Recommendation 8

The Special Committee recommends the reduction of the number of peremptory challenges in criminal trials to 8 challenges for a defendant being tried alone, with 6 challenges permitted to the State. Where there are multiple defendants, each defendant will be permitted 4 peremptory challenges, with the State permitted 3 challenges for each defendant.

Note: The Committee has drafted proposed new language to accomplish the revisions to R.1:8-3 and N.J.S.A. 2B:23-13 that will be required in order to effect this change. Those proposed revisions are included following the discussion below.

In order to fully address the complexities in the current rule and statute relating to peremptory challenges in criminal trials, including the numbers currently authorized, the Chair appointed the Criminal Issues Subcommittee and asked Judge Frederick J. DeVesia, Criminal Presiding Judge in the Middlesex Vicinage, to chair that group. The subcommittee included three judges (including the Chair), the members representing the County Prosecutors' Association, the Office of the Public Defender, and the New Jersey Defense Association, and requested the assistance of the Assistant Director for the Criminal Practice Division within the Administrative Office of the Courts, Joseph J. Barraco, Esq., who had worked with the Criminal Practice Committee for a number of years. Judge Lisa also participated in discussions along with Committee staff. The subcommittee had the benefit of discussions that had taken place at meetings of the full Committee and, after several meetings, recommended the following to the full Committee: (1) that there should no longer be different numbers of peremptory challenges authorized based on the crime charged; (2) that there should no longer be a disparity between the number of challenges provided to the defense and to the State; and (3) that there should no longer be fewer challenges provided where a foreign jury is ordered. The subcommittee recommended 6 peremptory challenges for each side in a one-defendant trial. In multi-defendant trials, each defendant would get 3 and the State would get 3 per defendant.

When it considered the recommendations of the subcommittee and the underlying issues, the full Committee made the determinations shown below, which are
reflected in Recommendation 8, agreeing with some of the recommendations but coming to a different determination with regard to others.

The number of peremptory challenges in criminal trials merits a reduction, especially in light of the changes proposed by this Committee with regard to how voir dire is conducted.

The Supreme Court clearly identified the focus of the Committee in its mandate as well as its title. It was to focus on peremptory challenges and voir dire—two areas identified by earlier committee and conference reports as being closely linked. The Committee, early in its efforts, identified voir dire as its initial focus and the actions that it has proposed will, if approved, provide for uniform jury selection procedures, including a set of uniform voir dire questions, a set of standards that cover areas such as attorney participation and granting cause challenges, education programs for judges and attorneys, a standing committee devoted to voir dire, and that committee's development of a voir dire manual.

The Criminal Issues Subcommittee, following a strongly contested discussion, recommended that both the defendant and the State, where the defendant is being tried alone, receive 6 peremptory challenges. Discussion of that recommendation at the full Committee resulted in a draft recommendation for 6 challenges for the defendant and 4 challenges for the State when a defendant is tried alone. Because some members were unable to attend the meeting at which these votes were taken, the Chair agreed to provide the opportunity for reconsideration at the next meeting. That reconsideration resulted in this recommendation that the defense receive 8 peremptory challenges and the State 6 peremptory challenges when a defendant is tried alone. It is not surprising that there are opposing views on the issue of whether to reduce the number of peremptory challenges in criminal trials, but it should be stated that the disagreement appears to not be the result of blind adherence to established positions but instead appears to be a sincere difference in viewpoints. Judges noted the numbers of jurors not questioned at voir dire and described the disappointment shown by many jurors who are dismissed through the exercise of a peremptory challenge as well as the numbers who are assigned to voir dire but not reached for questioning. Attorneys have
commented that their concern is with the jurors selected to sit on the trial and not those challenged or not questioned.

Data from judge surveys and actual jury selections are consistent in pointing out that attorneys usually do not exhaust their allotted challenges. Attorneys' opposition to reducing the current number of challenges is rooted in the belief that the system is working well, producing good results, and therefore does not require the proposed change. But judges, when viewing that same data tend to focus instead on the fact that large numbers of jurors are not questioned at voir dire, that those dismissed through the exercise of a peremptory challenge are often angry, disappointed, and view the trial process and the justice system in a negative way. They are concerned about eroding public confidence in the justice system when more jurors experience that part of the trial process than serve on trials. Data from 389 criminal trials from September 2004 through January 2005 shows that there were an average of 26 jurors sent to each voir dire who were not questioned during jury selection. The same data shows that the average number dismissed through the exercise of peremptory challenges (by both sides) was 12. Therefore, 38 jurors were either not questioned or removed by peremptory challenge at the typical trial during this period. Another 21 jurors were challenged for cause in the average trial and 14 were selected to sit as jurors at trial.

The impact of the proposed change will be to reduce the number of peremptory challenges in single defendant trials for enumerated crimes from 32 challenges to 14, a difference of 18 challenges per jury selection. In single defendant trials for other crimes, the number of challenges will be reduced from 20 challenges to 14. There were 1,489 voir dires initiated during calendar 2004 for criminal trials. Because there is no breakdown available that shows which voir dires involved enumerated crimes (18 fewer challenges per voir dire) and which involved trials for other crimes (6 fewer challenges per voir dire) or how many defendants were being tried, the impact of these proposed changes can only be estimated. But even if all trials are assumed to involve a single defendant and half were for enumerated crimes and half were not, an estimated 17,662 fewer juror days would be needed for voir dires in a typical year if the proposed changes were made. Additionally, the proposed reductions will also result in a reduction in the number of persons summoned to report as jurors since approximately 1 out of 3
persons summoned, based on experience, meets the statutory qualification criteria to serve as a juror and can serve on the summons date. Therefore, the above estimate translates to about 54,000 fewer citizens per year who would have to be summoned for jury duty, attributable to criminal trials alone.

There should no longer be different numbers of peremptory challenges authorized based on the crime charged.

There presently is a two-tier system in which the defendant gets 20 peremptory challenges and the State gets 12 for crimes deemed more serious; and the defendant and the State get 10 peremptory challenges each for the less serious crimes. The Committee determined that the two-tier system should be eliminated, and the same criteria should apply for all indictable offenses (except capital offenses, which are not part of the Committee’s consideration). Elimination of the two-tier system is appropriate because: (1) with offense-specific and other mandatory sentencing provisions, many of the so-called less serious offenses carry much more substantial penalties than those deemed more serious; and (2) even if an effort were made to establish more rational classifications in each tier, procedures designed to select a fair jury and provide the parties with a fair trial should be equally applicable in all criminal trials. It is incongruous to suggest that the process should be "more fair" in more serious cases. If the process is fair, it is fair. Further, the number of peremptories allowed in New Jersey for the more serious cases is very far out of the national mainstream and most in need of reform by substantial reduction.

There should continue to be a disparity in the number of peremptory challenges permitted the defense as compared to the prosecution.

Notwithstanding the fact that the Committee identified significant changes that evolved within the criminal justice system over the many decades since the numbers of peremptory challenges were originally set, including provision of counsel for indigent defendants, expansion of the jury pool to include additional persons who are more likely to identify with criminal defendants, societal attitudes that are generally less favorable to law enforcement and government than in past times, and greater legal protections for
the accused, such as the inadmissibility of confessions or suppression of evidence, a majority of the Committee held to the view that there remains some residual advantage to the State in a criminal trial. For those reasons, and in recognition that the right to trial is a right possessed by the criminal defendant, the Committee determined that defendants should receive more peremptory challenges than the State.

The lesser number of peremptory challenges provided for trials involving a foreign jury should not be retained.

As noted above, the current court rule provides for 5 peremptory challenges per side where there is a foreign jury. The Committee does not believe that there is a basis for continuing the lesser number provided to defendants when tried with a foreign jury. Further, except in capital trials, the foreign jury practice is rarely utilized. Indeed, no Committee member has ever seen or heard of it being used in a non-capital trial.

Proposed Revisions to N.J.S.A. 2B:23-13b and c:*

Peremptory challenges

Upon the trial of any action in any court of this State, the parties shall be entitled to peremptory challenges as follows:

[b. Upon an indictment for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree as defined by subsection b. of N.J.S.2C:21-1, or perjury, the defendant, 20 peremptory challenges if tried alone and 10 challenges if tried jointly and the State, 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded the defendants if tried jointly. The trial court, in its discretion, may, however, increase proportionally the number of peremptory challenges available to the defendant and the State in any case in which the sentencing procedure set forth in subsection c. of N.J.S. 2C:11-3 might be utilized.]

b. Except as provided in c., in any criminal action where a defendant is tried alone, the defendant shall have 8
peremptory challenges and the State shall have 6 peremptory challenges. Where defendants are tried jointly, each individual defendant shall have 4 peremptory challenges and the State shall have 3 peremptory challenges for each defendant being tried.

[c. Upon any other indictment, defendants, 10 each; the State, 10 peremptory challenges for each 10 challenges allowed to the defendants. When the case is to be tried by a jury from another county, each defendant, 5 peremptory challenges, and the State, 5 peremptory challenges for each 5 peremptory challenges afforded the defendants.]

c. In any case in which the sentencing procedure set forth in subsection c. of N.J.S.2C:11-3 might be utilized the defendant shall have 20 peremptory challenges if tried alone and 10 if tried jointly; and the State shall have 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded the defendants if tried jointly. The trial court, in its discretion, may, however, increase proportionally the number of peremptory challenges available to the defendant and the State in any such case.

Proposed revisions to: R. 1:8-3(d):*

Number of Peremptory Challenges

(d) Peremptory Challenges in Criminal Actions. [Upon indictment for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree as defined by N.J.S.A. 2C:21-1b, or perjury, the defendant shall be entitled to 20 peremptory challenges if tried alone and to 10 such challenges when tried jointly; and the State shall have 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded defendants when tried jointly. In other criminal actions each defendant shall be entitled to 10 peremptory challenges and the State shall have 10 peremptory challenges for each 10 challenges afforded defendants.] In any criminal action where a defendant is tried alone, the defendant shall have 8 peremptory challenges and the State shall have 6 peremptory challenges. Where defendants are tried jointly, each individual defendant shall have 4 peremptory challenges and the State shall have 3 peremptory
challenges for each defendant being tried. Provided, however, that in any case in which the sentencing procedure set forth in subsection c. of N.J.S. 2C:11-3 might be utilized, the defendant shall have 20 peremptory challenges if tried alone and 10 if tried jointly; and the State shall have 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded the defendants if tried jointly; and in such cases, the trial court, in its discretion, may increase proportionally the number of peremptory challenges available to the defendant and the State. The trial judge shall have the discretionary authority to increase proportionally the number of peremptory challenges available to the defendant and the State in any case in which the sentencing procedure set forth in subsection c. of N.J.S. 2C:11-3 might be utilized. [When the case is to be tried by a foreign jury, each defendant shall be entitled to 5 peremptory challenges, and the State 5 peremptory challenges for each 5 peremptory challenges afforded defendants.]

*Note: Material proposed to be deleted is placed in brackets. Material proposed to be added is underlined.*
Recommendation 9

The Special Committee recommends the reduction of the number of peremptory challenges in civil trials to 4 per party.

Note: The Committee has drafted proposed new language to accomplish its proposed revisions to R.1:8-3(c) and N.J.S.A. 2B:23-13. Those proposed revisions are included following the discussion below.

The issues relating to the number of peremptory challenges in civil trials are not as complex as with criminal trials and the Chair did not establish a separate subcommittee to review issues relating to civil voir dires. The 6 challenges provided in civil trials have, like the numbers in criminal trials, been in place for many years. It was noted that there was no adjustment made to the number of challenges when the court rule was revised to reduce the number of deliberating jurors from 12 to 6 in nearly all civil trials. That revision significantly increased the impact of peremptory challenges in civil trials because a party then had 6 peremptory challenges for 6 seated jurors as compared to formerly having 6 challenges for 12 seated jurors.

Data available for 673 voir dires conducted in civil trials during the period from September 2004 through January 2005 showed that the average voir dire panel consisted of 43 jurors and that 11 were challenged for cause, 6 were challenged through the exercise of a peremptory (3 per side), 8 were seated, and 18 were not questioned. The responses from judges to the Committee’s voir dire survey and Committee members’ responses also supported the data with respect to the fact that parties rarely exhausted their peremptory challenges. The Committee in its initial vote on the recommended number of peremptory challenges in civil trials set that number at 3 per party but after further discussion and reconsideration, the Committee recommends that the number be set at 4 peremptory challenges per party, regardless of the number of parties. Part of the consideration in this regard was the Committee’s recognition of attorney members’ assertion that they retain a challenge during jury selection in almost all trials “just in case” and that the data confirmed that they rarely exhaust their challenges. The Committee agreed to provide an additional challenge, moving to recommending 4 per party, in recognition of that point and other issues raised in discussion. According to the National Center for State Courts’ information on the
numbers of peremptory challenges (see Appendix B), only 10 of 52 jurisdictions have more than 4 challenges in civil trials. Fourteen jurisdictions currently provide 4 challenges in civil trials; twenty-six jurisdictions provide 3; and two jurisdictions provide 2.

It was also made clear during discussions of the appropriate number that greater uniformity in judges' granting of challenges for cause would make it less necessary to use peremptory challenges to remove jurors about whom they have concerns. The impact of allowing fewer peremptory challenges in civil trials cannot be fully assessed because no data is available on the number of parties participating at trial, but allowing 2 fewer challenges per party, even where there are only two parties at trial, will mean 4 fewer peremptory challenges per trial, or 8,668 fewer challenges in a typical year based on the number of civil voir dires initiated during calendar 2004. Applying the experience-based ratio of approximately 3 summoned jurors to each qualified juror, this translates to about 26,000 fewer jurors who would have to be summoned for jury service, attributable to civil trials alone.

Proposed Revisions to N.J.S.A. 2B:23-13a:

Peremptory challenges

Upon the trial of any action in any court of this State, the parties shall be entitled to peremptory challenges as follows:

a. [In any civil action, each party, 6.] In civil actions each party shall be entitled to 4 peremptory challenges. Parties represented by the same attorney shall be deemed 1 party for the purposes of this rule. Where, however, multiple parties having a substantial identity of interest in one or more issues are represented by different attorneys, the trial court in its discretion may, on application of counsel prior to the selection of the jury, accord the adverse party such additional number of peremptory challenges as it deems appropriate in order to avoid unfairness to the adverse party.
Proposed Revisions to R. 1:8-3(c):*

Number of Peremptory Challenges

(c) Peremptory Challenges in Civil Actions. In civil actions each party shall be entitled to [8] 4 peremptory challenges. Parties represented by the same attorney shall be deemed 1 party for the purposes of this rule. Where, however, multiple parties having a substantial identity of interest in one or more issues are represented by different attorneys, the trial court in its discretion may, on application of counsel prior to the selection of the jury, accord the adverse party such additional number of peremptory challenges as it deems appropriate in order to avoid unfairness to the adverse party.

*Note: Material proposed to be deleted is placed in brackets. Material proposed to be added is underlined.

Note: If Recommendation 10 is approved, the additional revisions to N.J.S.A. 2B:23-13a and R. 1:8-3(c), as set forth under that Recommendation, will be required.