May 9, 2005

Honorable Joseph F. Lisa, J.A.D.
Superior Court of New Jersey – Appellate Division
216 Haddon Ave. – 7th floor
Westmont, New Jersey 08108–2815

Re: Final Report of the New Jersey Supreme Court Special Committee on
Voir Dire and Peremptory Challenges

Dear Judge Lisa:

Thank you for your efforts as Chair of this Committee and the balanced manner in which you described the process leading to the preparation of the Final Report.

We certainly applaud the Final Report’s recommendations to the extent they seek to improve the voir dire process and make the system of jury selection in New Jersey as fair as possible. Consistent with that goal, however, we must respectfully differ with the majority view on the need to reduce the number of peremptory challenges in criminal cases.

We are writing to address our opposition to Recommendation 8 in the Report concerning the proposed reduction in the number of peremptory challenges to be allotted both sides in a criminal case. We view this as a drastic proposal that is unnecessary, unsupported by sound analysis and, at a minimum, premature. It is our sincere belief that this recommendation should be rejected.

In the Report and during the discussions at Committee meetings, a number of reasons were advanced in support of a dramatic reduction in the number of peremptory challenges in criminal cases. At the heart of our objection to Recommendation 8 is our view that none of these reasons, either singularly or collectively, justify its enactment. In fact, we believe that the reasons offered are flawed in a number of respects and do not justify the proposed departure from long-established practice. We will therefore approach the issue by analyzing the alleged reasons individually.

Before discussing the reasons specifically set forth in the Final Report for Recommendation 8, it should be noted that the question of how much time is devoted to jury selection was raised in the context of both voir dire practices and the number of peremptory challenges. We acknowledge that, in the end,
the Final Report indicates that this issue did not drive the recommendations, but we believe some discussion of it is necessary. In this connection, the 2002 Report of the Conference of Criminal Presiding Judges and Criminal Division Managers on Backlog Reduction specifically argues that the number of peremptory challenges should be reduced because it makes jury selection take too long.

During our initial discussions in Committee meetings, we had the distinct impression that judges felt that reducing the number of peremptory challenges was a good idea in part because it would shorten the process. In fact, early on, Committee members were asked to get feedback from their colleagues on issues pertinent to the Committee’s work. The single biggest concern expressed by attorneys from the New Jersey State Office of the Public Defender was that judges compromise thorough and fair jury selection procedures in order to pick the jury as quickly as possible. There is a perception among criminal defense attorneys that judges are under pressure not to spend “too much time” on jury selection.

From the outset, we questioned the extent to which this should be a factor if there is any risk that the fairness of the process will be compromised. We noted that there is a tremendous disparity around the State in terms of the amount of time devoted to jury selection in particular cases. The reality is that some judges do it more efficiently than others. We also noted that the number of trials is way down. In 2003, for example, there were 209 jury trials in Essex County. Given that there were 16 to 18 judges trying criminal cases at any given time, the average per judge was only about 12 or 13 cases. In some parts of the State, the average is even lower. We feel with so few cases actually being tried concern over the amount of time it takes to select a jury is unjustified.

A constant theme of those Committee members advocating for a reduction in the number of peremptory challenges in criminal cases was the extent to which other jurisdictions allow far fewer than does New Jersey. The Final Report refers to New Jersey as being “out of the mainstream”. It has been our position throughout that this is simply not a reason to change the law in New Jersey absent some showing that to do so would make the system better or fairer in some clearly identified way. Change for change’s sake or because others do it differently is not a good reason. The fact that Louisiana or Texas, for example, allow for fewer challenges does not make it a good idea for New Jersey. There is an old expression – “if it ain’t broke don’t fix it” – which applies here. There has not been a showing by the Committee that the system is somehow in need of overhaul on the issue of peremptory challenges. The Final Report’s own data demonstrate that attorneys do not abuse the process by exhausting their peremptory challenges for the sake of it nor is the amount of time spent in jury selection excessive.

The Final Report cites as further justification for the recommended reduction “changes in the criminal justice system”. We reject both the reasoning and the assumptions underlying this rationale. Peremptory challenges have long existed for a number of reasons including the elimination of subtle juror biases and the perception of litigants that they have some say in the selection of those who will determine their fate. The kinds of changes in the criminal justice system cited by the Final Report do not relate to those concerns. Neither the right to counsel nor the right to seek suppression of illegally obtained evidence, for example, relates to the right to a fair and impartial jury.

Prior to Gideon v. Wainwright, the number of peremptory challenges was the same for represented and unrepresented defendants. That a defendant is represented by competent counsel who will advocate for his Fourth, Fifth, and Sixth Amendment rights does not mean that the jury that ultimately hears his case is unbiased. Those constitutional guarantees exist to protect the individual from overreaching by the State. Peremptory challenges exist to protect the defendant not from any State conduct but from the biases of potential jurors.
The Final Report also relies on expanded jury pools and what it calls a change in “societal attitudes”. It is true that over time efforts have been made to expand the number of citizens called for jury duty. What is unsubstantiated, however, by any empirical data is that the persons called who were previously excluded are somehow less likely to have the same preconceived notions and biases as other citizens. What is also wholly unsubstantiated is that “societal attitudes” have changed so that more jurors are likely to reject law enforcement testimony or be “anti-government” in some sense. Anecdotal information supplied by judges on the Committee is not hard evidence of a real change in “societal attitudes”. The reality is that New Jersey is extremely diverse with jurors from all kinds of backgrounds. A blanket statement that people are not as pro-government as they used to be is not the basis for changing the method traditionally used to safeguard against ingrained prejudices. If the judiciary’s perception of public opinion is to be the basis for deciding the number of peremptory challenges, that number will be subject to adjustment on a county to county basis depending on public opinion polls about crime and law enforcement issues.

The Final Report also points out that the reduction will result in a significant cost savings because the system will require fewer jurors. This is difficult to assess. On one hand, some reduction in the number of jurors summoned might be possible. On the other hand, the judges on the Committee emphasized throughout the process that they would be more inclined to grant challenges for cause if the number of peremptory challenges were reduced and voir dire expanded. In addition, many counties have already tried to render the system more efficient and more convenient for the jurors by permitting them to call in after the first day or requiring only one day of service if not picked for a case. The Final Report notes that the average number of jurors dismissed by challenge by both sides combined is 12 and the average number excused for cause is 21. The latter number will go up under the new standards and the average number of peremptory challenges currently exercised (12) is under the proposed combined total of 14 in Recommendation 8. These numbers suggest that an immediate large scale reduction in the number of jurors summoned would not necessarily be possible.

Another reason offered in the Final Report for Recommendation 8 is that public/juror perception of the criminal justice system is unnecessarily negative as result of the wholesale and unexplained use of peremptory challenges by attorneys, particularly defense attorneys. This is not consistent with our experience. Our experience is that people are not enthusiastic about being called to jury duty and are perfectly happy to be excused and go back to their daily routine. Once selected, there is no doubt that they take the job seriously and do their best to fulfill their responsibilities as jurors. No doubt some potential jurors do not know why they were excused and do not like that they were. The same can be said for those excused for cause. There is, however, no proof that this “negative perception” is a widespread problem. Rather, it is based on anecdotal information provided by judges on the Committee.

At the same time, it is important that the Court carefully explain the concept of the peremptory challenge to the prospective jurors. It would be a simple thing to explain to the jurors that both sides have a great deal at stake in the outcome. One side will disagree with the ultimate verdict. By explaining that one of the purposes of the peremptory challenge is to give the litigants a sense that they had a say in the make-up of the jury, the Court could give the jurors a better idea of the role of the practice.

Two final issues need to be addressed. First, at various points, the Committee discussed the impact of the series of decisions by both the New Jersey Supreme Court and the United States Supreme Court restricting the use of peremptory challenges for alleged discriminatory purposes. There is an
obvious tension between the notion that peremptory challenges can be exercised for any or no reason on one hand, but not for a growing number of unlawful reasons on the other. Obviously, if peremptory challenges were eliminated altogether, there would be no risk of lawyers using them in a discriminatory manner. The historical reality, however, is that it was the conduct of prosecutors who engaged in racial discrimination in jury selection that caused this to be an issue in the first place. It would certainly be ironic if this abuse became the rationale for reducing or eliminating peremptory challenges – changes that would work against the very group victimized by the abuse. It is the extent to which prosecutors have unlawfully used their peremptory challenges particularly when African-Americans are on trial that argues in favor of maintaining the current system in New Jersey.

Second, the Final Report emphasizes that the improved voir dire recommended by the Committee along with more liberal granting of cause challenges will to a large extent obviate the need for peremptory challenges. This may or may not be so in the long run but, in any event, it is way too soon to know in the short term. It depends first on the extent to which the proposed changes are adopted and, more importantly, utilized by trial judges around New Jersey. Even assuming the new practices become standard, it is not possible to gauge in advance the impact they will have on the process. From our perspective, any reduction in the number of peremptory challenges would be premature given these considerations.

Thank you for your consideration of these issues.

Respectfully submitted,

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cc: Members of the Supreme Court Special Committee
on Voir Dire and Peremptory Challenges