenges ignores their rights to fully participate in our democracy through jury service.

In my comments to be submitted to the JCJS on June 9, 2022, I shall more fully document the origin and contours of these prospective juror rights. I shall also argue that if the striking party articulates a legally cognizable reason to support a cause challenge, then the exclusion of that prospective juror does not violate their right to serve on a jury. Absent this basis for a valid cause challenge, I shall argue that their exclusion through the exercise of a peremptory challenge violates their rights to fully participate in our democracy through jury service.

B. The JCJS should reconsider its recommendation to reduce, rather than eliminate peremptory challenges, as it condones continued invidious discrimination in jury selection.

The extreme ACDL position stands in stark contrast to other criminal practitioners withing the JCJS majority who have agreed to reduce the allotment of peremptories from 20/12 to 8/6 for the purposes of a JCJS pilot program. (See JCJS II at 4, 20-24). Certainly, any reduction is an improvement. However, this reduction should be viewed within the context of current peremptory usage. More specifically, a 2015 study revealed that, on average, the State exercised 6 or less challenges and the defense exercised 10 or

less challenges. (JCJS I, Attachment G. at 14, 23). It is submitted that this reduction to 8/6 is not "significant" because it merely codifies the State's existing practice of exercising 6 challenges and only modestly reduces the current defense practice to roughly coincide with the national average of 7.3 challenges. Foregoing these "unused" peremptory challenges - 12.7 for the defense and 4 for the State - could be viewed as "house money" readily relinquished by trial counsel seeking to preserve their currently utilized complement of peremptory challenges. Since such retention effectively preserves peremptory challenges, this recommendation suffers from the same defect which compromised all remedies short of elimination. More specifically, it preserves peremptory challenges – the tool that facilitates continued invidious discrimination in jury selection. (See, 7 supra.).

Thank you for allowing me to share my thoughts on these important issues.

Very truly yours,

MARTIN CRONIN, J.S.C.

MGC/tmh

Cc: Hon. Shelia Venable, A.J.S.C.
Hon. Mark Ali, P.J.Cr.

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[1] Judicial Conference on Jury Selection Recommendations for Improving Jury Selection (April 28, 2022)(hereinafter " JCJS II"), comments of Association of Criminal Defense Lawyers of New Jersey to JCJS (April 19, 2022), reproduced at JCJS II 45-49, comments of New Jersey Institute of Social Justice to JCJS (April 19, 2022), reproduced at JCJS II 50-56. This letter incorporates by reference my prior letter to the Supreme Court Committee on Jury Selection in Civil and Criminal Trials (June 25, 2019)(attached as Ex. A.), excerpts from an unofficial transcript of oral argument before the New Jersey Supreme Court in State v. Andujar (attached as Ex. B.), my prior memorandum regarding Washington GR 37 (Jan. 13, 2020)(attached as Ex. C).

[2] Report of Assignment Judges Committee to Review the use of Peremptory Challenges, at 5 (1997) ("Weiss Report").

[3] See Weiss Report at 6, noting that in 1825, England eliminated the use of peremptory challenges by prosecutors. For defendants, the number was reduced to 3 in 1977. In 1988 the use of peremptory challenges in criminal trials was eliminated altogether "because defense attorneys were misusing the system to "stack" juries with individuals who favored their side." Id. at 6-7.

[4] A Guide to the New Jersey Judicial Conference on Jury Selection at C-2 (Sept. 28, 2021)(hereinafter "JCJS I").

[5] Reduction merely reduces the extent of invidious discrimination, thereby implicitly condoning it and perpetuating it. (See 11, infra.).

[6] See Weiss Report at 5. Compare N.J.S.A. 2B:20-10 (1995)(present) with N.J.S.A. 2A:6-2 (1991)(repealed).

[7] Weiss Report at 5.

[8] This relevant issue is the prospective jurors' ability to decide the case based upon evidence presented and the law as instructed. (See 3, supra).

[9] Report of the Special Supreme Court Committee on Peremptory Challenges and Jury Voir Dire, at 5 (2005)("Lisa Report").

[10] The legislature did not adopt the Lisa Committee's accompanying recommendation to reduce peremptory challenges.

[11] Brief of *Amicus*, Office of the Public Defender, State v. Gilmore, Docket No. 023874 at 33, n. 17 (1986).
[12] In other contexts, the conflict between value systems and legal requirements have resulted in cognitive dissonance, presenting decisionmakers with the "means-ends" dilemma. See Caldero & Crank, Police Ethics: Corruption of the Noble Cause at 117 (2000)(applied to law enforcement officers).
[13] Matt Haven, Reaching Batson's Challenge Twenty-Five Years Later: Eliminating the Peremptory Challenge and Loosening the Challenge for Cause Standard, 11 U. Md. L.J. Race, Religion, Gender & Class 97, 117 (2011).
[14] Randall Kennedy, Race, Crime and the Law at 218 (1997). Similarly, Mr. Haven observed that reliance upon stereotypes is high in the legal community "[a]cting rationally upon these stereotypes, "[t]he discriminating litigant improves his or her chances of seating a jury 'favorable' to her case..." Haven, supra, at 114-15.
[15] Id. at 113.
[16] Id. at 113-114. See also, State v. Andrews, 216 N.J. 271, 291 (2013)(discriminatory strikes by a criminal defendant).
[17] See Kennedy, supra. at 218. This "tactical" or "strategic" use of peremptory challenges is well ingrained into the culture of criminal trial practice in New Jersey and throughout the United States. See Weiss Report at 8 – 9, see Saltzburg, supra, at 341-42 (counsel seek to "control the composition of the jury" by "excluding those jurors most strongly biased in favor of the opposition.")
[18] 103 N.J. at 538. See also, id. at 548 (O'Hearn, J. concurring)("a party is entitled to the visceral reaction of a trial attorney"). Accord State v. Zavala, 259 N.J. Super. 235, 240 (L.Div. 1999) (acknowledges that "Gilmore did not eliminate the traditional 'hunch' challenge..."). Subsequent advances in cognitive science suggest that this 'hunch' may reflect of counsels' implicit bias. (See Ex. A at 7-8).
[19] See Brown, "Peremptory Challenges as a Shield for the Pariah," 31 Am. Crim. L. Rev. 1203 (1994).
[20] See Brown, "Voices Not Heard at Judicial Conference on Jury Selection," New Jersey Law Journal (Nov. 17, 2021).
[21] The express nature of this consideration is established by counsel's description of these racially conscious strikes as a "tool" to remedy the historical imbalances that continue to exist in our criminal justice system.
[22]If prospective jurors are unaware of their biases, the efficacy of expanded attorney conducted voir dire to probe the existence of their implicit biases is highly questionable. Judge Bennett also acknowledged the inherent limitation of such juror questioning: "the interrogation process is designed to ferret out concealed explicit bias, not implicit bias." Jerry Kang, Mark Bennett, et. als., "Implicit Bias in the Courtroom," 59 U.C.L.A. Rev. 1124, 1179 (2012), cited as source material, in JCJS II at B-1.
[23] Karen Thompson, Comments Regarding Prepared Changes to the Jury Selection Process in New Jersey (Nov. 5, 2021). For example, the ACLU cited one study which revealed that while prosecutors excluded black venire-persons more than four (4.51) times more frequently than white venire-persons, defense counsel struck white venire-persons more than four (4.21) times more frequently than black venire-persons. DeCamp, "It's Still About Race: Peremptory Challenge Use on Black Prospective Jurors," 57 J. of Rsch in Crime and Deliq. 3, 3 (2020). In another study, prosecutors used 60% of their peremptory challenges against black venire-persons while defense counsel used 87% of their challenges against white venire-persons. Id., citing Grasso, "A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials," 97 Iowa L. Rev. 1531, 1539 (2012).
[24] Although the exercise of cause challenges could theoretically be subject to some forms of Batson/Gilmore analysis, "any pretext finding would be effectively estopped by the prior judicial finding of the juror's case-specific bias, a finding required to previously dismiss that juror for cause." (Ex. A. at 4).

SUPERIOR COURT OF NEW JERSEY
CRIMINAL DIVISION
ESSEX VICINAGE

Chambers of
Honorable Martin Cronin
Judge

Veterans Court House
50 West Market Street, 8th Fl.
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June 25, 2019

Hon. Alberto Rivas, A.J.S.C.
Chair, Supreme Court Committee on Jury
Selection in Civil and Criminal Trials
Superior Court of New Jersey
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Re: Reevaluation of Peremptory Challenges

Dear Colleagues,

A. Introduction.

Please accept this letter as supplementing my oral comments made during the jury selection roundtable conducted at the May 7, 2019 criminal division retreat. Initial observations made by panel members focused primarily upon jury selection efficiency. Repeated references were made to maximizing jury pool utilization and minimizing petit jury selection time. Within that efficiency discussion, a reduction in the number of peremptory[1] challenges was mentioned.

My comments at the roundtable were triggered by a sense of déjà vu. Over the past 20 years, blue ribbon panels,[2] standing Supreme Court committees,[3] and presiding judge conferences[4] have consistently recommended reductions in the number of peremptory challenges. These prior recommendations were primarily supported by efficiency arguments.[5] Even though all of these recommendations were thoughtfully made by respected practitioners and jurists, none of their reduction recommendations were implemented. Hence, efficiency alone may be insufficient to support necessary change in our use of peremptory challenges. The continued strategic use of peremptory challenges, affecting the composition of the jury, in terms of race, ethnicity, and gender, is a more compelling reason to effectuate change. Such strategic use of peremptories

always conflicts with the purpose of jury selection and often facilitates constitutional violations.

In my earlier comments, I suggested a shift in primary focus away from efficiency to fairness, defined as selection of jurors without case-specific bias which is the authorized purpose of jury selection.[6] Additional consideration of recommendations made by the Supreme Court Committee on Minority Concerns,[7] suggests that this focus shift is also supported by inclusion, grounded upon the constitutional rights of prospective jurors to fully participate in our democracy through jury service. Given that these constitutionally based deficiencies arise within a judicial proceeding, several commentators have forcefully argued that judicial acquiescence to continued use of peremptory challenges impugns the integrity of the entire criminal justice system, including the integrity of the judiciary itself.[8]

Recent advances in cognitive science, illuminating the effect of implicit bias upon the exercise of peremptory challenges and the application of the Batson/Gilmore paradigm,[9] suggest that now is the time to critically reevaluate whether the continued use of peremptory challenges advances or inhibits the selection of a fair and inclusive jury. As illustrated by the landmark State v. Henderson[10] decision, our Supreme Court is receptive to considering scientific research when considering the continued viability of legal frameworks designed to safeguard constitutional rights.

This reevaluation of our jury selection procedures supports elimination of preemptory challenges, a more expansive granting of excusals for cause,[11] and comprehensive training of all criminal justice participants on both the redefined "cause" challenges and the effects of implicit bias. These recommendations are hardly novel. In Batson, Justice Marshall recommended eliminating peremptory challenges altogether.[12] A majority of the Weiss committee concluded that such elimination was "desirable."[13] The Lisa committee recommended that judges "should more be more liberally disposed to excusing jurors for cause...."[14] As recommended by the Supreme Court Committee on Minority Concerns, implicit bias training was featured during our 2018 Judicial College.[15]

Over the past several years, the effect of implicit bias has been illuminated by a growing body of scientific and scholarly research.[16] These effects have been widely accepted within the legal community. Acknowledging its potential effect on jury selection and judicial decision making, the American Bar Association launched an implicit bias educational initiative in 2016.[17]

In addition to scientific advances, this reevaluation is facilitated by the "lessons learned" through the use of peremptory challenges and the paradigm over the past thirty (30) years.

Significantly, this information was unavailable to the Gilmore Court when it adopted the Batson paradigm in 1986, to the legislature when it amended the peremptory challenge statute in 1995,[18] and to the Weiss and Lisa Committees when they recommended to reduce, rather than to eliminate, peremptory challenges in their reports issued in 1997 and 2005, respectively.

B. The Reevaluation – Focus Upon Case-Specific Bias and Inclusion.

Our Supreme Court in State v. Gilmore reiterated that the objective or purpose of jury selection is to empanel a "fair jury" defined a one comprised of jurors without case specific bias.[19] Peremptory challenges initially were created in England to disqualify potential jurors with case specific bias or animus against a specific litigant. Thus, a refocus upon fairness not only advances the present purpose of jury selection, but would also realign the present use of peremptory challenges with its initial justification as envisioned in England centuries ago.

By focusing upon the legal sufficiency of the reason proffered by counsel to support a claim of case-specific bias in a cause challenge, rather than whether counsel genuinely believes that this reason supports that claim in response to a Batson/Gilmore objection to a peremptory challenge, counsel's subjective mental state becomes irrelevant to the court's determination of whether to excuse that juror.[20] Divining counsel's mental state is a challenging task that courts are often "ill-equipped" to perform.[21] By removing inquiry into counsel's subjective mental state, this revised approach focuses upon objective factors, namely the legal sufficiency of the reason proffered by counsel to support the cause challenge. Trial courts are already familiar with this process, as cause challenges play a central role in our existing jury selection process. Since the record of this objective analysis of legal sufficiency is more amenable to appellate review, greater consistency in application is likely to evolve over time.

Given the limited time and information available during the jury selection process, the trial court is better equipped to perform this legal sufficiency determination then it is to divine counsel's mental state.[22] Clarification through rulemaking of those reasons which arise to legally sufficient "cause" would enhance the predictability of the revised procedure. This should also reduce these legitimate predictability concerns and assist all criminal justice participants in their transition into the revised jury selection procedure.

Cognitive scientists maintain that implicit bias affects everyone - jurors, litigants, counsel, and the court.[23] To minimize the potentially corrupting effects of implicit bias, these scientists essentially recommend that the subject "slow down" and refrain from making "snap judgments"

which may reflect the operation of implicit bias.[24] If counsel were required to articulate the factual and legal basis for each claim of case-specific bias, asserted through a "cause" challenge, then they would be forced to "slow down" and reflect upon the potential operation of implicit bias upon their claim. Moreover, a court ruling upon the legal sufficiency of each claim would also be required to "slow down" and similarly reflect.[25]

This revised approach simplifies the jury selection process, significantly reducing reliance upon the Batson/Gilmore burden-shifting paradigm.[26] Since the existence of case specific bias constitutes sufficient grounds to excuse a prospective juror for "cause," counsel would have no need to rely upon a peremptory challenge to excuse that juror. If no peremptory challenge is used, then a court need not determine whether that challenge was a pretext for invidious discrimination. Moreover, any pretext finding would be effectively estopped by the prior judicial finding of that juror's case-specific bias, a finding required to previously dismiss that juror for "cause."

This refocused approach significantly modifies long established procedures and requires statutory and rule amendment. Accordingly, this letter seeks to demonstrate why change is needed. This demonstration will revisit the purpose of jury selection, describe present jury selection procedures, identify historical abuses of that system, and explain how the refocused approach promises to more fully curb these potential abuses. When applied together with a jury pool that represents a cross section of the community, this refocused approach is designed to more fully satisfy the purpose of jury selection – to yield a "fair"[27] and "inclusive"[28] jury. Adoption of this approach will silence any suggestion that the judiciary has been complicit in the retention of premptories and their attendant abuses.

C. Present Jury Selection Procedures.

Our present jury selection procedure has four interrelated stages:

(1) creation of a jury pool which is a representative cross section of the community;[29]

(2) dismissal of jurors for whom counsel establishes sufficient "cause" (i.e., case- specific bias) to justify their dismissal in that case;[30]

(3) dismissal of jurors , through peremptory challenges, whom counsel believes have a case-specific bias, but for whom counsel is unable to justify a "cause" challenge;[31] and

(4) application of the Batson/Gilmore burden-shifting paradigm to determine

whether peremptory challenges were exercised to purposefully discriminate against a legally cognizable group.[32]

The first stage vindicates the constitutional right of prospective jurors to fully participate in our democracy through jury service, thereby operationalizing "inclusion." The second stage enables counsel and the court to strike those prospective jurors with case-specific bias. It also advances the accused's rights to equal protection by facilitating the exclusion of only those jurors within a legally cognizable group for whom counsel establishes a case-specific bias.

Stage Three involves the exercise of peremptory challenges, a right[33] conferred by statute, N.J.S.A. 2C: 23-13, and by court rule, R. 1:8-3(d). Critically, the law as written diverges drastically from the law as applied at this stage. As written, the law unequivocally provides that no litigant has a right to a favorable jury.[34] As applied, the law effectively permits counsel to strategically use peremptory challenges to obtain a favorable jury. Hence, peremptory challenges are the tool used to apply the law in a manner that circumvents the law as written.

Theoretically, the use of peremptory challenges by each trial attorney will "cancel out" jurors whom counsel believes may harbor a case-specific bias, but for whom counsel is unable to establish such bias as required for a cause challenge.[35] Significantly, trial counsel's exclusion of each juror in this stage involves some form of group association or group bias which may function to exclude members of a legally cognizable group from jury service.[36]

Stage Four is designed to ensure that counsel does not purposefully exclude jurors based upon counsel's group bias against prospective jurors within a legally cognizable group. To achieve this objective, stage four applies the Batson/Gilmore paradigm with the ultimate burden of establishing purposeful discrimination upon the party challenging the exercise of a peremptory challenge. This paradigm involves three (3) steps:

(1) challenging counsel must establish a prima facie case by "showing that the totality of the relevant facts give rise to an inference of discriminatory purpose,"

(2) opposing counsel must articulate a race neutral reason supporting exercise of the peremptory challenge, and

(3) challenging counsel must establish that opposing counsel exercised the peremptory challenge with the purpose to discriminate against a legally cognizable group.[37]

To establish a prima facie case, step one requires an exclusion pattern premised upon the exercise of at least two peremptory challenges upon members of a legally cognizable group.[38] The non-

discriminatory reason articulated in step two "does not demand an explanation that is persuasive, or even plausible."[39] Articulated reasons satisfying this step are virtually unlimited, as courts have accepted trial counsel's dissatisfaction with the juror's facial hair, hair color, employment status, residential neighborhood, demeanor, body language, attitude, and even "vibe."[40] These examples suggest that "[a]ny neutral reason, no matter how plausible or fantastic, even if it is silly or superstitious, is sufficient to rebut a prima facie case of discrimination."[41] Thus, "[i]t is not until the third step that the persuasiveness of the justification becomes relevant."[42] At that time, the trial court must determine trial counsel's mental state, as the court must determine whether trial counsel seeks to exclude the juror for the articulated facially non-discriminatory reason or for the purpose of discriminating against a legally cognizable group. Application of this third step has been widely criticized as undermining the efficacy of the entire paradigm.[43]

D. Peremptory Challenges – Historical Justification.

Historically, "the use of peremptory challenges had some justification in the limited numbers of persons eligible for jury duty."[44] In England during the 1700s, those eligible persons were limited to male property owners. Based upon this limited jury pool, it was not unusual for a potential juror to have personal animus against a litigant arising from a prior business transaction or personal interaction. Use of peremptory challenges thereby facilitated a "fair jury" by eliminating potential jurors who may harbor personal animus against a litigant. Thus, at English common law, the original purpose of peremptory challenges was to promote selection of a fair jury, meaning one that could decide the case based on the facts and the law, rather than based upon any personal bias for or against a litigant.

Over time, savvy English litigators began to use peremptory challenges strategically. More specifically, they utilized peremptory challenges to excuse potential jurors whom the lawyers perceived would not view their client's case favorably. This strategic "stacking" of the jury panel was determined to be an abuse of the jury selection system and ultimately resulted in the elimination[45] of peremptory challenges in England.

Due to the homogeneous jury pool, the potential the use of peremptory challenges to facilitate racial discrimination played no role in their elimination in England.[46] They were eliminated to promote fairness - the same objective that supported their initial creation.

Despite its elimination in England, the common law practice of allowing peremptory challenges continued[47] throughout the United States. As previously noted, the "historical

justification for peremptory challenges was the limited numbers of persons eligible for jury duty in 18th Century England and in colonial America."[48] However, the New Jersey legislature has substantially enlarged the pool of potential jurors through methods including expansion of juror lists and elimination of virtually all occupational disqualifications.[49] Accordingly, the 1997 Weiss Report concluded that "[w]ith the broadening of representation in jury pools, the historical basis for peremptory challenges has lost its justification."[50] Moreover, counsel's use of peremptory challenges to obtain a "favorable" jury – the abusive practice which led to the elimination of peremptory challenges in England – has been repeatedly condemned by New Jersey courts.[51] Nevertheless, it continues. Understandably, trial counsel view this strategic use of peremptory challenges as providing them with a tactical "edge" which they are loathe to relinquish.

E. Implicit Bias in Jury Selection.

The Baston/Gilmore paradigm is designed to enforce the constitutional prohibition against purposeful discrimination against members of a legally cognizable group. Over the past several years, the great weight of scholarly and scientific research has identified that this paradigm's focus upon *conscious* discrimination has undermined its effectiveness.[52] This is because biases often operate *unconsciously.* Implicit bias operates through a heuristic or mental short cut.[53] As Professors Jolls and Sunstein explain, "the problem of implicit bias is best understood in light of existing analyses of System I processes. Implicit bias is largely automatic; the characteristic in question (skin color, age, sexual orientation) operates so quickly... that people have not time to deliberate. It is this reason that people are often surprised to find that they show implicit bias."[54] Through the cognitive process of categorization, this readily observable characteristic, such as skin color, is assigned to a group attribution, such as violence.[55]

These unconscious biases may directly conflict with egalitarian values which the actor consciously holds.[56] This dichotomy is best understood through the prism of the "two cognitive systems. System I is rapid, intuitive, and error-prone; System II is more deliberative, calculative, slower, and often more likely to be error-free. Much heuristic-based thinking is rooted in System I, but it may be overridden, under certain conditions, by System II."[57] Similarly, cause challenges would impose a System II override of the implicit biases otherwise operating under System I.

By requiring counsel to articulate the reason supporting a cause challenge, the proposed refocused approach compels counsel to engage in a conscious, deliberative thought process. This invokes System II, which "overrides" the otherwise operational unconscious or automatic

processes (System I) within which implicit bias flourishes. This court has repeatedly observed this "override" in action. On several occasions, once a prima facie case was established, thereby requiring counsel to articulate a non-discriminatory reason to support any additional peremptory challenges, this court has observed that counsel attempted to exercise very few, if any, additional peremeptories. This anecdotal evidence corroborates not only operation of the "override," but also its self-regulatory effect upon counsel's use of peremptory challenges.

F. Batson/Gilmore Paradigm Revisited.

In overruling Swain v. Alabama, the Batson Court significantly enhanced a court's ability to protect constitutional equal protection guarantees. However, the Batson decision itself reflected some judicial skepticism that its burden-shifting paradigm would actually work. In his concurring opinion, Justice Marshall perceived an inherent flaw in this paradigm:

> 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 hand 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.[58]

By referencing "unconscious racism," these prescient observations foreshadowed operation of implicit bias, a concept that was not widely recognized by cognitive scientists until three (3) years after the Batson decision.[59]

In Swain, the Court admonished prosecutors not to use racially motivated peremptory challenges.[60] After evaluating more than 20 years of non-adherence to that admonition, the Batson Court decided that this admonition was insufficient and that a mechanism or procedure was required to enforce it. The resulting enforcement mechanism was the Batson paradigm. This paradigm was adapted from the procedure which the Court previously developed in complex civil litigation.[61] Similar to the Swain admonition, application of the Batson paradigm now is widely recognized as insufficient to enforce the constitutional guarantee of equal protection under the law.[62]

Synthesizing deficiencies in the application of Batson's third step, one commentator observed that "unconscious [bias] is almost undetectable and conscious bias is too easy to hide."[63] Conscious bias is exemplified by trial counsel's use of peremptory challenge to "stack" the jury

with individuals whom counsel perceives to be favorable to their side. Seeking this "favorable" jury, Professor Randall Kennedy observed that "many attorneys, prosecutors as well as defense counsel, racially discriminate in their deployment of preemptory challenges because they reasonably believe that doing so redounds to the benefit of the side they represent. Here... emerges the phenomenon of strategic... racial discrimination."[64] As an example of this strategic racial discrimination, assume that trial counsel are privy to opinion surveys reflecting that black citizens are more likely than white citizens to view the police with mistrust and to view themselves as targets of aggressive police investigation tactics.[65] Given these opinion surveys,

> if a prosecutor is attempting to convict a defendant in a jury trial, and his main witnesses are police officers, the prosecutor has every reason to try to strike as many black venire members as possible. When a prosecutor knows that he can statistically improve his chances of having a jury with more favorable jurors, he is likely to jump at this chance. The same can be said for the defense, who is more likely to strike white jurors in a case where police testimony is used because white jurors statistically, are likely to view police testimony more favorably.[66]

Such strategic[67] racial discrimination is a particularly egregious form of prohibited "stacking," as it also violates the equal protection clause.

Concerning such conscious bias, Justice Marshall observed that "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror and courts are ill-equipped to second guess these decisions."[68] Scholarly commentators have identified the ease with which such a reason can be articulated as a systemic weakness, undermining the paradigm's overall effectiveness.[69] Moreover, it is widely recognized that "trial judges are reluctant to doubt prosecutor's proffered reasoning for their challenged strikes..."[70] Professor Kennedy provided a psychological explanation for this judicial reluctance:

> [w]hen a judge rules against a prosecutor in this setting, he rules not only that the prosecutor wrongly discriminated; he also rules that the prosecutor was either mistaken or lying about his motives. Many judges will refrain from reaching such an embarrassing conclusion in the absence of overwhelming evidence. This hesitancy informally raises the evidentiary burden and further limits the circumstances under which judges deem prosecutors' explanations to be erroneous or pretextual.[71]

This judicial reluctance may be even more pronounced in New Jersey where teams of assistant prosecutors and public defenders are assigned for more than a year to a specific trial court. In addition to trials, these teams of attorneys assist the court in administering its calendar and its

attendant backlog. Due to this weekly and often daily interactions, personal relationships develop, thereby heightening the court's psychological disincentive[72] to find purposeful discrimination.

Given the existence of "cause" challenges, the Gilmore Court sought to describe legitimate use of peremptory challenges as follows:

> there are any number of bases on which a party *may believe*, not unreasonably that a prospective juror may have some slight bias that would not support a challenge for cause but that would make excusing him or her *desirable*. Such reasons, if they *appear to be genuine*, should be accepted by the court, which will bear the responsibility of assessing the genuineness of the ...response and of being alert to the reasons that are pretextual.[73]

Seizing upon this rationale, a minority of the Weiss Committee opposed both elimination and reduction of peremptory challenges.[74] Summarizing the minority's argument, the Weiss Report provides that "[t]he major argument of those who favor the continued use of peremptory challenges is that when a lawyer cannot sufficiently demonstrate a prospective juror's bias so as to challenge for cause, but for whom he/she nevertheless has an *intuitive feeling* that the prospective juror will not be unbiased in deciding the case, the sole remedy is the exercise of a peremptory challenge."[75]

Explaining operation of its burden shifting paradigm, the Gilmore Court emphasized that "[p]ermitting such questioning of the use of peremptory challenges does not destroy the "hunch" challenge. There is nothing ineffable or inscrutable about "sound" "hunches."[76] While preserving the "hunch" challenge, the Gilmore Court acknowledged the dangers inherent in such preservation: "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."[77] Unfortunately, this possibility often ripens into reality. As reflected in the ABA training, cognitive scientists have determined that "intuition is... the likely pathway by which undesirable influences, like race... affect the legal system."[78] Thus, the Gilmore Court retained peremptory challenges, in large part, to preserve the so-called "hunch" challenge which, in turn, the Court suggests is not subject to meaningful scrutiny under the paradigm. Since the "hunch" is likely a reflection of counsel's implicit bias, cognitive science appears to support the scholarly conclusions that the Batson/Gilmore paradigm is ill-equipped to curb the corruptive influence of implicit bias in jury selection.

In addition to its express deference to "hunches" and "intuitive feelings," practical application of the paradigm actually encourages reliance upon group stereotypes. Several

commentators have focused upon the limited information which the litigants typically[79] receive from jurors through the voir dire process. Hence, when trial counsel are "[f]aced with making exclusionary decisions on the basis of limited information, attorneys naturally rely on group stereotypes..."[80] Noting that counsels select jurors with "less than perfect information," Professor Stephen A. Saltzberg observed that, counsel "naturally rely upon stereotypes..."[81] The author candidly acknowledged the invidious nature of these stereotypes: "in some cases, attorneys made race or sex or religion the dominant, sometimes the exclusive, for deciding who to challenge."[82]

This comparatively limited extent of information is a direct consequence of the Batson Court's application to criminal jury selection of a burden-shifting paradigm developed in complex civil litigation. During jury selection, application of the Batson/Gilmore paradigm severely compresses both the amount of information and the time available to evaluate this information. Cognitive scientists have also identified this time limitation as encouraging reliance upon group stereotypes which, in turn, increases the potentially corruptive influence of implicit bias.[83]

Finally, an unavoidable consequence of application of the paradigm's first step is that several prospective jurors will be excused from service before a prima facie case can be established. Each of these prospective jurors has been denied an opportunity to fully participate in our democracy through jury service. When counsel demonstrates that any juror harbors a case-specific bias, then their excusal through a "cause" challenge does not violate their constitutional right to so serve and participate.[84] However, absent such a case-specific demonstration, the excusal is suspect.[85] If the trial court later determines that a prima facie case has been established, then the likelihood that the constitutional rights of these excused jurors were violated increases substantially.[86] As a practical matter, there is no remedy for these excused jurors. Although, the trial court could reseat the dismissed juror,[87] that remedy is wrought with practical difficulties, as the jurors may have been already sent home. Since the juror knows which litigant excluded him or her from service, then there is a grave danger that the excluded juror will harbor resentment against that litigant and potentially taint the entire panel.[88] Thus, there is no way to safely "unring the bell" which sounded when these jurors were deprived of their opportunity to serve through the exercise of a peremptory challenge.

The absence of a viable remedy for these discharged jurors deeply troubling because "Batson only makes analytical sense if one recognizes that it has shifted the primary focus from the rights of the litigants to the prospective jurors. Batson is only able to depart so dramatically from

Swain because it stands for the proposition that, at least in the context of racial discrimination, the rights of citizens to participate in their government, and in particular the right to by service on juries, outweighs the rights of litigants to remove jurors without cause."[89] Significantly, the Supreme Court Committee on Minority Concerns recommended to eliminate peremptory challenges in order to preserve the constitutional rights of these excused jurors to fully participate in our democracy through jury service.[90] Hence, inclusion provided not only a constitutional basis for the Batson/Gilmore paradigm, but also a constitutional basis to eliminate peremptory challenges entirely.

G. The Refocused Approach.

The sordid history of the use of preemptory challenges as a tool to facilitate discrimination against members of legally cognizable groups is well documented.[91] Indeed, invidious discrimination in jury selection is "perhaps the greatest embarrassment in the administration of our criminal justice system."[92] To curb the use of this tool of discrimination, the Batson and Gilmore Courts developed their burden-shifting paradigm. For many of the reasons predicted by Justice Marshall, this paradigm has proven to be ineffective in enforcing the constitutional rights to equal protection and to serve on a jury.[93]

In Gilmore, the Court distinguished the permissible striking of prospective jurors for demonstrated case specific bias from the impermissible striking of jurors for perceived group bias.[94] Since all peremptory challenges (which would not otherwise qualify as cause challenges) do involve reliance upon some form of group stereotyping or group bias, the continued existence of peremptory challenges blurs this critical distinction and renders it virtually impossible to enforce.

This blurring is compounded by the paradigm's preservation of trial counsel's ability to rely upon group stereotyping or bias to identify those prospective jurors whom counsel perceives to have such an extreme group bias that they can't be fair, and then exclude them from jury service through a peremptory strike.[95] Hence, this ability to "cancel out" potentially "extreme" jurors through peremptory challenges actually perpetuates reliance upon the group stereotyping that the paradigm seeks to eradicate.[96]

This blurring also occurs through trial counsel's reliance upon group stereotyping to identify and then strike those jurors whom counsel perceives would not render a "favorable" verdict.[97] Concerning this use of group stereotyping, the Weiss committee observed that in "[t]he current use of peremptory challenges often runs counter to the goal of having impartial jurors.

Courts should reject the notion that voir dire should be used to obtain a jury that is predisposed to one or the other litigants."[98] Indeed, our Supreme Court has expressly rejected that notion.[99] Since there is no right to a "favorable" jury, the continued use of peremptories to advance this nonexistent right lacks any legal justification.

(i) The Alternative Proposal.

A straightforward alternative was proposed by Justice Marshall in his Batson concurrence: "[t]he decision today will not end racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."[100] The elimination of peremptory challenges divests trial counsel of the tool through which the biases of both themselves and their clients,[101] are injected into the jury selection process. Over thirty (30) years ago, our Supreme Court in Gilmore declined Justice Marshall's invitation to eliminate peremptory challenges.[102] Subsequent advances in cognitive science and lessons learned from applying the paradigm strongly support that we now accept Justice Marshall's invitation.[103]

As emphasized by Judge Bennett, elimination of peremptory challenges properly realigns the burdens of production and persuasion:

> [p]ermitting only for cause strikes avoids many of the problems with Batson. The court would not ... evaluate whether the proffered reason was a pretext for discriminatory animus as the last step of the burden –shifting analysis weighted in favor of upholding the peremptory strike. It would instead evaluate the sufficiency of the proffered reason as a basis for striking the juror in the first place. *The onus of justifying the strike would always lie with the party that wished to strike, rather than the one resisting the strike.* In that context, courts are far less likely to accept implausible or marginally adequate reasons.[104]

By placing the burden of persuasion upon the party wishing to strike or exclude, the alternative proposal is designed to more fully protect the constitutional rights of prospective jurors to participate in our democracy through jury service.

Prior opposition to proposals to reduce or eliminate peremptory challenges included practitioners' legitimate concerns that courts were interpreting "cause" challenges too narrowly and inconsistently.[105] The Lisa committee

> recommended substantial reductions in the number of peremptory challenges allowed, especially in criminal trials. With fewer peremptory challenges available, excusals for cause are more important. There has been a practice, at least implicitly, in which judges have withheld excusals for cause where the issue is reasonably debatable because the attorney seeking the excusal has a large number of peremptory challenges

> available. With the reduction in the number of peremptory challenges, this practice must end... With the reduced number of peremptory challenges available, judges should be more liberally disposed to excusing jurors for cause where the issue is a close one.[106]

To address this legitimate concern, I suggest that the Committee should embrace the Lisa committee's recommendation that courts should be instructed to more liberally excuse jurors for cause.

The Gilmore Court declined to provide a "bright line rule" to distinguish between "permissible grounds for [striking jurors based upon] situation specific bias and impermissible reasons evidencing presumed group bias...."[107] This declination was understandable, as Batson was decided only 77 days earlier. There was no record of judicial application of the Batson paradigm upon which to formulate any prospective guidance. Moreover, through their rejection of a "bright line" rule, the Court sought to preserve judicial discretion in the determining whether case or situation specific bias exists.[108]

We now have that record of application. Professor Kenneth Melilli has meticulously analyzed virtually every reported judicial decision which interpreted Batson from April 30, 1986 until December 31, 1993. Based upon his evaluation of 3,898 peremptory challenges,[109] Professor Melilli characterized the reasons supporting these challenges as follows: (1) Prior Involvement with Criminal Conduct or Litigation, (2) Behavior During Voir Dire, (3) Possession of Extrajudicial Information or Bias, (4) Difficulty Following Information, (5) Age, (6) Employment or Training, (7) Economic Characteristics, (8) Family Situation, (9) Education and Intelligence, (10) Location of Home, Workplace or Other Activities, (11) Incapacity, (12) Personal Appearance, (13) Prior Jury Service, (14) Gender, and (15) Miscellaneous Characteristics.[110] While reasonable minds could disagree concerning some of these characterizations, Professor Melilli's analysis provides a promising starting point to implement the alternative proposal recommended in this letter.

After characterizing these challenges, Professor Melilli then analyzed them consistently with the situation specific/group bias distinction drawn by the Batson and Gilmore Courts.[111] His analysis revealed that "[b]oth the critics and the defenders of the peremptory challenges agree that challenges for cause are unrealistically narrow, both as defined and as applied."[112] In view of his recommendation to eliminate peremptory challenges, Professor Melilli acknowledged that "any system of jury selection would seek to function without the peremptory challenge would have to require the revitalization, and possibly the expansion, of the challenge for cause."[113]

Seeking to determine "whether a system which allowed only challenges for cause could sufficiently accommodate the legitimate concerns of litigants and their counsel...,"[114] Professor Melilli examined each of these 3,898 challenges and reached three significant conclusions. First, a "sensible" system for cause would excuse nearly 44% of those jurors for whom counsel exercised peremptory challenges.[115] This analysis supports the legitimacy of practitioner concerns that "cause" challenges are too narrowly interpreted. Second, 52% of the peremptory challenges were based upon group stereotyping.[116] Characterizing this group stereotyping as "impermissible," Professor Melilli applied the distinction between permissible case-specific bias and impermissible group biases established by the Batson and Gilmore courts. Third, the remaining 4% of the peremptory challenges were based upon subjective judgments of counsel.[117] Noting that these subjective judgments often reflect the effects of "intuition" or "hunches," Professor Melilli also characterized them as "impermissible" manifestations of group stereotyping.[118] Thus, if accompanied by a sensible and expanded system for exercising cause challenges, the elimination of peremptory challenges could substantially reduce both impermissible group stereotyping while preserving the ability of both counsel and the courts to exclude jurors with case specific bias through the exercise of cause challenges.

The alternative approach relies heavily upon his analysis to provide a starting point for further development. Rather than "bright line" rules, the alternative approach would involve a decision-making framework that includes more precise definitions for reasons to strike which have been developed over the last 30 years. While these definitions are designed to enhance predictability and consistency in judicial decision-making, the framework must seek to preserve both judicial discretion and counsel's ability to strike a juror for demonstrated case specific bias through a cause challenge. Thus, this framework must balance predictability and flexibility. If Court management determines that this alternative approach merits further inquiry, the development of this decision making framework would be the next step to be undertaken by this Committee or any other group as designated by Court management.

Application of these revised "cause" definitions will significantly affect the jury selection process. Thus, training of all criminal justice stakeholders on this application is essential to the successful implementation of this refocused approach. Since implicit bias may also affect administration of cause challenges, this training should also extend to the potentially corrupting influence of implicit bias.[119]

(ii) Responses to Potential Objections.

Since both the Weiss and Lisa committees recommended reductions in the number of peremptory challenges, this court anticipates that similar objections will be raised against the proposed elimination of peremptories. The six principal objections presented to those committees will be addressed seriatum.

The first and most fundamental objection a blanket denial that any change is needed. Adherents baldly assert that the current system works well. In essence, they contend that "if it ain't broke, then don't fix it." As demonstrated in sections F and G, the present system is badly broken. The proposed alternative is specifically designed to fix it.

The second objection is merely a request for more time to evaluate the present use of peremptories before deciding whether any change is appropriate. Peremptories have been used in New Jersey for centuries. Batson and Gilmore were decided more that 30 years ago. Throughout this time, their application has been evaluated by several different committees. The "lessons learned" over these 30 years of application was considered in formulating the proposed alternative. We have all the information that we need. Now is the time to act.

The third objection is that peremptories are needed to eliminate "subtle" juror biases. This argument begs the question – how does counsel know that these subtle biases exist in jurors? If that basis cannot be articulated, then recent developments in cognitive science suggest that there is a strong likelihood that counsel's desire to strike that juror results from the operation of counsel's own implicit bias. In other words, the unarticulated basis for the challenge suggests that counsel's alleged perception of subtle juror bias is really just a "hunch," which, in turn, is often the result of counsel's own impermissible group stereotyping. Alternatively, the unarticulated basis for the challenge may arise from counsel's desire to select a "favorable" jury. Since no litigant has a right to such a jury, this third objection appears to be premised on either impermissible group stereotyping or a nonexistent right. In either case, it is meritless. Moreover, assuming arguendo that there is some residual legitimacy this subtly biased juror argument, it is a slender reed to preserve the entire peremptory challenge system in view of all the havoc that it reeks upon efforts to select a fair and inclusive jury.

In deciding to reduce, rather than eliminate preemptories, the Lisa committee gave some credence to the fourth objection that the ability to exercise these challenges contributes to a perception by the litigants that they have some say in the selection of the jury that will decide their fate.

Alternatively stated, peremptory challenges should be retained at present levels because litigants will be more accepting of the jury's verdict in the event that they participate in jury's selection. This court rejects this argument on several grounds.

As previously noted, through their input concerning the exercise of a peremptory challenge, litigants may insert their own group biases into the jury selection process.[120] Since the court's focus is upon counsel's mental state, the litigant's bias effectively evades scrutiny under the paradigm.[121] Moreover, the litigants may meaningfully participate in decisions to strike jurors for cause. There may be a legally sufficient reason to strike a juror for cause, but counsel may exercise their discretion not to bring it to the court's attention. Counsel may consult with the litigant before deciding whether to strike for cause. The litigant may also consult with counsel regarding the questions posed in the jury questionnaire. Thus, under the alternative approach, litigants retain meaningful opportunities to participate in jury selection.

Most significantly, this fourth objection completely ignores the perception of jurors against whom a peremptory strike was exercised, thereby depriving them of an opportunity to fully participate in our democracy through jury service. Under the alternative approach, only those jurors with demonstrated case specific bias would be excused. If so excused, the prospective juror would be aware that he or she was denied the opportunity to serve because of some reason which the court accepted, rather than as the result of a decision (to exercise a peremptory challenge) that counsel summarily announces in open court. Thus, the alternative proposal enhances the excused juror's perception of the criminal justice system's integrity.

The gist of the fifth objection is that some peremptories must be retained in order to provide a "safety net" to cure what the litigants perceive "to be error in the judge's refusal to grant challenges for cause."[122] Although the Lisa committee found this argument somewhat persuasive, this court completely rejects it for several reasons. Essentially, this argument seeks to assuage litigant's understandable concerns regarding the what now may appear as the uncertain "life after peremptories." If the recent implementation of criminal justice reform has taught us anything, it has taught us that criminal justice stakeholders in New Jersey have a remarkable capability to implement systemic change. These stakeholders responded with alacrity to this systemic overhaul of our criminal justice system. This was achieved, in part, through leadership and preparation.

Under the leadership of Court management, the preparation would include the design of decision-making framework that includes more precise definitions which are legally sufficient to

support a cause challenge. These more precise definitions respond to practitioner's uncertainty concerns by enhancing the predictability and by promoting consistency in judicial decision-making. This framework should also seek to preserve both judicial discretion and counsel's ability to strike a juror for demonstrated case specific bias through a cause challenge. To strike such a subtle balance between certainty and flexibility, eventual participation of all criminal justice stakeholders is suggested. Criminal justice reform teaches us that stakeholder input would not only improve quality during the framework's design phase, but it would also facilitate stakeholder "buy in" which proved to be so important during the implementation phase.

While the litigant's apprehension to change is understandable, retention of "safety net' challenges effectively nullifies that change, which includes the elimination of peremptories. Alternatively stated, if any peremptories remain, then all of the supporting procedures (including the Batson/Gilmore paradigm) and all of the attendant problems which supported their elimination, must also remain. In other words, "safety net" strikes could continue be used to invidiously discriminate and tactically exclude in violation of existing law. Thus, the retention of any "safety net" would undermine implementation of the very reform which it purports to facilitate.

The Weiss committee majority concluded that "[a]lthough desirable, it is the view of this committee that it would be impractible to advocate the total elimination of peremptory challenges. The hue and cry which would arise from the Bar could prove an obstacle to obtaining any changes in the use of peremptory challenges."[123] It is submitted that this sixth objection, the anticipated "hue and cry," should no longer delay implementation of the critical reforms embodied in the alternative approach. If the "hue and cry" is based upon substantive objections to proposed change, then the prior articulation of those objections, as summarized in objections one through five, are meritless.

If the "hue and cry" arises from a desire to continue the strategic use of peremptories to obtain a "favorable jury," then that desire is predicated upon an attempt to exercise a nonexistent right. Our Supreme Court has clearly ruled that litigants have no right to a favorable jury, but rather a right to a fair jury. In view of this law as clearly articulated by our Supreme Court, any tactical exercise of a peremptory challenge to obtain a favorable jury raises potential ethical concerns for counsel.[124] Similarly, it also raises potential integrity concerns for the judiciary itself arising from its continued acquiesce to such use. Moreover, the continued use of peremptories may adversely affect public confidence of the integrity of the criminal justice system.[125] Thus, it is submitted that the din of the "hue and cry" should be drowned out by our adherence to the sound of our sworn duty to uphold the

integrity of this criminal justice system.

I. Conclusion.

Judicial acquiescence to the continued use of any peremptory challenges, even those labeled as "safety net" challenges, is appropriate only if proponents can identify a legitimate purpose for their continued use. This court cannot discern any legitimate use, as jurors with demonstrated case-specific bias may be excluded through cause challenges. Although the law as written clearly prohibits use of peremptories to individually discriminate and tactically stack, the law as practiced reveals that such prohibited use continues.

Although the Batson/Gilmore paradigm was designed with the best of intentions to curb these abuses, analysis of its application reveals that it has not fully accomplished that laudable objective. Thus, courts are not fully equipped to curb these abused peremptory challenges.

This committee has an opportunity to embrace a more promising approach. The goal has always been to select a fair jury – one composed of persons without case-specific bias. The most straightforward method to select such a jury is to abolish peremptory challenges by statutory amendment and to exclude only those jurors whom an objecting attorney establishes has a case-specific bias. This exclusion occurs through a cause challenge. It is submitted that this linkage between an elimination of peremptory challenges and a more expansive granting of cause challenges will yield juries that are both more fair and more inclusive. This alternative approach will enhance a court's ability to protect constitutional rights of both litigants and jurors and to preserve the integrity of the criminal justice system.

Thank you for allowing me to share my thoughts on this important issue.

Very truly yours,

MARTIN CRONIN, J.S.C.

Cc: Hon. Sallyanne Floria, A.J.S.C.
Hon. Ronald D. Wigler, P.J.Cr.

MGC:tmh

[1] Without providing any supporting reason, trial counsel may excuse prospective jurors through the exercise of peremptory challenges. See N.J.S.A. 2C: 23-13, R.1:8-3(d).
[2] Report of Assignment Judges Committee to Review the use of Peremptory Challenges, 9 (1997) ("Weiss Report"), Report of the Special Supreme Court Committee on Peremptory Challenges and Jury Voir Dire, at 3, 49 – 52 (recommendation 8) (2005)("Lisa Report"), Report of the Joint Committee on Criminal Justice, at 91(recommendation 25) (2014)("JCCJ Report").
[3] See, e.g., Report of N.J. Supreme Court Committee On Minority Concerns, at 33 (2015-2017). The Lisa Report noted that, "The Conference of Criminal Presiding Judges recommended reduction in accordance with the recommendations contained either in the Weiss Report or other previously submitted reports, such as those emanating from the Supreme Court Criminal Practice Committee. That committee has considered the issue approximately seven times since 1984 and has repeatedly recommended reductions. In 1998, for example, it recommended reduction to 5 for each defendant and 4 for the prosecution, to be accompanied by a more extensive voir dire and more liberal granting of challenges for cause." Lisa Report at 12.
[4] See Lisa Report at 12 referencing Criminal Presiding Judge recommendations.
[5] See notes 2 – 4, supra. But see, Weiss Report at 2 - 4 (discusses discriminatory use of peremptory challenges), Lisa Report at 6 – 7 (same).
[6] An unofficial transcript of those comments are attached as Appendix A.
[7] Report of N.J. Supreme Court Committee On Minority Concerns, at 33. See also, State v. Gilmore, 103 N.J. 508, 525 (1986), interpreting, N.J. Const. Art. I Para. 5 as implicating the rights of "citizens generally," including the right "to participate in the administration of justice by serving on... petit juries." Accord, State v. Andrews, 216 N.J. 271, 291 (2013)(defense strike implicates rights of excluded juror to participate in our democracy).
[8] See, e.g, Bennett at 158 ("judiciary remains complicit... in permitting continued discrimination").
[9] Batson v. Kentucky, 467 U.S. 79 (1986), State v. Gilmore, 103 N.J. at 539.
[10] 208 N.J. 208, 228, 286-87, 302-03 (2013)(revised Manson/Madison framework for evaluating eyewitness identification).
[11] The court may excuse a juror "for cause" whenever counsel establishes that the prospective juror has a case-specific bias. Such bias is typically established by the prospective juror's familiarity with the litigants, their attorneys, the facts underlying the charged offense, or the nature of the charged offense. Excusal "for cause" is also appropriate whenever the trial schedule would impose a severe personal hardship upon the juror and whenever the juror expresses an unwillingness to follow the law. Thus, "for cause" challenges empower courts to excuse jurors whom counsel establishes are either unwilling or unable to decide the case based upon the facts, as established by the trial evidence, and the law, as explained by the trial court. These challenges are premised upon facts, as elicited during voir dire, which apply to a specific juror's service in a specific case. Those jurors remaining in the panel, those without a case-specific bias, are "fair" jurors as our Supreme Court in Gilmore defined that term. 103 N.J. at 529, 530-32.
[12] Batson, 476 U.S. at 102 - 03 (Marshall, J., concurring), quoted at, 12, infra.
[13] Weiss Report at 8.
[14] Lisa Report at 39. See also, id. at 5 ("the guidelines recommend an expansive granting of excusals for cause").
[15] See Report of N.J. Supreme Court Committee On Minority Concerns, at 4 (recommendation 2017-01 (2017)).
[16] Matt Haven, Reaching Batson's Challenge Twenty-Five Years Later: Eliminating the Peremptory Challenge and Loosening the Challenge for Cause Standard, 11 U. Md. L.J. Race, Religion, Gender & Class 97 (2011). Kenneth J. Melilli, Batson in Practice: What We Have Learned about Batson and Peremptory Challenges, 71 Notre Dame L. Rev. 447, (1996), Anthony Page, Batson's Blind Spot: Unconscious Stereotyping and the Peremptory Challenge, 85 B.U.L. Rev. 155 (2005). Bennett: Unraveling of the Gordian Knot of Implicit Bias in Jury Selection, 4 Harv. L. & Pol. Rev. 149, 150 (2010). Chris Guthrie, Blinking on the Bench: How Judges Decide Cases, 83 Cornell L. Rev. 1, 28 (2007). Patricia Devine, Stereotyping and Prejudice, Their Automatic and Controlled Components, 56 J. of Personality and Soc. Psych., 5, 15-16 (1989). Christine Jolls and Cass R. Sunstein, The Law of Implicit Bias, 97 Cal. L. Rev. 969, 975-76 (2006). Anthony G. Greenwald et. al., Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity, Journal of Personality and Social Psychology, Vol. 97 No. 1, 17 (2009).
[17] The ABA developed a series of instructional videos concerning implicit bias, including one on judicial decision-making. (https://www.americanbar.org/groups/diversity/resources/implicit-bias/, (hereinafter "ABA video")).
[18] N.J.S.A. 2C: 23-13 (1995).
[19] 103 N.J. at 529 ("[p]eremptory challenges on grounds of presumed group bias as distinguished from specific bias... unreasonably restrict [the right to trial by an impartial jury]), 530-32 (peremptory challenges are to be used to remove jurors who are believed to entertain a case specific bias [that is, "a bias relating to the particular case on trial or the parties or the witnesses thereto..."]).
[20] See Bennett at 167.
[21] Haven at 117.

[22] See Bennett at 167.
[23] See Jolls at 971 (implicit bias "has proven to be extremely widespread"), Bennett at 150 (implicit bias effects jurors themselves (as opposed to their counsel), judges and lawyers), Id. at 158 (implicit bias "permeates our criminal justice system."), Guthrie at 31 (implicit bias effects judges), see ABA video. The bias of litigants is a topic which has received little attention in reported decisions or scholarly publications. But see, Haven at 116 (litigants' "bad vibe" from juror "could have an unconscious basis in race). This is understandable due to the privileged nature of attorney-client communications). See N.J.R.E. 504. During the selection of several different juries, defense counsel advise this court of their client's "concerns" regarding certain jurors. Whenever counsel was unable to translate their client's "concerns" into a legally sufficient basis to strike that juror for cause, peremptory challenges were often used. This court suspects that some of these challenges reflected the bias, either explicit of implicit, of the defendant/client. This court further suspects that counsel used the peremptory challenge, in part, to mollify the client and maintain their working relationship. If some of these suspicions are valid, then counsel's use of the challenge functioned as a "pass through" of the client's biases upon the jury's composition. This effect remains, even though the client's biased decisions are effectively immune from review under the paradigm which focuses upon counsel's purposeful decisions.
[24] See 7-8, infra., discussing system overrides which function to slow down the decision making process and reduces effects of implicit bias.
[25] Cf., Guthrie at 28 ("judges have the capacity to override [intuitive decisions] with deliberative thinking").
[26] See Report of N.J. Supreme Court Committee On Minority Concerns at 33 (observes that elimination of peremptories "would eliminate the issue of Batson challenges").
[27] A fair jury focuses upon the rights of the accused is defined as one composed of jurors without case-specific bias. Alternatively stated, the goal is to select a jury which will decide the case based upon the facts, as established by the trial evidence, and the law, as explained by the trial court. See Gilmore, 103 N.J. at 529-32, Weiss Report at 4-5.
[28] An inclusive jury focuses upon the rights of the prospective jurors and is defined as one composed of jurors who are drawn from a representative cross section of the community. Such an inclusive jury pool vindicates the constitutional right of prospective jurors to fully participate in our democracy through jury service. See Minority Affairs Report at 3. E.J.I. Report at 18, 28-29.
[29] Gilmore, 103 N.J. at 523-25.
[30] Gilmore, 103 N.J. at 532.
[31] Gilmore, 103 N.J. at 532.
[32] Gilmore, 103 N.J. at 539.
[33] There is no constitutional right to exercise a peremptory challenge. While often described as "substantial," our Supreme Court in State v. Hoffman, clarified that "the right of peremptory challenge in criminal prosecutions... does not have a constitutional basis." 82 N.J. 184, 187 (1980). Hence, peremptory challenges are statutory creations whose continued existence is a matter of policy. See Weiss Report at 5 ("[t]he question of the continuation of the use of peremptory challenges involved a policy decision"). As a matter of comity, the Supreme Court has deferred this policy decision to the legislature. Recent criminal justice reform legislation suggests that our legislature embraces well-reasoned statutory recommendations supported by Court leadership. Accordingly, any recommendations by your committee to Court management may initiate the process to secure the requisite legislative amendments.
[34] See note 32, supra. Each litigant has a right to a fair jury. Id.
[35] See Swain v. Alabama, 380 U.S. 202, 220 (1965), overruled in, Batson, 476 U.S. at 92-93. This tactic has received pointed criticism. See 12, infra. (citing critical authorities).
[36] Melilli at 501. This group stereotyping would be minimized if not eliminated, under the proposed procedure. See 15, infra.
[37] Gilmore, 103 N.J. at 530-538, interpreting, Batson 478 U.S. at 96-98.
[38] Analyzing this first step, Justice Marshall observed that, "where only one or two black jurors survive the challenges for cause, the prosecutors have no compunction about striking them from the jury because of their race." Batson, 476 U.S. at 97 (Marshall J., concurring).
[39] Haven at 107, quoting, Hernandez v. New York, 500 U.S. 352, 360 (1991).
[40] Equal Justice Initiative, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy (August 2010) at E.J.R. Report, http://eji.org/reports/illegal-racial-discrimination-in-jury-selection., Haven at 115-118.
[41] Bennett at 163.
[42] Haven at 108.
[43] See, e.g., Bennett at 150, Haven at 112, 115, 117, Melilli at 503 (application of step 3 results in "hopelessly" irremediable inconsistency). See also, Randall Kennedy, Race, Crime and the Law, 211 (1997)(observes that trial courts often give benefit of doubt to prosecutors due "partially from the difficultly in accurately delineating motive").

[44] Weiss Report at 5.
[45] See Weiss Report at 6, noting that in 1825, England eliminated the use of peremptory challenges by prosecutors. For defendants, the number was reduced to 3 in 1977. In 1988 the use of peremptory challenges in criminal trials was eliminated altogether "because defense attorneys were misusing the system to "stack" juries with individuals who favored their side." Id. at 6-7. Similarly, the Lisa committee observed that "in England, from whom we inherited the practice of allowing peremptory challenges, the practice has now been eliminated," Lisa Report at 13.
[46] See Gilmore, 103 N.J. at 531-32 (notes homogeneous nature of English society).
[47] State v. Hoffman, clarified that "the right of peremptory challenge in criminal prosecutions... does not have a constitutional basis." 82 N.J. at 187. It is provided for by statute, N.J.S.A. 2C:23-13, and court rule, R. 1:8-3.
[48] Weiss Report at 5-6.
[49] See Weiss Report at 5. Compare N.J.S.A. 2B:20-10 (1995)(present) with N.J.S.A. 2A:6-2 (1991)(repealed).
[50] Weiss Report at 5.
[51] See, e.g., State v. Manely, 54 N.J. 259, 281 (1969). Limiting the questioning of the jury panel by trial counsel, the Manley Court observed that "[t]he impression is inescapable that the aim of counsel is no longer the exclusion of unfit or partial or biased jurors. It has become the selection of a jury... favorable to the party's point of view..." Id. at 281, quoted in, Lisa Report at 13.
[52] See, e.g., Bennett at 150, 158, Haven at 113, ("litigants continue to use peremptory challenges in a discriminatory manner, either consciously or unconsciously").
[53] Jolls at 973.
[54] Id. at 975. The referenced test is the implicit association test (IAT). See Jolls at 971. There is some dispute concerning the validity of this test. See Bennett at 154. However, a 2009 meta-analysis of the existing scientific research supports validating. Id. at n. 17.
[55] Page at 160. As Judge Bennett explains, "implicit bias is formed by repeated negative associations – such as the association of a particular race with crime –that establish neurological responses in the area of the brain responsible for quickly responding to danger." Bennett at 153. These "intuitive associations, for example, of African Americans with violence, "seem to reflect automatic, intuitive judgments, while "active deliberation limits such biases." Id. at 157, quoting, Guthrie, 93 Cornell L. Rev. at 28.
[56] Devine at 5. Bennett at 150 ("we unconsciously act on implicit bias even though we abhor them when they come to our attention"), id. at 157 (applies to judges).
[57] Jolls at 974. This process has also been described as "intuitive override." See Guthrie at 28, cited in, Bennett at 156.
[58] 476 U.S. at 102-03 (Marshall, J., concurring), quoted in, Bennett at 162.
[59] Bennett at 2, citing, Devine at 5, 15-16. Accord Greenwald at 32 (concludes that for "high sensitivity topics, such as racial behavior, the predictive validity of the IAT 'significantly exceeds' that of self-report").
[60] 380 U.S. 202, 220 (1965).
[61] 476 U.S. at 93, citing, Arlington Heights v. Metropolitan Housing Development Auth., 429 U.S. 252, 266 (1977).
[62] See Haven at 97. Melilli at 508, Kennedy at 218, Edward Adams and Christian Lane, Constructing a Jury that is Both Impartial and Representative: Cumulative Voting in Jury Selection, 73 N.Y.U.L Rev. 703, 706 (1998). Bennett at 161, E.J.I. Report at 16.
[63] Haven at 117.
[64] Kennedy at 218. Similarly, Haven observed that reliance upon stereotypes is high in the legal community "[a]cting rationally upon these stereotypes, "[t]he discriminating litigant improves his or her chances of seating a jury 'favorable' to her case..." Haven at 114-15, quoting, Adams at 708.
[65] See Haven at 113.
[66] Id. at 113-114. Accord, Adams at 748. See also, State v. Andrews, 216 N.J. 271, 291 (2013)(discriminatory strikes by a criminal defendant).
[67] This "tactical" or "strategic" use of peremptory challenges is well ingrained into the culture of criminal trial practice in New Jersey and throughout the United States. See Weiss Report at 8 – 9, see Saltzburg at 341-42 (counsel seek to "control the composition of the jury" by "excluding those jurors most strongly biased in favor of the opposition.") It is probable that this culture inspired the "hue and cry" that dissuaded the Weiss Report majority from recommending the elimination of peremptory challenges in 1997.
[68] Batson, 476 U.S. at 106 (Marshall, J. concurring). See also Haven at 115 ("courts are incompetent, through no fault of their own, to discover the litigant's true reason for their strikes.").
[69] See, e.g., Haven at 115.
[70] Bennett at 162.

[71] Kennedy at 111-112. Accord, Page at 177.
[72] See Page at 177 (recognizing nationwide judicial reluctance).
[73] 103 N.J. at 532, quoting McCray v. Abrams, 750 F.2d at 1113, (2d Cir. 1984) (emphasis added).
[74] See Weiss Report at 4 (emphasis added).
[75] Weiss Report at 4 (emphasis added).
[76] 103 N.J. at 538. See also, id. at 548 (O'Hearn, J. concurring)("a party is entitled to the visceral reaction of a trial attorney"). Accord State v. Zavala, 259 N.J. Super. 235, 240 (L.Div. 1999) (acknowledges that "Gilmore did not eliminate the traditional 'hunch' challenge...").
[77] 103 N.J. at 529, citing, Batson, 476 U.S. at 105-56 (Marshall, J., concurring). Accord E.J.I. Report at 18 (hunch).
[78] Guthrie at 31, citing, Jolls at 975-76. See also, ABA video.
[79] As compared to civil litigation, the information available during jury selection is limited. However, as a result of the Lisa Committee recommendations, this information available to New Jersey litigants is among the most extensive in the nation. Factual determinations in civil litigation are often supported by extensive pretrial discovery, including depositions and document production, which often take years to amass. Trial courts address the burden-sifting paradigm in substantive civil litigation only after that extensive discovery has been amassed and sufficient time is allocated to evaluate this information.
[80] Haven at 114, quoting, Abrams & Lane at 706.
[81] Stephen A. Saltzburg, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md.L.Rev. 337, 342 (1982).
[82] Id. This acknowledgment of the interrelationship among peremptory challenges, group stereotyping, and invidious discrimination was made four years before Batson was decided.
[83] See Guthrie at 35 ("[j]udges facing cognitive overload due to heavy dockets or other on-the-job constraints are more likely to make intuitive rather than deliberative decisions because the former are speedier and easier.").
[84] See Gilmore, 103 N.J.at 520-31.
[85] Id. at 536. See also E.J.I Report at 28-29, 46 (stigma upon excluded jurors).
[86] Id. at 538-39.
[87] See State v. Andrews, 216 N.J. at 291.
[88] See Andrews, 216 N.J. at 277, 286.
[89] Melilli at 453.
[90] Report of N.J. Supreme Court Committee On Minority Concerns at 33.
[91] See, e.g., Batson, 476 U.S. at 103 (Marshall, J. concurring)("[m]isuse of the peremptory challenge to exclude black jurors has become both common and flagrant").
[92] Wilkerson v. Texas, 493 U.S. 924, 928 (1989)(Marshall, J. dissenting from denial certiorari), quoted in, Bennett at 158.
[93] See 8-12 supra. Gordon at 686.
[94] 103 N.J. at 529-31, 545.
[95] See Gilmore, 103 N.J. at 530-31. Rather than the "fair" jury as defined in Gilmore, Professor Saltzburg clarified that counsel seeks a "favorable" jury through this process: "each side will be able to identify and exclude these jurors most strongly biased in favor of the opposition. The result will be a jury which extremes of bias have been removed." Saltzburg at 342.
[96] Melilli at 481.
[97] Melilli at 409.
[98] Weiss Report at 8.
[99] See Manely, 54 N.J. at 289. See also, Weiss Report at 8, Lisa Report at 13.
[100] 476 U.S. at 102-03 (Marshall, J. concurring).
[101] See n. 23 supra (discusses client/litigant bias).
[102] 103 N.J. at 530.
[103] See sections E and F, supra. See also, Bennett at 167. A majority of the Weiss Committee supported elimination of peremptories. Weiss Report at 8. Scholarly analysis of Batson has generated repeated recommendations to eliminate peremptories. See, e.g., Bennett at 151, 166-67. Haven at 118.
[104] Bennett at 167 (italics added).
[105] See Lisa Report at 14, 39.
[106] Lisa Report at 39.
[107] See Gilmore, 103 N.J. at 545.
[108] Id. at 545.
[109] Melilli at 485.
[110] Melilli at 486-88.

[111] Compare Melilli at 468-88 (methodology) with n. 19, supra (legal distinction).
[112] Melilli at 481, 500-01.
[113] Melilli at 487. Accord, Haven at 118 ("[c]ompletely eliminating the peremptory challenge, and slightly loosening the 'for cause' challenge standard, is the only way to realize Batson's, and the constitution's promise.").
[114] Melilli at 486.
[115] Melilli at 487, 497.
[116] Id. at 487, 497.
[117] Id. at 487, 497.
[118] Melilli at 501-02.
[119] Bennett at 168-70.
[120] See 3, and n. 23, supra.
[121] See n. 22, supra.
[122] Lisa Report at 5, 15.
[123] Weiss Report at 8-9.
[124] See Andres G. Gordon, Beyond Batson v. Kentucky: A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection, 62 Fordham L.Rev. 686, 717 & n. 318 (1993), referencing, R.P.C. 8.4(g) (professional misconduct for a lawyer to engage in conduct involving discrimination in official proceedings because of race, national origin, or socio-economic status "where the conduct is intended or is likely to cause harm.")
[125] See E.J.I Report at 28-29, 46.

[APPENDIX A]

Jury Selection Round Table Transcription: 1:01:40 – 1:04:18

Comments by Judge Cronin:

This is going to be a brief comment and you may think this is off the wall.

We're talking a lot about efficiency, and we're talking about efficiency and jury selection.

Which is like talking about herding cats and efficiency and that, they sorta don't match.

I think one of the... I suggest that I hope we should mean, is not what is the most efficient way we should pick a jury... we want to get to a fair jury and that might affect peremptory challenges.

Historically, peremptory challenges, back in England, was you know it's a small town and you know we had a fight about selling a horse a month ago. That person can't be on my jury because I have a problem with him or her, right.

It comes over to the States and jury selection has become, it's a tactical thing, most of it's the trial lawyers, it's a tactical thing.

The question is not whether that person can be fair in terms of deciding a case based upon the law and facts, but whether that person sitting in that box is going to help me get the best results for my client, right.

So in terms of making recommendations for how to select a jury, I think it's a statement.

You have to come to a point where, is that what we want? Do we want fair juries? How do we get to that?

Preemptory challenges have been historically oriented towards discrimination.

Because when you don't have to give a reason...you don't have to go any farther than that.

Thurgood Marshall, way back in the day, said, "How you deal with discrimination and jury problems is to get rid of preemptive challenges."

Before the Lisa report was the Weiss report, and one of the two of them said, "We recommend getting rid of peremptory challenges."

I'm not saying get rid of them, I think they [their elimination] should be on the table.

Rather than talking about [efficiency]... No disrespect to such biographical questions, but it's just let's talk about what's the function of it and do we need Preemptions? Do we need preemptions at all?

In order to achieve that, you just gotta give cause reasons, because when I have a Batson challenge, and once I have a prima facie case, have they have give me a reason they want me to get rid of this juror, then the number of challenges goes down ... down to like zero.

So if you have to state cause right out of the box, you can smoke out racial discrimination... you know ethnic discrimination, you can get a tighter, shorter process and you might get a fairer jury at the end of the day.

That's it.

Exhibit B

Excerpts from oral argument before N.J. Supreme Court in State v. Andujar

ACDL Counsel at 2:09:09

If you live in an urban America, you will be exposed to all of this, and it is interesting that the word that FG kept using was "lifestyle." He was talking about a cultural context in which he would be exposed to these things although he didn't wanna know the details, and oh, by the way, he had a couple people murdered and had some cops who were friends. So it seems to me that the State was allowed to do precisely what the Appellate Division said, which is, deliberately circumvent Batson, circumvent any systemic process that would enable anybody, including the judge or the defense counsel to systemically look at the factors being raised, and there was kind of a bulls rush into saying let's get rid of this guy and move on with jury selection. That's not permitting the court to do its job, which 1:8-3 contemplates, and Batson contemplates, and due process clause contemplates of protecting us from violations…

Justice Albin at 2:10:04

I want to ask you a question. It may be a little off the beaten track. Isn't it more likely that implicit and explicit bias is likely to be concealed under the veil of peremptory challenges and that Batson and Gilmore is not going to be able to regulate it?

ACDL Counssel

I'm afraid of where you're going.

Justice Albin

… the defense bar, including your organization, is the biggest supporter of multiple peremptory challenges, which is actually concealing the very thing you're condemning.

ACDL Counsel

I was gonna say yes to the first part, but now that you're accusing me of concealing implicit racism I can't go there. Here's my dilemma, and here's the dilemma of my organization, we are concerned about the imprimatur of race filtering in through the uneducated minds of all parties, I mean, defense lawyers, criminal prosecutors and even occasionally, perish the thought, judges, who are not aware of their own biases, and yes, that's a reason to regulate the use of challenges. But. I have been living in the community, I have been practicing almost 50 years justice. I think my ability to understand the biases of potential jurors and why my clients, who in early years certainly, were almost always been marginal people, people who subject to great prejudice and bias. People who were maybe unattractive.

Those people need to be protected by their advocates who have some tool to say, here's a person, race aside, who may be biased against me for reasons I can't alter. So, to the extent that taking away peremptories is seen as in juxtaposition with our attempts to dig deeper into the problems of implicit racism it seems to me that's a false dichotomy, and I saw where you were going Justice, and I'm not smart enough to out wit you, but I do agree with you that peremptory challenges pose a problem and that the Baston line and the Osario line has been an attempt to root it out, but we can't stop. When I started out by saying it's the imprimatur of the court, I trust the court, I trust this court to continue to grow, I like the plan, and that's why I'm disturbed, because I think we don't always have honest discourse, and I don't was to attribute this to Mr. Ducoat, but in his reply to amicus, he says that we're saying there's widespread pandemic of racism among prosecutors, or that we make a blind assumption that everything a prosecutor does is racist. That's not where this discussion is. Each one of us, including myself, has implicit biases. Our awareness, our ability to tease it out, and our ability to be protected by this body, from having improperly taint a judicial process is really what matters. And I'm saying that where we are now with the prosecutors in this case, and I'm not saying that they were Klansmen, but they took those things which are the essence of implicit bias, used it as a basis for going home and saying, "We're going to face a Batson challenge, let's dig up some evidence," and doing it in a way that not only violates due process, but also created a hurly-burly environment where the judge and the defense lawyer were stampeded and there was no time for a judicial review that would protect us from this kind of error.

Exhibit C

The Washington state reforms responded to their observation that the burden-shifting paradigm of Batson [1] has been ineffective in ferreting out rampant racial discrimination occurring in the exercise of peremptory challenges.[2] This ineffectiveness was due, in part, to the Batson paradigm's exclusive focus upon *purposeful* discrimination.[3] They concluded that this paradigm was ill equipped to address unconscious discrimination arising from the effects of implicit bias.[4]

Despite their recognition of "rampant" racial discrimination in the exercise of peremptory challenges, Washington officials chose to retain the practice and modify the existing paradigm in GR 37, rather than entirely replace it. I suspect New Jersey will ultimately align with Washington's observations; however, I do not support alignment with Washington's solution.

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[1] Batson v. Kentucky, 476 U.S. 79, 96-98 (1986). Accord State v. Gilmore, 103 N.J. 508, 530-538 (1986)(applies Batson paradigm to New Jersey Constitution).

[2] GR 37 was drafted by the ACLU of Washington. In the commentary accompanying their proposal, the ACLU quoted the Washington Supreme Court's observation that "[t]wenty –six years after Batson, a growing body of evidence shows that racial discrimination remains rampant in jury selection. In part this is because Batson recognizes only "purposeful discrimination," whereas racism is often unintentional, institutional, or unconscious. We conclude that our Batson procedures must change and that we must strengthen Batson to recognize these more prevalent forms of discrimination." GR 37 cover sheet, comment c (purpose), quoting, State v. Saintcalle, 178 Wn.2d 34, 36 (2013).

[3] The sponsors of GR 37 observed that "over the years it has become evident that Batson fails to adequately protect potential jurors and the justice system from the biased use of peremptories. This is because Batson requires parties to meet an extremely high bar to show that a peremptory challenge was motivated by bias. Batson requires attorneys to allege, and judges to find, *purposeful* discrimination and fails to acknowledge that bias can be subtle, institutional, or inadvertent." GR 37 cover sheet, comment c (purpose)(emphasis added). The ACLU further emphasized that "[l]egal scholars have also long noted that Batson's failure to effectively eradicate discrimination in peremptory challenges. This failure is especially pressing when one considers issues of unconscious racism." Id., citing, Matt Haven, Reaching Batson's Challenge Twenty –Five Years Later: Eliminating the Peremptory Challenge and Loosening the Challenge for Cause Standard, 11 U. Md. L.J. Race, Religion & Gender 97 (2011). Significantly, Mr. Haven embraces the recommendations of Professor Kenneth Melilli to eliminate peremptory challenges and to expand cause challenges. Id. at 118, citing, Kenneth J. Melilli, Batson in Practice: What We Have Learned About Batson and Peremptory Challenges, 71 Notre Dame L. Rev 447 (1996)(hereinafter "Melilli"). Professor Melilli's recommendations provide the framework for my proposed alternative to GR 37. See letter from Martin Cronin, to the Supreme Court Comm. on Jury Selection in Civil and Criminal Trials at 13-15 (June 25, 2019) (hereinafter "Jury Letter").

[4] Id.

GR 37 modifies the Batson paradigm by eliminating its first prong (prima facie case)[5] and the ultimate burden of establishing *purposeful* discrimination.[6] In GR 37, Washington replaces Batson's subjective/purposeful requirement with an "objective observer" standard.[7] This objective standard permits the denial of peremptory challenge "if an objective observer could find race to be factor influencing the use of the peremptory challenge."[8] GR 37 also makes it easier for the objecting party to satisfy this standard by creating presumptions effectively invalidating reliance upon certain proffered reasons traditionally associated with invidious discrimination.[9] Additionally, GR 37 invalidates demeanor-based challenges (e.g., juror inattentiveness), recently associated with implicit bias, unless the court or the objecting party observes that conduct.[10]

By retaining the Batson paradigm in GR 37, Washington officials continue the trial court's focus upon the mental state of the attorney seeking to exercise the peremptory challenge.[11] Clearly, the Washington reforms work to make it easier for the objecting attorney to establish that objectively evaluated mental state. However, this continued focus upon mental state compromises the efficacy of GR 37. As Washington officials acknowledged, the extreme difficulty encountered by trial courts in ~~defining~~ [determining] this mental state (albeit subjectively evaluated) significantly contributed to the ineffectiveness of the Baston paradigm which they sought to correct through promulgation of GR 37.[12]

In his concurring opinion in Batson, Justice Thurgood Marshall proposed a more straightforward alternative. He recommended eliminating peremptory challenges altogether.[13] He proposed this alternative, in part, based on his prediction that trial courts

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[5] GR 37(c) & (d).
[6] GR37 (e) expressly provides that "[t]he court need not find purposeful discrimination to deny the peremptory challenge."
[7] Id.
[8] Id.
[9] GR 37 (h). Significantly, GR 37 does not specify how this presumption can be rebutted.
[10] GR 37 (i).
[11] See GR 37 (e).
[12] See notes 2 and 3, supra.
[13] Batson, 476 U.S. at 102-03 (Marshall, J., concurring). More specifically, Justice Marshall stated that, "[t]he decision today will not end racial discrimination that peremptories inject into the jury-

would encounter great difficulty in determining counsel's mental state as required by the Batson majority.[14] As noted above, Washington officials recently confirmed the accuracy of this prediction.

Many scholarly commentators, most prominently Professor Kenneth Melilli, recommend that any elimination of peremptory challenges must accompanied by a more liberal or expansive granting of cause challenges.[15] Significantly, this shift towards cause challenges triggers a corresponding shift in the trial court's focus away from the mental state of an attorney to the legal sufficiency of the cause challenge itself.[16] Under this approach, many presumptively invalid and demeanor-based challenges highly scrutinized in Washington would simply not qualify as cause challenges.[17] This alternative approach could potentially eliminate reliance upon those suspect grounds without any inquiry into counsel's mental state.[18] I have shared Professor Melilli's research with Judges Rivas and Ironson who, in turn, have circulated it to other members of their committee on jury selection.[19]

By requiring counsel to articulate the reason supporting a cause challenge, this alternative approach compels counsel to engage in a conscious, deliberative thought process.[20] This "overrides" the otherwise operational unconscious cognitive processes

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selection process. That goal can be accomplished only by eliminating peremptory challenges entirely." Id.

[14] Batson, 476 U.S. at 102-03, quoted in, Jury Letter at 8.

[15] Melilli at 486-87, cited in, Jury Letter at 13-14.

[16] Melilli at 486-87, cited in , Jury Letter at 3, Bennett: Unraveling the Gordian Knot of Implicit Bias in Jury Selection, 4 Harv. L. & Pol. Rev. 149, 150. (2010)(hereinafter "Bennett").

[17] Compare GR 37 (h) (presumptions) with Melilli at 487-94 (cause).

[18] See Jury Letter at 3 & n.4, citing, Bennett at 167.

[19] See Jury Letter.

[20] See Jury Letter at 3 – 4, 7 - 8. More specifically, this letter provides that, "[o]ver the past several years, the great weight of scholarly and scientific research has identified that [the Batson] paradigm's focus upon *conscious* discrimination has undermined its effectiveness. This is because biases often operate *unconsciously.* Implicit bias operates through a heuristic or mental short cut. As Professors Jolls and Sunstein explain, "the problem of implicit bias is best understood in light of existing analyses of System I processes. Implicit bias is largely automatic; the characteristic in question (skin color, age, sexual orientation) operates so quickly… that people have not time to deliberate. It is this reason that people are often surprised to find that they show implicit bias." Through the cognitive process of categorization, this readily observable characteristic, such as skin color, is assigned to a group attribution, such as violence. These unconscious biases may directly conflict with egalitarian values which the actor consciously holds. This dichotomy is best understood through the prism of the "two cognitive systems. System I is rapid, intuitive, and error-prone; System II is more deliberative, calculative, slower, and often more likely to be error-free. Much heuristic-based thinking is rooted in

within which implicit bias flourishes.[21] Thus, recent developments in cognitive psychology also support this alternative to Washington approach.

In my opinion, elimination of peremptory challenges, accompanied by an expansion of cause challenges, is a far preferable response to Batson's deficiencies than those embodied in Washington's GR 37.

System I, but it may be overridden, under certain conditions, by System II." Similarly, cause challenges would impose a System II override of the implicit biases otherwise operating under System I. By requiring counsel to articulate the reason supporting a cause challenge, the proposed refocused approach compels counsel to engage in a conscious, deliberative thought process. This invokes System II, which "overrides" the otherwise operational unconscious or automatic processes (System I) within which implicit bias flourishes." Id. at 7 – 8, citing, Jolls and Sunstein, The Law of Implicit Bias, 97 Cal. L. Rev. 969, 975-76 (2006).

[21] Id. See also Jury Letter at 4 & n.25, 7 & n.57.