REDUCING PEREMPTORY CHALLENGES IN CALIFORNIA

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Table of Contents

Abstract 1

Introduction 3

Literature Review 7
- History in the British Commonwealth and United States 7
  - Great Britain 7
  - Canada 8
  - United States 9
- Peremptory Challenges and Race 10
  - General Post-Batson Case Law 11
  - Research Conducted on the Implementation of Batson. 11
  - Studies on Use of Peremptory Challenges and Race 12
- Peremptory Challenges and Voir Dire 14
- Peremptory Challenges and Jury Verdicts 16
- Efforts to Reduce or Refine Peremptory Challenges in Other States 17
  - New Jersey 17
  - Tennessee 19
- Peremptory Challenges in California 20
  - California History of Peremptory Challenges 20
  - California Statutory Authority 20
  - California Post-Batson Case Law 22
  - California Jury Reform 23
  - California Studies on Voir Dire, Jury Utilization and Associated Costs 25
- California Legislative Attempts to Reduce Peremptory Challenges 28
  - 1995-1996 Legislation – Assembly Bill 2003 (AB 2003) 28
  - 1995-1996 Legislation – Assembly Bill 2060 (AB 2060) 28
  - 1997-1998 Legislation – Assembly Bill 886 (AB 886) 28
  - 2007-2008 Legislation – Assembly Bill 1557 (AB 1557) 29
  - 2013-2014 Legislation – Senate Bill 794 (SB 794) 30

Methods 37

Findings 41

Conclusions and Recommendations 51
- Conclusion Number 1 51
  - Recommendation Number 1 52
- Conclusion Number 2 52
  - Recommendation Number 2 53
- Conclusion Number 3 55

Recommendation Number 3 56
Conclusion Number 4 57
Recommendation Number 4A 57
Recommendation Number 4B 57
Conclusion Number 5 58
Recommendation Number 5 59

Summary 61

References 63

APPENDIX – SURVEY ON PEREMPTORY CHALLENGES 71

List of Tables & Figures

Table 1: Number of Peremptory Challenges Revisions Under CCP § 231…….. 31

Table 2. Summary of Comments on SB 794…….. 34

Figure 1: Estimate of Exhausted Percentage of Allotted Peremptory Challenges… 41

Figure 2: Appropriate Level of Peremptory Challenges……. ……. 42

Reducing Peremptory Challenges in California

Kathleen Shambaugh

Abstract

Despite having among the highest rates of peremptory challenges in the United States, California has not succeeded in five separate legislative bills to reduce peremptory challenges. This study seeks to understand the competing factions which support and oppose reductions in peremptory challenges.

The literature review provides a history of peremptory challenges in Great Britain, Canada, the United States and, most particularly, in California. It outlines the relevant case and statutory law, as well as studies on the impact of peremptory challenges on jury verdicts, voir dire and race. It also contains studies from other jurisdictions where there have been legislative attempts to reduce peremptory challenges.

The methodology used in this study consisted of an opinion survey to California judges, district attorneys, public defenders and civil attorneys. Results from the survey indicated that:

- The survey respondents believe that peremptory challenges are a useful tool in jury selection, even though not all allowable peremptory challenges are exercised;
- A majority of survey respondents would support a reduction in criminal misdemeanor peremptory challenges;
- A majority of survey respondents believe that levels of peremptory challenges in capital and felony case types are appropriate;

- A majority of survey respondents are not surprised by state variations in the conduct of jury voir dire and believe that shared voir dire between judges and attorneys is most favorable.

Conclusions and recommendations from this study indicate that:

- Not enough attention has been given to the relationship between levels of peremptory challenges and skewed jury verdicts or hung juries;
- The recent focus on budget cost savings has acted as a catalyst for the legislative efforts to reduce peremptory challenges;
- There are strong, opposing viewpoints on the issue of reducing peremptory challenges;
- Legislation is not the only option to address improvements in the use of peremptory challenges.

Senate Bill 794, which would reduce peremptory challenges in misdemeanor case types is active in the 2013-2014 legislative cycle, has passed the Senate and is currently in the Assembly for consideration. It has sparked significant attention in the legal community. If SB 794 does not pass, future efforts should focus on new studies regarding the impact of peremptory challenges on jury verdicts and hung juries. Finally, peremptory challenges should be considered, along with other jury utilization management tools, to monitor the ongoing costs of jury management.

Introduction

On April 25, 2008 Jay Shawn Johnson entered a plea of guilty to voluntary manslaughter in a Contra Costa County California Superior Court. Mr. Johnson's 12-year odyssey from arrest, through three jury trials, conviction, appeal, reversal, remand, and final plea agreement provides a setting to introduce a discussion of peremptory challenges used in jury trials.

In 1996, Mr. Johnson was arrested for the death of his girlfriend's daughter. He was tried three times before being convicted by jury verdict in 1998.[1] During jury voir dire in the third trial, the prosecutor used three of his 12 peremptory challenges to remove the only African American prospective jurors on the panel.

The resulting jury panel, including alternates, was all white. Despite two motions by the defense to challenge the all white jury, the trial proceeded and Johnson was convicted and sentenced to 15 years-to-life in prison. After years of lengthy appeals at the state and national level, the United States Supreme Court overturned the trial court's conviction in *Johnson v. California (*2005), finding that the trial court did not properly determine whether there was a prima facie showing of racial discrimination in the use of peremptory challenges.

Mr. Johnson's case was sent back to the trial court on remand for further consideration of the peremptory challenge issues since the Supreme Court determined

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[1] The first trial ended in mistrial due to failure to provide discovery, the second trial conviction was reversed by the California Court of Appeals on instructional error.

that California's "more likely than not" standard was higher than the standards set in *Batson v. Kentucky* (1986) (which will be more fully discussed in this study). Rather than proceed through a fourth trial on the case, Johnson entered into a guilty plea agreement and was sentenced to 11 years in jail. His final sentence was reported by both the Contra Costa Times (May 8, 2008) and the San Francisco Chronicle (May 8, 2008).[2]

As illustrated above, the *Johnson* case primarily turned on race as a discriminating factor in use of peremptory challenges. This paper focuses on whether the number of peremptory challenges in California can and should be reduced in certain case types and how other factors, including voir dire affect the use of peremptory challenges. The reason to highlight the *Johnson* case is that apparent misuse of peremptory challenges, such as on racial grounds, is one factor in telling the story about appropriate use and number of peremptory challenges.

The Trial Jury Selection and Management Act (1988) as codified in California Code of Civil Procedure § 231, details the number of peremptory challenges allowed in death penalty (capital) and life imprisonment, non-capital felony, misdemeanor cases with more than 90 days imprisonment, misdemeanor cases with less than 90 days imprisonment, and civil cases. The statute has not been amended since 1988, though several attempts have been made to reduce the number of peremptory challenges in

[2] At the time of change of plea and sentencing, it was expected that Mr. Johnson would be imprisoned for four years of the 11-year sentence. He had been imprisoned since his 1996 arrest on this case.

certain case types. Also, pursuant to Code of Civil Procedure § 231.5, a party may not exercise a peremptory challenge based on race, color, religion, sex, national origin, sexual orientation or similar grounds in California (Trial Jury Selection and Management Act, 1988).

This paper will provide a global understanding of the peremptory challenge, its impacts and effects. The paper specifically focuses on California and lessons to be learned from other jurisdictions which have attempted to reduce peremptory challenges. This study will also address whether there is a correlation between how jury voir dire is conducted and reliance on the use of peremptory challenges. It will also discuss how peremptory challenges affect jury verdicts. Finally, this study will make some observations and recommendations on whether reductions in peremptory challenges should be pursued in light of strong and continued opposition from district attorneys and public defenders and, if so, how might the issues be drafted and framed for consideration and dialogue.

Literature Review

History in the British Commonwealth and United States

Great Britain

The history of the use of peremptory challenges dates back to Roman times and the rule of law in *The Lex Servilia* in B.C. 104 as outlined by William Forsyth, in *History of Trial by Jury (*1852). The *Lex Servilia* mandated that both parties would select 100 potential jurors each. The accuser and the accused would each be able to strike 50 from the other side, so that 50 jurors would remain. In the 12th century at the dawn of common law in England, the defendant was allowed 35 peremptory challenges and the prosecution's number of allowable peremptory challenges was unlimited (Forsyth, 1852). However, in 1305, English Parliament abolished all prosecutorial peremptory challenges (Aikman, 2006).

Until the 20th century, the defense right to peremptory challenges in Great Britain was left untouched. The Juries Act in 1974 (1974, C. 23) reduced the number of peremptory challenges to seven in criminal trials, followed by the Juries Act of 1977, in which the number was reduced to three (Heinz, 1993).

In 1986, shortly after the enactment of the Juries Acts, the English government submitted a "white paper" as part of the *Criminal Justice: Plan for Legislation* stating that peremptory challenges, especially in multiple defendant cases, were being used "as a means of getting rid of jurors whose mere appearance is thought to indicate a degree of insight or respect for the law which is inimical to the interests of the defense".

A survey was commissioned to determine if there was predetermined bias in the use of peremptory challenges but the survey results did not support the government's interests to abolish peremptory challenges. Instead, the survey results showed higher conviction rates in trials in which peremptory challenges were used (Vennard & Riley, 1987).

While the debate in Parliament leaned toward maintaining peremptory challenges, the Home Secretary supported abolition of peremptory challenges based on "logic and common sense" and Parliament voted to eliminate peremptory challenges altogether in Great Britain (Heinz, 1993).

Canada

Soon after Great Britain abolished peremptory challenges, the Canadian Supreme Court in *R. v. Bain*, (1992) determined that the Crown's use of standby jurors created an imbalance between the prosecution and the defendant and insisted that Parliament make changes concurrent with its opinion. The Canadian Parliament then enacted legislation consistent with the decision in *Bain* and granted each side the same number of peremptory challenges. Inherent in the statutory revisions in Canada was the observation that discrimination and race played a key role in the selection of an impartial jury and that protection for impartiality and fairness was of paramount importance. Unlike Great Britain, Canada still maintains the use of peremptory challenges (Heinz, 1993).

United States

In the United States peremptory challenges have played an important role in jury trial selection since colonial times. In 1790, Congress mandated that defendants in federal death penalty cases be given 20 peremptory challenges and most states followed by including a certain number of peremptory challenges by statute. In 1872, Congress extended the right to peremptory challenges to civil cases (Diamond, 2009). All states followed suit with various levels of statutorily-mandated peremptory challenges continuing today.

However, the U.S. Supreme Court has also made it clear that peremptory challenges are not guaranteed by the United States Constitution:

> But we have long recognized, as well, that such challenges are auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension. (*United States v. Martinez-Salazar,* 2000, p. 311*).*

Three United States Supreme Court justices have been vocal in their opposition to peremptory challenges, two as recently as 2006. Justice Thurgood Marshall in the 1986 concurring decision in *Batson* stated that: “The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.” (*Batson,* 1986, pp. 102-103).

Twenty years later, Justices Breyer and Souter in *Rice v. Collins* (2006) also revisited the prosecutor’s intent in justifying the use of peremptory challenges “The prosecutor’s inability….to provide a clear explanation of why she exercised her

peremptory challenges may well reflect the more general fact that the exercise of a peremptory challenge can rest upon instinct not reason" (*Rice,* 2006, p. 343). Breyer goes on to say that "…history has proved Justice Marshall right…I continue to believe that we should reconsider *Batson's* test and the preemptory challenge system as a whole" (*Rice,* 2006, p. 344).

Since the Supreme Court has clearly stated that peremptory challenges are not guaranteed by the U.S. Constitution, it is likely that the discussion to eliminate peremptory challenges will continue.

Peremptory Challenges and Race

Following the United States Civil War, in which slavery was abolished, prosecutors began using peremptory challenges to excuse blacks from juries. This practice continued until *Swain v. Alabama* (1965), where the Supreme Court held that the Equal Protection Clause prohibited prosecutors from racially discriminating by using peremptory challenges.

Swain had little effect on the way prosecutors used peremptory challenges because the standard of proof was too high, requiring that the court find a "systematic exclusion by way of a peremptory challenge." More than 20 years after *Swain*, the Supreme Court redefined the basis for finding racial discrimination in the use of peremptory challenges (*Batson v. Kentucky* in 1986).

Batson is still the key case on the use of racially-based peremptory challenges. The three part (or three strikes as it is sometimes called) standard in *Batson* requires:

1) that the opponent must demonstrate a “prima facie” case of racial discrimination; 2) that if the prima facie case is established, the attorney must defend the use of the peremptory challenge by offering a race or gender neutral explanation for the peremptory; and 3) that the judge must decide whether the challenged peremptory was the result of purposeful race or gender discrimination.

General Post-Batson Case Law

In the first several years after *Batson* was decided*,* the U.S. Supreme Court decided a series of opinions that clarified and expanded *Batson. Powers v. Ohio* (1991) expanded protections to defendants of any race; *Hernandez v. New York* (1991) expanded the ban to peremptory challenges based on ethnicity; *Edmonson v. Leesville Concrete Co.* (1991) expanded the ban to civil litigants; *Georgia v. McCollum* (1992) expanded *Batson* to strikes made by criminal defendants; *J.E.B. v. Alabama ex rel. T.B.* (1994) expanded the ban to strikes based on gender discrimination.

Research Conducted on the Implementation of Batson.

A study by Kenneth Milili, in 1996, entitled *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges,* concluded that in about 62% of *Batson* hearings, courts found that there was a prima facie case of discrimination, thereby finding true the first step of *Batson’s* three standards (Milili, 1996).

In 1994, Raphael and Ungvarsky in an article entitled *Excuses, Excuses: Neutral Explanation Under Batson v. Kentucky* researched 2,000 *Batson* hearings and found that very few judges rejected explanations of race neutrality, the second step of *Batson.*

Milili (1996) determined that judges accepted attorneys' explanations of race neutrality and only 17% of *Batson* objections were successful at being sustained.

In *The Shrinking Strike Zone: Avoiding Problems During Jury Selection in the Age of Batson,* Sean Overland discusses that a significant problem in sustaining any *Batson* objection is that the Supreme Court did not provide a remedy for a *Batson* violation. Two possible remedies are considered: striking the entire venire or readmitting the struck jurors. The problem with the latter option is that readmitting the stricken jurors compromises fairness and impartiality, especially against the party who made the challenge against them (Overland, 2010).

Not until *Parkett v. Elem* (1995) did the court give a definition to satisfy the second standard in *Batson* – "race neutral" means just that. Any explanation need not be "persuasive or even plausible," just race neutral.

Then, in 2005, the Court struck down California's "strong likelihood" standard which was decisive in the *Johnson* case mentioned in the introduction to this study. In *Miller-El v. Dretke* (2005), the Court overruled a conviction because the same explanation given about excusing a black juror would also apply to white jurors not stricken from the jury. The Court struck down another conviction in *Snyder v. Louisiana* (2008) holding that an explanation would not hold if it was similar to the explanation applied to other jurors who were not struck.

Studies on Use of Peremptory Challenges and Race

Professor Melynda J. Pryce of the University of Kentucky has written two exceptional works on the study of peremptory challenges and racial discrimination post-

Batson. In her first work *Performing Discretion or Performing Discrimination: Race, Ritual and Peremptory Challenges in Capital Jury Selection,* Professor Pryce calls for the elimination of peremptory challenges. She argues that empirical evidence shows that the standards set forth in *Batson* cannot be sustained and racial discrimination still dominates the use of peremptory challenges (Pryce, 2009).

However, Professor Pryce, in a later article in 2012, *Policing the Borders of Democracy: The Continuing Role of Batson in Protecting the Citizenship Rights of the Excluded* reexamined her earlier call for the elimination of peremptories by focusing her attention on efforts of the Kentucky Commission on Racial Fairness for Jefferson County ("RFC) to more fully understand issues of access to justice for dismissed jurors. The RFC began tracking the dismissal of jurors by race, not just by peremptory challenges, but by all factors. While the RFC made recommendations to look at how peremptory challenges were used, it continued to struggle in making recommendations to reduce peremptory challenges (Pryce, 2012).

As such, Professor Pryce stated in conclusion "[a]lthough I made an earlier call for the end of the use of peremptory challenges, I realize the quixotic nature of this call…I am encouraged by the way the RFC has taken up the call of *Batson* to look beyond voir dire and to ask how race impacts the ability of marginalized individuals to participate in the legal system" (Pryce, 2012, p. 1645).

In these and subsequent court decisions, the discussion shifted from racial discrimination to focus on how the court's conduct of voir dire affects peremptory challenges.

Peremptory Challenges and Voir Dire

The basic mechanism of conducting voir dire can affect the level and number of peremptory challenges. Voir dire can be conducted in various ways, such as judge-conducted, attorney-conducted or a combination of both judges and attorneys.

In California, the method by which voir dire is conducted is controlled by statute in Code of Civil Procedure § 223 as part of the Trial Jury Selection and Management Act (1988). The history of this section is important to review because it demonstrates the lack of state uniformity on the conduct of voir dire.

In 1990, the voters of California passed an amendment to the California Constitution, known as the Crime Victims Justice Reform Act (1998), commonly referred to as Proposition 115. Proposition 115, in its entirety, was offered as a response to the expansion of rights that had been given to criminal defendants by the California Supreme Court in earlier case decisions. The objective of Proposition 115 was to dial back some of these changes to criminal procedures that went beyond rights guaranteed by the U.S. Constitution. Prior to the passage of Proposition 115, attorneys conducted voir dire in both criminal and civil trials. The effect of Proposition 115 was to redirect the domain of voir dire to judges and limit the involvement of attorneys.

Ten years later, in the 1999-2000 legislative session, the legislature reverted back to allow attorney participation in criminal jury voir dire through passage of Assembly Bill 2406 (2000) which amended California Code of Civil

Procedure § 223. The legislative analysis to Assembly Bill 2406 cited five reasons for allowing attorney participation as follows:

1) Judges are not in a position to know the nuances of a case or case-specific issues related to juror bias. The attorneys are.
2) Studies show jurors tend to be intimidated by judges, resulting in jurors stating no prejudice, without even knowing whether they do [sic].
3) Judges frequently rely on jurors to reveal their own biases, rather than eliciting information about opinions, attitudes and experiences. It's obvious that self-reporting on bias and prejudice is highly unreliable, and studies prove this. Attorneys are trained to elicit this information.
4) Without recourse to voir dire, attorneys can be forced to exercise challenges based on racial, gender, religious or other stereotypes, which is improper and unconstitutional.
5) Ineffective voir dire affects the outcome of trial, which undermines public confidence in our justice system. Surveys by the National Jury Project show that many people actually believe it is the defendant's responsibility to prove his or her innocence.

(AB 2406 (2000) – Bill Analysis, p. 2).

The author of the bill, Assemblyperson Carole Migden, had the support of the Attorney General, California Attorneys for Criminal Justice, California District Attorneys Association, California Public Defenders Association, and the Los Angeles County District Attorney. The legislature passed AB 2406 by a two-thirds vote and gave the attorneys back the right to voir dire in criminal cases. The bill became effective on January 1, 2001. There have been no further revisions to this statute since 2000.

The fluctuating history of voir dire in California clearly illustrates a lack of unanimity on the appropriate method to conduct voir dire.

Peremptory Challenges and Jury Verdicts

Besides the impact of different methods of conducting voir dire, the actual number of peremptory challenges may directly affect or skew jury verdicts. In a significant technical study entitled *Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts,* Roger Allen Ford makes several important findings and provides some specific recommendations. His findings are summarized below:

1. Juries are less likely to convict if the number of peremptory challenges is high because, as the number of allowable peremptory challenges increases, both the prosecution and defense peremptorily challenge outlier jurors on both ends of the spectrum, leaving only median jurors in the population to serve. ”In other words, peremptory challenges make individual jurors much more homogenous and much less ideologically diverse than juries selected randomly.” (Ford, 2010 p. 404).

2. This result is contrary to the idea that juries are to be chosen from a fair cross-section of the community;

3. If jurors do not have a variety of opinions or experiences, it reduces the likelihood of accurate verdicts.

4. Since states award more peremptory challenges in serious cases, the greatest impact and largest margin of erroneous errors in jury verdicts are in those cases in which the defendant’s rights are most at stake (Ford, 2010, pp. 404-405, 416).

Ford concludes that peremptory challenges should be reduced or eliminated to have the “greatest confidence in jury verdicts.” He argues that

peremptory challenges help to exclude the occasional “nutty juror,” supporting defendants’ beliefs that trials are fair. (Ford, 2010, pp. 419-421). He concludes his study by saying:

> These findings cast significant doubt on the argument that peremptory challenges help create juries that are more impartial than randomly selected juries. Using standard selection procedures and reducing the amount of information available about potential jurors would reduce, but not eliminate, the problem. **Accordingly, courts and legislatures should consider limiting or eliminating peremptory challenges**. (Ford, 2010, p. 432) (emphasis added).

This study is significant because it outlines various alternative models by using identifiable measurements to substantiate its conclusions. Ford’s work is new and, as yet, has not received much attention in the legal community.

However, two states have recently attempted to reduce peremptory challenges and those efforts, which are instrumental to understanding opposing factions in this debate are more fully discussed below.

Efforts to Reduce or Refine Peremptory Challenges in Other States

New Jersey

In 2005 the New Jersey Supreme Court convened a Special Committee on Peremptory Challenges and Jury Voir Dire, known as the “Lisa Committee” named after its Chair, Judge Joseph Lisa. The Lisa Committee issued the *Report of the Supreme Court’s Special Committee on Peremptory Challenges and Jury Voir Dire* in May 2005, making recommendations to reduce the number of peremptory challenges in both civil and criminal case types. The Committee looked at criminal trial data from September

2004 through January 2005 which revealed that an average of 12 jurors was dismissed by peremptory challenge by both sides. The Committee estimated that about 54,000 fewer jurors would have to be summoned for criminal trials alone if the New Jersey legislature adopted revisions to voir dire and peremptory challenge recommendations (Lisa Committee Report, 2005, pp. 51-52).

The Lisa Committee concluded, through examination of civil trials, that not all peremptory challenges were exhausted. They recommended reducing the number of peremptory challenges in civil cases from six (6) per side to four (4) and estimated that these proposed revisions would eliminate the need to call approximately 26,000 jurors per year for civil trials. (Lisa Committee Report, 2005, p. 58).

The New Jersey Supreme Court adopted the recommendations of the Lisa Committee. Initially, Assembly Bill 2376 (2006) was introduced to implement all the recommendations of the Lisa Committee relating to peremptory challenges. The bill was referred to the Assembly Judiciary Committee but did not move forward (Assem. Bill 2376, Reg. Sess., N.J. 2006).

In 2008, Assembly Bill 2715 was introduced proposing that the number of peremptory challenges should be established by Rules of Court through its rulemaking process. This was a novel approach to reducing peremptory challenges. The bill passed in the Assembly but ultimately did not succeed, failing to pass the Senate. (Assem. Bill 2715, Reg. Sess. N.J. 2008).

Since that time the Lisa Committee disbanded and its responsibilities were assigned to the Supreme Court Committee on Jury Selection in Civil and Criminal

Trials, which began an informal study on peremptory challenges. No new efforts have been introduced to revise peremptory challenges in New Jersey since 2008.

Tennessee

Tennessee has detailed the number of peremptory challenges to be used in criminal trials as well as the process for exercising peremptory challenges in the Tennessee Rules of Criminal Procedure. These rules mandate that attorneys will submit simultaneous to the court "either a blank sheet of paper or a sheet of paper challenging one or more jurors…Neither party shall make known the fact that the party has not challenged a juror." (Tennessee Rules of Criminal Procedure, 2003, Rule § 24(d)(1)). In this manner, juror privacy and candor in answering questions is ensured.

Tennessee Rule § 24(d)(5) specifies that the judge alone keep a list that remains undisclosed to jurors. The rule specifies the procedure. "[I]f the same juror is challenged by both parties, each party is charged with the challenge. The trial judge shall not disclose to any juror the identity of the party challenging the juror." (Tennessee Rules of Criminal Procedure, 2003, Rule § 24(d)).

In 2003, Tennessee expanded this process to civil cases by amending its civil rules to be consistent with the criminal rules by adding Civil Procedure Rule § 47.03. (Tennessee Rules of Civil Procedure, 2003, Rule § 47.03).

Tennessee and New Jersey were chosen to review because they have done the most recent analysis of their own peremptory challenge parameters. Even though Tennessee has not altered the number of peremptory challenges, important lessons can be learned from their practice. Since Tennessee conducts its peremptory

challenges in a blind manner, attorney gamesmanship is reduced or, perhaps, eliminated. Tennessee criminal and civil rules are designed to maintain fairness, reduce bias and provide jurors with a safe environment for questioning.

Peremptory Challenges in California

California History of Peremptory Challenges

California became the 31st state in the union on September 9, 1850. The use of peremptory challenges in California dates back to 1851 and was authorized in the Field Codes in 1872, pertaining to civil cases. Later amendments expanded the use of peremptory challenges to criminal cases.

California Statutory Authority

In 1975, Penal Code 1070 was amended to increase the number of peremptory challenges in capital cases from 20 to 26. However, in 1988 the legislature consolidated Penal and Civil Codes into a new Trial Jury Selection and Management Act. As part of this revision, Code of Civil Procedure § 231 was revised as follows:

> (a) In criminal cases, if the offense charged is punishable with death, or with imprisonment in the state prison for life, the defendant is entitled to 20 and the people to 20 peremptory challenges. Except as provided in subdivision (b), in a trial for any other offense, the defendant is entitled to 10 and the state to 10 peremptory challenges. When two or more defendants are jointly tried, their challenges shall be exercised jointly, but each defendant shall also be entitled to five additional challenges which may be exercised separately, and the people shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants.
> (b) If the offense charged is punishable with a maximum term of imprisonment of 90 days or less, the defendant is entitled to six and the state to six peremptory challenges. When two or more

defendants are jointly tried, their challenges shall be exercised jointly, but each defendant shall also be entitled to four additional challenges which may be exercised separately, and the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants.

(c) In civil cases, each party shall be entitled to six peremptory challenges. If there are more than two parties, the court shall, for the purpose of allotting peremptory challenges, divide the parties into two or more sides according to their respective interests in the issues. Each side shall be entitled to eight peremptory challenges. If there are several parties on a side, the court shall divide the challenges among them as nearly equally as possible. If there are more than two sides, the court shall grant such additional peremptory challenges to a side as the interests of justice may require; provided that the peremptory challenges of one side shall not exceed the aggregate number of peremptory challenges of all other sides. If any party on a side does not use his or her full share of peremptory challenges, the unused challenges may be used by the other party or parties on the same side.

(d) Peremptory challenges shall be taken or passed by the sides alternately, commencing with the plaintiff or people; and each party shall be entitled to have the panel full before exercising any peremptory challenge. When each side passes consecutively, the jury shall then be sworn, unless the court, for good cause, shall otherwise order. The number of peremptory challenges remaining with a side shall not be diminished by any passing of a peremptory challenge.

(e) If all the parties on both sides pass consecutively, the jury shall then be sworn, unless the court, for good cause, shall otherwise order. The number of peremptory challenges remaining with a side shall not be diminished by any passing of a peremptory challenge. (Code of Civil Procedure § 231, 1988).

In summary, under current law in Code of Civil Procedure § 231 peremptory challenges are available as follows per side (unless altered by multiple defendants or parties):

- 20 in capital and life imprisonment cases;
- 10 in criminal cases where the sentence may exceed 90 days in jail;
- 6 in criminal cases with sentences less than 90 days in jail; and

- 6 in civil cases.

California Post-*Batson* Case Law

Returning back to the Johnson case discussed in the Introduction, the United States Supreme Court focused its discussion on the first step of the Batson standard and questioned if there was a “prima facie case of racial discrimination.” When the challenge was made at the trial, the Judge indicated that the peremptory challenges being used were in close proximity to being problematic, but based her ruling on the “strong likelihood” standard in place at the time from *People v. Wheeler* (1978) and found no indication of racial discrimination.

The United States Supreme Court reversed the conviction in *Johnson* ruling that though the judge had explained that the challenges could be justified by race-neutral explanations, she did not require the prosecution to offer his own race-neutral explanation. The Supreme Court stated that California’s “more likely than not” standard was at odds with *Batson,* which required only an “inference of discrimination” before proceeding on to the second and third prong tests under *Batson.* As such, after determining that there was an inference of discrimination under *Batson* in the *Johnson* case*,* the Supreme Court remanded the case back to the trial court for further investigation into the second and third prongs of the standard tests laid out by *Batson.* As indicated earlier, rather than proceed through a fourth trial, Mr. Johnson pled guilty and received a state prison sentence, effectively closing the chapter on this case.

The *California Bench Handbook on Jury Management* (2013) provides judges with some cautionary instructions about the use of peremptory challenges. It details

recent California cases *People v. Gonzales* (2008) and *People v. Mills* (2010) by instructing that improper use of peremptory challenges must be viewed in light of the equal protection rights of defendants, the equal protection rights of the challenged juror and the right to a jury venire drawn from a cross-section of the community.

Specifically, the handbook states:

> Note: Peremptory challenges are coming under increasing attack because of their widespread illegal use. They were abolished in England, their country of origin in 1988, and three United States Supreme Court justices have called for their abolishment. (California Bench Handbook, 2013, p. 49).

California Jury Reform

Jury reform in California in the 1990s grew out of a call for change after some high-profile trials, including the trial of media celebrity, O.J. Simpson in 1994-1995. This trial, as well as others, focused public attention on the trial experience.

California's Chief Justice and the Judicial Council created a Blue Ribbon Commission on Jury System Improvement in 1995. The charge of the Blue Ribbon Commission was to conduct a thorough review of all aspects of the jury system. In 1996, *The Blue Ribbon Commission on Jury System Improvement Report* was published. As a result of the Blue Ribbon Commission recommendations, several legislative and procedural changes were made. These included implementing a one-day, one-trial system statewide, an increase in juror fees, and the development of a model juror summons (Blue Ribbon Report, 1996).

While the Blue Ribbon Commission met and considered peremptory challenges as part of its final report, owing to the political and controversial nature the task force could not reach consensus or make concrete recommendations as to the appropriate number of peremptory challenges. Recommendation 4.5 of the Blue Ribbon Commission stated:

> A reasonable and equal number of peremptory challenges must be given to each side in criminal and civil cases, and the trial court should be given discretion to increase the number of peremptory challenges for good cause in the interests of justice. (Blue Ribbon Commission Report, 1996).

In 1998, a new Task Force on Jury System Improvement was created to continue the work of the Blue Ribbon Commission. Significant jury reform and other legislative action had taken place in the years between 1996 and 2002 that lended some support for reducing peremptory challenges. Among them, California's three strike case law and reintroduction of attorney participation in voir dire might impact the use and level of peremptory challenges. The task force in its *California Task Force on Jury System Improvements Final Report (*2003, Revised April, 2004*)* approved draft amendments to Code of Civil Procedure § 231 reducing the number of peremptory challenges.

At the same time California was conducting studies to examine jury management practices, the Bureau of Justice Statistics through the U.S. Department of Justice conducted a nationwide study of practices, issuing a report entitled S*tate Court Organization 2004.* A wide variance in number of peremptory challenges across all case types was reported. In non-capital felony trials, the range varied from a low of

three (3) (Hawaii) to a high of 20 in New York. In fact, other than New York and New Jersey, California was found to have the highest levels numbers of peremptory challenges allowed across all case types (Rottman & Strickland, 2006, pp. 228-230).

California Studies on Voir Dire, Jury Utilization and Associated Costs

Prompted by the Blue Ribbon Commission and the Task Force on Jury System Improvement work, the National Center for State Courts (NCSC) was requested to examine voir dire in California in 2003-2004. This study also encompassed review of California's peremptory challenges. Their report, *Examining Voir Dire in California,* issued in 2004, concluded that California attorneys used only about half of the peremptory challenges allotted to them by law in criminal cases. Lawyers in civil cases were found to use about two-thirds of the peremptory challenges allowed to them (Hannaford-Agor & Waters, 2004, p. 9).

The authors compared actual usage of peremptory challenges to the task force recommendations. It was found that the implementation of the recommendations would have the most impact on misdemeanor trials because the task force had recommended the number of peremptory challenges be reduced from 10 to 3 per side. Comparatively, lawyers in civil cases would experience the loss of about one-third of the peremptory challenges available. In criminal cases, the effects of the task force recommendations would be felt in less than half of the jury selection panels. The report concluded that the reduction in peremptory challenges would allow courts to reduce the number of jurors summoned for jury service and better manage case panel sizes. Such changes would have a positive cost-benefit effect, since it was estimated that 110,000 less jurors would

be needed for jury service in California per year (Hannaford-Agor & Waters, 2004, p. 22).

In another report commissioned by the California Administrative Office of the Courts in 2004, entitled *Increasing the Jury Pool: Impact of the Employer Tax Credit,* Paula Hannaford-Agor of the NCSC focused on three jury management methods to save costs: Reducing the number of jurors told to report, reducing the number of people who are sent to a courtroom for jury selection but not "reached" and reducing the time spent on voir dire. The study showed that if all three jury utilization methodologies were adopted, California could "potentially save $14.5 million in direct and jury administration costs alone." (Hannaford, 2004, p. 13).

In a report conducted by the NCSC in 2011, entitled *Assessment of Juror Utilization in the Superior Courts of California,* it was found that statewide, in the 2007-2008 fiscal years, California incurred $39,875,652 for administrative costs and $20,965,345 in juror fees and mileage for a total of approximately $60 million to summon and qualify approximately 10 million prospective jurors. The community costs of a juror not working on the day they report for jury duty is approximately $737 per day, or about $24 per juror (Hannaford-Agor, Waters & Jones, 2011, pp. 5, 6).

In 2012, as a result of the budget cuts to the judiciary, the idea of reducing peremptory challenges in California was renewed, this time led by the Presiding Judges Advisory Committee Jury Working Group. California's economy and ongoing budget reductions to the judiciary prompted the judges to support reductions to peremptory challenges for cost-saving reasons. The advisory group submitted a report, entitled *The*

Report of the Presiding Judges Advisory Committee Jury Working Group: Reducing Peremptory Challenges and Reducing Jury Size was issued in November 2012, (and updated January, 2013) supporting reductions in peremptory challenges.

This draft report concluded that by reducing the number of peremptory challenges along the lines previously recommended, California could save approximately $5.1 million in jury costs savings and $174 million in community costs. The report also noted that California consistently ranks among the highest in the country on numbers of peremptory challenges. It also cited other non-economic benefits to reducing peremptory challenges, such as enforcing fairness, reducing gamesmanship, and saving valuable court time.

In the past six years, California's judicial budget, which just represents 2.1% of the annual state budget, has been cut by $1 billion dollars. In January 2014, the Chief Justice of California, Tani G. Cantil-Sakauye, announced a three-year blueprint to restore funding for a fully functioning judicial branch. The plan focuses on core elements that are needed to restore access to California courts (Judicial Branch Three-Year Blueprint, 2014).

California Legislative Attempts to Reduce Peremptory Challenges

1995-1996 Legislation – Assembly Bill 2003 (AB 2003)

Code of Procedure § 231 has not been revised since 1988, though there have been five attempts in succeeding years to reduce the number of peremptory challenges.

> In the 1995-96 legislative session AB 2003 would have reduced the number of peremptory challenges available to each side in criminal cases during the jury selection process in all criminal case types. The focus of this bill seemed to be in response to the fact that 20 peremptory challenges per side were allowed in capital cases, contributing to juror shortages and "congested calendars in the criminal courts" (Assemb. Bill 2003, 1995-1996, Reg. Sess. Bill Analysis, pp. 2, 3, 1996).

Lacking adequate support for the legislation, AB 2003 failed passage on the Assembly floor by a vote of 38 Noes to 25 Ayes.

1995-1996 Legislation – Assembly Bill 2060 (AB 2060)

Also introduced in the 1995-96 legislative session, AB 2060 would have limited peremptory challenges in civil as well as criminal cases. AB 2060 died before it was heard by the Assembly Judiciary Committee (Assemb. Bill 2060, 1995-1996, Reg. Sess. 1996).

1997-1998 Legislation – Assembly Bill 886 (AB 886)

In the 1997-98 legislative session AB 886 would have reduced the number of peremptory challenges in criminal and civil cases and proposed other jury

modernization changes to the jury system. AB 866 was introduced, failed to muster any steam, and became a two-year bill. After it failed to gain passage from the original house by January 31,' 2008 it died due to inactivity pursuant to Article IV, Section 10(c) of the California Constitution, due to inactivity (Assemb. Bill 886, 1997-1998, Reg. Sess. 1998).

2007-2008 Legislation – Assembly Bill 1557 (AB 1557)

In the 2007-2008 legislative session AB 1557 would have reduced the number of peremptory challenges in misdemeanor cases punishable by up to one year in custody from ten (10) down to six (6) challenges. AB 1557 passed through the Public Safety Committee. An analysis of the bill for the policy committee focused on studies conducted by the National Jury Project (NJP), citing juror bias, dynamics in the courtroom, lack of candor during the jury process, judges' authority in the courtroom and the use of peremptory challenges to modify any perceived bias in jury selection. However, the policy analysis failed to connect findings made by the NJP to any positive outcomes that might be realized by reducing peremptory challenges in misdemeanor cases. The bill was passed out of the policy committee by a vote of six (6) to one (1) (Assemb. Bill 1557, 2007-2008, Reg. Sess. 2008).

Later, AB 1557 was heard by the full assembly along with the following written statement by the author:

> This bill is designed to both minimize the burden on potential jurors and to provide for a more efficient handling of the more routine misdemeanor cases. This bill would free up limited court resources for the more serious criminal cases as well as civil matters (Assemb. Bill 1557, 2007-2008 Reg. Sess., Bill Analysis, Page C).

The bill became a two-year bill, but failed to stir any interest in 2008, and died as inactive pursuant to Article IV, Section 10(c) of the California Constitution.

2013-2014 Legislation – Senate Bill 794 (SB 794)

In the 2013-2014 legislative session SB 794, similar to AB 1557 was initially introduced to reduce the number of peremptory challenges in misdemeanor cases to an "unspecified number" (Senate Bill 794, 2013-2014 Reg. Sess., Introduced February 22, 2013).

The first amendment to SB 794 in April, 2013 was gutted. It was replaced with language specifying that if the offense is punishable with a maximum term of imprisonment for one year or less, "the defendant is entitled to five and the state to five peremptory challenges." The amended bill also specified that if two or more defendants were tried jointly, each defendant would get two more additional challenges (Senate Bill 794, 2013-2014 Reg. Sess., Amended April 8, 2013).

Comparing how the bill would revise the number of peremptory challenges if SB 794 becomes law, Code of Civil Procedure § 231 would be revised as follows:

Table 1. Number of Peremptory Challenges Revisions Under CCP § 231

	Number of Peremptory Challenges Under	
Case Type	**Current Law**	**SB 794**
Capital / Life Imprisonment	20	20
Criminal cases where sentence		
>90 days	10	---
<= 90 days	6	---
1 year or less		5
Civil cases	6	6

Despite support from the influential California Judges Association and the call for cost savings as a motivating factor to implement peremptory challenge reductions, SB 794 failed to make it to a committee hearing in its first legislative year (2013) of a two-year legislative cycle. It received opposition from California District Attorneys Association, California Public Defenders Association; Taxpayers for Improving Public Safety; and the California Attorneys for Criminal Justice – the same folks who had previously opposed AB 1557.

One argument used in the first analysis of SB 794, that by reducing peremptory challenges, the state could save “millions of dollars” was not persuasive. First, the discussion in the analysis focused on the state’s mandate to reduce the prison population, which had no direct correlation to the number of peremptory challenges. Second, there was no actual cost savings calculated to be realized as a result of passage of the legislation. Third, one argument in the committee actually played

against the author's intention because it discussed higher costs from hung juries resulting from reduced peremptory challenges, stating that:

> By reducing peremptory challenges available to the prosecution, the likelihood of a non-unanimous jury increases because the prosecutor cannot use their instincts to remove a juror the prosecutor believes may prejudice the jury. Each non-unanimous verdict increases the chances of costly retrials. (Senate Bill 794, 2013-2014 Reg. Sess., Senate Committee on Public Safety; Bill Analysis, April, 2013).

A 2002 National Institute of Justice study on hung juries reported on the causation and rate of hung juries in various jurisdictions including Los Angeles, California, Maricopa County, Arizona, Bronx County, New York and the District of Columbia. Rates of hung juries varied from a low of 3.1% in Bronx County to a high of 19.5% in Los Angeles and 22.3% in the District of Columbia. To compare the data, the researchers defined "hung jury" as one which hung on any charge. The average rate of hung juries in 30 large, urban courts was found to be 6.2%.

Factors which impact the result of a hung jury are critical to review here. In the study, the researchers determined that "weak evidence, problematic deliberations, and jurors' perceptions of unfairness" were the primary causes for a hung jury (Hannaford-Agor, Hans, Mott, & Munsterman, 2002, p. 3). More importantly, the study also concluded that the level of peremptory challenges may bear no relation to the reasons for a hung jury:

> Various proposals currently consider the number of peremptory challenges allowed for attorneys. Some suggest attorneys need more challenges, while others suggest severely restricting the number. **Interestingly, we found that attorneys were typically satisfied with the voir dire process regardless of whether the jury hung or not**. (Hannaford-Agor, et al, 2002, p. 7) (emphasis added).

In its second legislative year, SB 794 generated significant interest and a Senate Public Safety Committee hearing was scheduled for January 14, 2014. On December 16, 2013, after the bill was set for hearing, a memorandum from the Director of the Office of Governmental Affairs of the Administrative Office of the Courts was sent to all California Presiding Judges and Court Executive Officers requesting each write to members of the Senate Public Safety Committee, ahead of its January 14, 2014 meeting. The purpose of the memorandum was to solicit support for SB 794 (M. Belote, & C. Jasperson, *Memorandum,* December 16, 2013).

The call to support SB 794 did not discuss the National Center for State Court's studies regarding voir dire, jury utilization, or specific cost savings that could be incurred by reducing peremptory challenges. It also did not discuss the NCSC's findings that only about one-half of allowable peremptory challenges are used. The memo also did not discuss the possible impact of higher numbers of peremptory challenges on erroneous jury verdicts.

The Senate Public Safety Committee analysis for SB 794 focused on California's ongoing budget and judiciary crisis during the past several years, stating that:

> "SB 794 seeks to increase efficiency in the **jury selection process and to potentially save the state millions of dollars** by reducing the number of peremptory challenges." (Senate Bill 794, 2013-2014 Reg. Sess., Senate Committee on Public Safety Analysis, 2013, p. 7) (emphasis added).

At the policy committee hearing on January 14, 2014 several supporters and opponents spoke on the bill. A summary of the some of the comments by supporters and opponents of the bill, as observed first-hand is detailed below:

Table 2. Summary of Comments on SB 794

Public Safety Committee Hearings – January 14, 2014	
In Support	**In Opposition**
Cost savings of $1.2 million.	Cost savings are speculative. This bill would create more hung juries, negates any cost savings. Rather than passage of this bill, courts should focus on better jury management practices to save money.
Does not affect due process.	Due process is affected because misdemeanors carry a huge impact of life imprisonment, firearm prohibitions, deportation. Peremptory challenges are important to determine and offset perceived bias.
The endorsement of this bill by all 58 courts.	
47 other states and the federal system have lower peremptory challenges than California.	

Senator Loni Hancock, the chair of this committee, agreed to support the bill if it was amended to include a two-year sunset clause, which would render the bill void unless the legislature takes action to extend or amend the law. The purpose of the sunset clause in this bill is to determine the impact of the legislation in cost savings if the bill was chaptered. With the author approving amendments to the bill, it was approved by the committee. The bill was amended to include a two-year sunset provision (Senate Bill 794, 2013-2014 Reg. Sess., Amended January 21, 2014).

After passage of the bill by the Senate Public Safety Committee it moved on to the full Senate for a vote and received considerable media attention from both supporters and opponents of the bill. In mid-January, Paul Jones of the San Francisco

Daily Journal, a legal publication, wrote an article reporting on the concerns of both the supporters and opponents to the bill *("Bill Would Limit Peremptory Strikes In Misdemeanor Cases,*" 2014). San Francisco Pubic Defender Jeff Adachi, a strong opponent of the legislation wrote a letter to the editor of the San Francisco Chronicle ("*Bill Jeopardizes Fair Trials,"* 2014). The San Francisco Chronicle wrote an editorial on January 28, 2014 supporting SB 794 ("*Jury Relief*," 2014).

The San Francisco Weekly newspaper and blog writer Joe Eskenazi wrote an article on January 27, 2014 in the San Francisco Weekly ("*Lawyers vs. Judges: Senate Bill United District Attorneys, Public Defenders Against Judges,"* 2014). Another supporting opinion was written by Hon. Joan P. Weber, San Diego Superior Court, Judge, in the San Francisco Daily Journal ("*Bill To Reduce Peremptory Challenges Is Common Sense Reform,"* 2014).

A letter to the editor was written to the San Francisco Chronicle by former judge Quentin L. Kopp claiming that SB 794 would not save either time or money (*"Ex-Judge Takes Issue With Jury Measure,"* 2014).

On January 28, 2014 the bill came to a vote in the Senate and passed (Ayes 21 and Noes 11). As of this writing, SB 794 has now passed to the Assembly for consideration where it awaits a policy committee assignment.

Methods

The primary method to conduct this study was a survey designed through Survey Monkey©. The survey was designed to be an opinion survey to test judges and attorneys' opinions about the appropriate levels of peremptory challenges and any relationship to the conduct of voir dire.

Survey of Bench Officers and Attorneys

A survey was created through www.Surveymonkey.com. Before sending out the survey it was pre-tested by a small group of three attorneys, a business analyst, and a judge to determine if it needed to be revised. Feedback from the pre-testing indicated some slight revisions in language wording but, otherwise, the pre-test indicated that it was readable and ready to go live.

On September 4, 2013, the author developed an introduction explaining the purpose and use of the survey and it was launched that day. The survey introduction also included California Code of Civil Procedure § 231 as a reference for responders.

Initially, the most difficult part of the survey process was to identify an appropriate statewide, representative audience to solicit for response. The California Judges Association, which is the state's largest association of judges was approached, and they agreed to send out the survey email link in a monthly newsletter to their membership of 2,016 judges throughout the state.

The California District Attorneys Association was approached and they also agreed to send out the survey to the 58 Assistant District Attorneys representing each

county in the state. Assistant District Attorneys in each of California's counties either do the work of trial attorneys or supervise those who do.

Engaging public defenders was difficult. They have a loosely-organized statewide presence with no central website or contact information. However, the incoming, and now current, California State Bar President is a public defender so he was approached about the survey and he agreed to send it out statewide, to a total of 710 public defenders.

The survey also went out to about 20 civil litigators who also circulated it among their colleagues. In total, the survey went out to approximately 2,800 judges and attorneys.

The survey included 24 questions about peremptory challenges in capital case, felony, and misdemeanor case types (Appendix). The survey also included questions based on two NCSC studies. First, the 2004 study prepared for the California Administrative Office of the Courts on use of peremptory challenges and the second, based on the 2007 State of the States Survey were used to develop the survey.

As a follow up to these questions, open-ended questions were included to determine if prior responses on levels of peremptory challenges would change based on increased knowledge and new information from these studies.

The responses came in two waves, first from about 55 people after the survey was sent to the California Judges Association and then about 40 more after the survey was sent to the district attorneys and public defenders. Responses were received from

115 judges and attorneys for a response rate of about 4%. The survey closed on November 16, 2013.

Findings

Survey respondents agree that not all peremptory challenges are exhausted In all case types. In the first grouping of survey questions, respondents were asked “In what percentage of (capital, criminal felony [non-capital] and misdemeanor) trials do you estimate that the parties exhaust their allotted number of peremptory challenges?” Across all case types, survey respondents believe that defendants exhaust a larger percentage of available peremptory challenges than prosecutors. Each of these questions received 114 responses, which are summarized in the Figure 1 below:

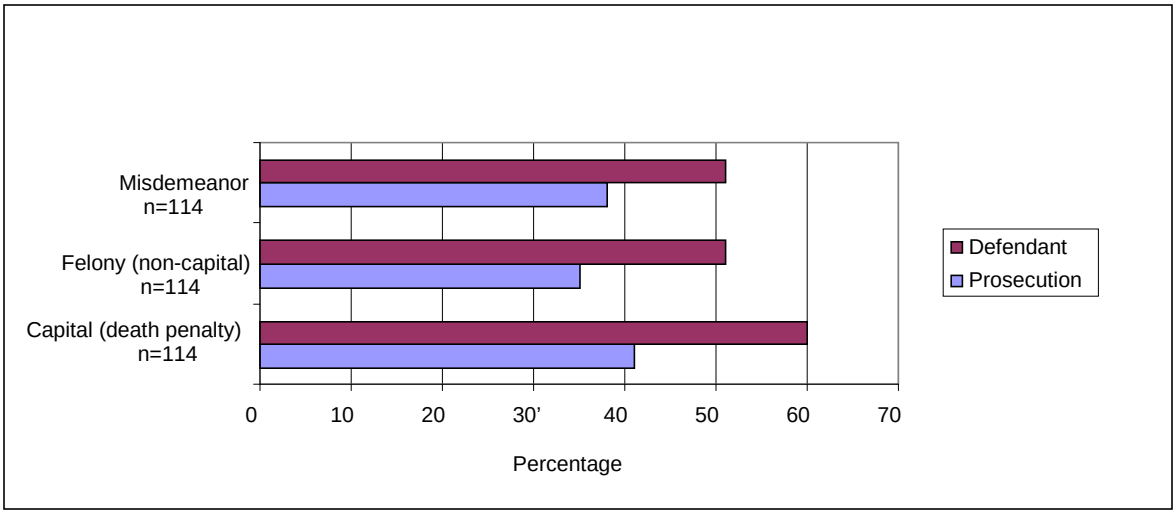

Figure 1: Exhausted Percentage of Allotted Peremptory Challenges

In the second grouping of questions, the respondents were asked by criminal case type if they believed that the statutorily allotted number of peremptory challenges by particular case types was too high, appropriate, or too low. Questions 4 and 7 each

received 114 responses. Question 10 (criminal misdemeanors) received 35 responses, a much lower number, probably as a result of survey attrition. The survey attrition may be a result of the fact that many judges and attorneys do not practice in misdemeanor case types. Also, at this point in the survey, the questions are repetitive – asking the same questions for different case types.

For comparison purposes, the responses to these questions are summarized in Figure 2 below:

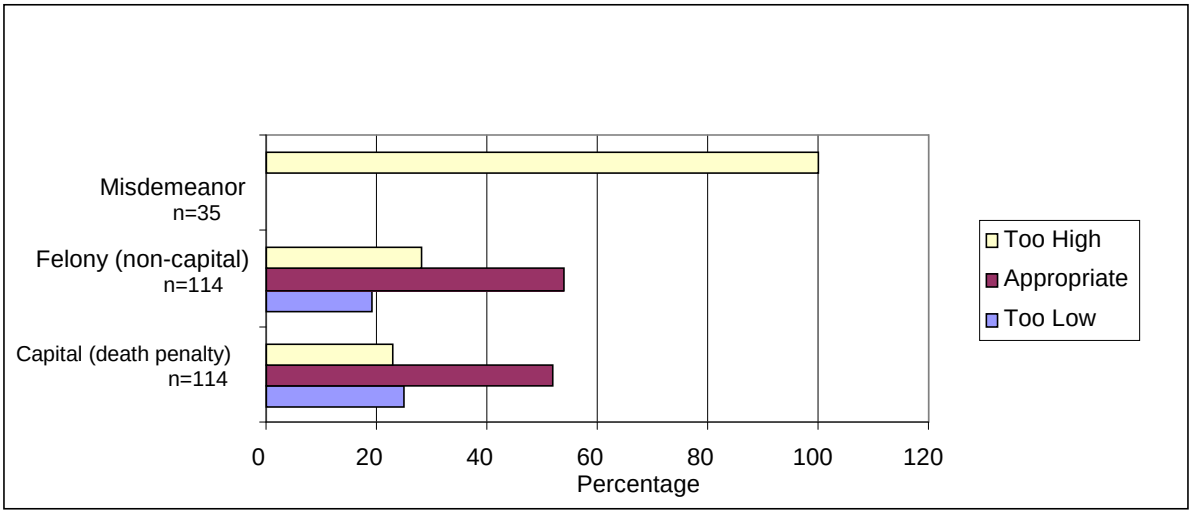

Figure 2: Appropriate Level of Peremptory Challenges

In the third set of questions, survey respondents indicated that they would support a reduction in criminal misdemeanor peremptory challenges, but not in capital or felony case types. The question about capital cases received 114 responses, the question about felony cases received 112 responses and the question about misdemeanors received 35 responses, again attributable to survey fatigue as the

responders moved toward the end of the survey and the questions became repetitive. Of the survey respondents, 97% would support reductions in misdemeanor case types, 30% in felonies and 31% in capital cases.

Of those responding that they would support reductions in peremptory challenges, a majority of those respondents indicated that they would support a slight reduction of peremptory challenges in capital cases. Based on the logic sequence in the survey, respondents who answered “Yes” to the questions about whether they would support reductions in peremptory challenges were then asked “How would you reduce the level?”

Currently, the statutory limit of peremptory challenges in capital cases is 20 per side. There were 34 responses. The range of responses to this question varied from a low of six (6) peremptory challenges to a high of 15. The responses indicated that 56% would not reduce the level of peremptory challenges in death penalty cases below 12 and 91% of the responders would not reduce levels in this case type lower than ten (10).

The majority of survey respondents indicate they would support a slight reduction in peremptory challenges for felony cases. For Question 9 (criminal cases), there were 36 responses. The statutory limit of peremptory challenges in criminal felony (non-capital) cases is ten (10) per side. The responses in this case type were evenly divided with 28% indicating they would reduce the number to eight (8); another 28% would reduce the number of peremptory challenges to six (6) and 25% would reduce the level to five (5).

A majority of survey respondents indicated that they would support a reduction of peremptory challenges in misdemeanor cases. For Question 12 (criminal misdemeanors) there were 34 responses. The statutory limit of peremptory challenges in criminal felony (non-capital) cases is ten (10) per side. Of the 34 responses, 60% indicated they would reduce levels of peremptory challenges in this case type to five (5).

Survey respondents were not surprised that only about 50% of the allotted peremptory challenges are used. Questions 13 in the survey outlined the 2004 study prepared for the California Administrative Office of the Courts by the NCSC. In that survey, Hannaford-Agor and Waters (2004) concluded that across all case types, California attorneys only use about 50% of the peremptory challenges allowed to them. The survey asked whether the result surprised the respondents followed by whether the respondent would consider revising answers to reduce the number of peremptory challenges allowed by law. Question 15 asked responders to describe the revised answers. Of those responses, 35% were not surprised by the results of the study and only 3% would consider revising their answers to reduce peremptory challenges based on this new information.

Question 16 focused on jury voir dire and stated findings of a 2007 State of the States Survey conducted by the NCSC. The study concluded that jury voir dire was conducted predominantly or exclusively by judges in only ten (10) states (DC included). In 18 states, voir dire was shared by the judge/attorneys and in 23 states, voir dire was conducted predominantly by attorneys. Question 16 asked whether the result surprised

the responders. There were 112 responses to this question, with 24% responding "Yes." It is interesting to note that the response rate significantly improved for this question when new information about the NCSC was added to the survey, breaking the repetitive nature of the survey.

Question 17 was a follow up and open-ended question to Question 16 and asked "Why?" There were 27 responses to Question 17. Of the remaining 22 responses that answered "Yes" that they were surprised by the State of the States survey, a majority of them did not know of the differences among the states. Also, 11 people wrote that they believed voir dire should be shared between attorneys and judges, six (6) people said they were surprised that judges did not participate in some jurisdictions in voir dire, three (3) people said that they were surprised that only judges conducted voir dire in some jurisdictions and two (2) people said that they were surprised that judges do not do as good a job as attorneys in conducting voir dire. Responders did not seem to know that there are differences among the states. One responder commented:

> I am surprised that in almost ½ of states, the judge does not voir dire the jury because it can eliminate the need for lengthy attorney voir dire and I believe jurors are more open and willing to talk to the judge about their true feelings. Also, I am surprised that the attorneys do not have an opportunity to voir dire the jury at all in certain situations because several judges do not adequately inquire into some jurors prejudices.

Question 18 was a follow-up question to the State of the States survey outlined in question 16 and followed up the "Why" in Question 17 with a "Why Not" in this question. Question 18 received 112 responders, which is a very high response rate in comparison to the "Why" in Question 17, though many respondents stated that this was

a redundant question after answering the previous question. There was not a solid majority of thought, though interesting statements were gathered. Seven (7) people stated that judge-only voir dire is a bad idea. Several commented on the court trying to save money and time in jury selection. One commenter stated:

> Jury selection is complicated. Frequently, the defense will not use all their peremptories because the prosecution has stopped using theirs. The bench frequently creates a hostile environment to using more peremptories because it costs money. Jurors take their cues from the bench. If the bench makes it appear the defense is using peremptories frivolously, the jurors become more hostile to the defense. I would support a change to the requirement that all peremptories must be exercised to preserve *Batson/Wheeler* issues.

Some respondents touched on the perceived unfairness of voir dire. One respondent commented:

> Attorneys don't want to come close to exhausting their peremptory challenges. A greater number of challenges would allow for the exercise of a greater number, while still keeping the percentage of used challenges about the same.

Another commenter noted:

> Because most judges think incorrectly that their voir dire is fair to both sides and want the whole process to go faster. Since judicial voir dire almost never hurts the prosecution, the prosecutors are happy about it. It is the criminal defendant's rights that are being harmed.

Several respondents noted that the law in California surrounding who conducts voir dire had changed over time. In the past, only judges conducted voir dire. More recently, attorneys regained some input into voir dire and responses to this question reflected this change: "It took a long time to get back the right to have attorneys do voir

dire in California, and judges don't like to share the spotlight." And, another offered this comment: "I know the prior state of the law in California when judges did most of the voir dire. It led to hung juries." Another respondent noted: "In California, rules regarding who conducts voir dire have changed several times over the last twenty years. Given that lack of unanimity in a single state, it is not surprising that there is no unanimity across the United States."

Question 19 asked respondents whether they would be in favor of more participation by attorneys in voir dire after learning that other states allow attorney involvement. Of the 112 responses, 55% agreed they favor attorney involvement. Again, this question – asking new information – enjoyed a good response rate.

Question 20 was a follow up to Question 19 about attorney participation in voir dire. It asked the "Why" question of whether respondents were in favor of attorney participation. There were 63 responses, of which the overwhelming majority – 55 responses or 89% - believe that attorneys should participate in voir dire. There were 4 responses that stated the responsibility should be shared between attorneys and the judge.

Among the responses to Question 20, several points were raised which were captured well by one person below:

> An attorney's ability to voir dire is critical in getting a feel for whether jurors are being honest in their answers and can be fair and impartial jurors. In my experience, attorneys sometimes base their peremptory challenges upon attitudes, vibes, demeanor, eye contact and such. Without being able to engage jurors in some sort of discussion, it is difficult to flesh out whether their answers are an actual representation of how they feel. When judges ask the questions juror by juror, in my experience, it seems

> jurors will all agree and will be hesitant to go against the group. When the attorney has the opportunity, this is the time to address the jurors that seemed hesitant but went with the group anyway; or seemed as if they wanted to say something relevant but were too timid to do so. In my experience, it is when the attorney have [sic] the opportunity to follow up with the jury that biases and impartialness is revealed.

Question 21 was a follow up question to Question 19 about whether respondents would support increased voir dire participation, Question 21 asked "Why not." There were 111 responses, however, 40 of the responses did not answer the question at hand. As such, the answers to this question would be considered repetitive to calculate. However, some comments are noteworthy, such as the following:

> Reducing the number of peremptory challenges is intended to reduce trial time, especially time for voir dire. I think the objective of voir dire is to ferret out bias. Remember, the trains ran on time in Nazi Germany. A jury trial is a forum to do justice for both the People and Defendants.

A comment from a respondent identified as a Deputy District Attorney is also noteworthy:

> As a DDA, prior to the courts being allowed to limit arty [sic] voir dire, it could take longer to pick the jury then [sic] to put on the entire case. It is a waste of juror's time, in that atty would go off on irrelevant tangents solely to ingratiate themselves to a jury.

Question 22 asked: "After learning about how often California attorneys use peremptory challenges, would any of your responses to reducing the levels of peremptory challenges change?" There were 110 responses to this question and 97% of responders stated they would not change their answers.

The last question, Question 24, asked the “Why” follow up question to Question 22, “Would the response change with this new information?” There were 112 responses to Question 24. Of those responses 44 were deemed non-responsive, mostly due to survey response fatigue (e.g., “I already answered that question”). There were 22 responses in favor of reducing peremptory challenges, mostly in misdemeanor cases or in multiple defendant cases. There were 46 responses which opposed reducing peremptory challenges, with responses such as “Less is not better” and “Certain cases simply require more peremptory challenges and the average should not be the rule (especially when the consequences are high)” and “Except for low level crimes such as misdemeanors, the stakes are high enough to give the parties some leeway in jury selection.”

Even though the survey was sent out to all California judges, a representative group of District Attorneys and Public Defenders, it was difficult to monitor the responses due to various factors. First, the survey was anonymous and so determining which interest group (judges, public defenders, district attorneys) a respondent represented could only be determined by how the responses came in. Initially, the first wave of responses came in after the survey went out to the judges. Judges have supported reductions in peremptory challenges so their responses were fairly easy to identify.

It became more difficult to segregate the responses of district attorneys and public defenders as more responses came in, though comments received provided clues to interest group identity.

This was a small survey that did not permit the labor-intensive exercise of extensive pre-testing. There was a considerable pattern of attrition as people moved through the survey and continued to answer similar questions for different case types. From a high response rate of 114 people, a drop of 34 or 44 people was not uncommon. The response rates picked up significantly in the survey once new information was introduced or the survey responders were asked questions about new subject matter, such as attorney participation in voir dire. However, because the survey reached out to only a small percentage of California judges and attorneys, its findings must be considered in light of its limited perspective.

Conclusions and Recommendations

Conclusion Number 1: There is continued support for the use of peremptory challenges as an important tool in jury selection, along with significant support to reduce peremptory challenges in misdemeanor case types

The majority of surveyed judges and attorneys view the use of peremptory challenges as an important tool to eliminate bias or perceived unfairness in the quest to finely craft a sworn jury. Peremptory challenges are viewed, not just in a traditional and historically significant sense, but as a means of avoiding problems of overreaching judges or opposing adversaries and to fine tune or balance the jury.

As earlier stated, three United States Supreme Court Justices have called for the abolishment of peremptory challenges. Great Britain has eliminated them entirely. However, no serious call for reformation or elimination of peremptory challenges has occurred in the United States. The discussion to eliminate peremptory challenges primarily has been raised in dissenting Supreme Court discussions focused on race issues and writings of an academic nature. The results of the survey clearly demonstrate that there is support for reducing peremptory challenges in misdemeanor case types. The survey findings conclude that 97% of responders supported reducing peremptory challenges in misdemeanor case types. In California, misdemeanor peremptory challenges are limited to ten (10). Of those who responded to the question about reducing criminal misdemeanor peremptory challenges, 60% supported reducing the level to five (5).

Recommendation Number 1: Primary legislative efforts to reduce peremptory challenges should focus on misdemeanor case types.

Previous legislative attempts to reduce peremptory challenges focused on all case types including all levels of criminal and civil cases. All these bills failed to muster support and pass. Since the survey results indicate that there is widespread support from lawyers and judges to reduce peremptory challenges in misdemeanor case types, the focus should be on beginning the legislative discussion with misdemeanors.

The survey conducted for this study represented only a small number of the attorneys and judges in the state, and so provided only a limited perspective on the issues surrounding peremptory challenges and voir dire. Senate Bill 794 has created a great deal of media attention not only in the state legal media, but also in the regular news media. This specialized attention to one piece of legislation affecting jury selection is rare in California and it is noteworthy that so many eyes are on the subject of peremptory challenges.

Conclusion Number 2: Not enough attention has been given to the relationship between levels of peremptory challenges and skewed jury verdicts or hung juries.

A respondent to the survey indicated that a hung jury is a negative consequence of reducing peremptory challenges. Recent studies suggest that high levels of peremptory challenges may have a significant impact on jury verdict convictions. Also,

no real discussion has concentrated on studies that show that hung juries may not necessarily be affected by the number of peremptory challenges.

Recommendation Number 2: Further research and education stemming from new information on the effects of peremptory challenges and the relationship between peremptory challenges and hung juries should be fully investigated and discussed with policymakers and legislators.

Roger Ford's work on *Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts* (2010) is a relatively new study in the field. In his study he finds that as the levels of peremptory challenges increase, prosecutors and defense attorneys are more likely to peremptorily challenge "outlier" jurors, creating more homogenous juries. The impact of a more homogenous jury reduces the level of diversity and likelihood of accurate jury verdicts. This finding is contrary to the notion that jurors should be selected from a fair cross-section of the community. High levels of peremptory challenges may actually have the opposite effect intended and result in reducing the rates of conviction. Since more peremptory challenges are given to more serious felony and capital cases, Ford suggests that the rate of the erroneous verdict is much higher in those cases which have more serious repercussions. He recommends that peremptory challenges be reduced to create greater confidence in jury verdicts.

Since Ford's study is so new, it may yet receive attention from the legal community for purposes of research and education. Only one of the recent legal articles discussing SB 794 even referenced Ford's study. It was not part of the legislative analysis in SB 794 or discussed at the Senate Policy Committee hearing which vetted

SB 794 before it was voted on by the Senate. This suggests a disconnect between recent academic studies on peremptory challenges and information that legislators and policymakers are relying on to make decisions.

In California, the Presiding Judges Advisory Group, the California Judges Association and the Judicial Council all support reductions in peremptory challenges and SB 794. Ford's study provides new information and helps to support the efforts to reduce peremptory challenges. In order to properly vet Ford's study, judges and the Judicial Council should urge legislative staff and analysts to seek out Ford's study in order to boost support for reducing peremptory challenges.

One respondent to the survey stated that there is a correlation between higher levels of peremptory challenges and hung juries. This notion was also stated in the analysis for SB 794. The National Center for State Court's study in 2002 for the National Institute of Justice (NIJ) found that, in those trials which resulted in hung juries, attorneys were happy with the voir dire process. Instead, a hung jury seems to be more the result of weak or confusing evidence, not closely associated with voir dire practices or levels of peremptory challenges. (Hannaford-Agor, et al., 2002, p. 3, 7).

Based on review of the SB 794 documentation, including written and oral discussions surrounding the bill, it appears that the NIJ's 2002 conclusions on hung juries and levels of peremptory challenges were not communicated to the legislature. This may be due to the fact that the study is now more than 10 years old. However, the age of the study does not preclude it from being shared or known by those in position to make policy. Again, the California Judges Association, the Presiding Judges Advisory

Group and the Administrative Office of the Courts policymakers may want to review the NIJ 2002 study and findings to help boost support for reducing peremptory challenges.

Conclusion Number 3: The recent focus on cost savings has acted as a catalyst for reducing peremptory challenges.

Courts have looked for ways to streamline operations, maximize technology and reduce costs. The discussion around reducing peremptory challenges as a cost-savings measure is a natural response to any discussion of budget considerations.

Studies have shown that jury costs in California average approximately $60 million per year. Approximately $14.5 million in savings could be realized if courts reduced the number of jurors summoned, reduced the number of jurors sent to the courtroom and reduced the time spent on voir dire. Cost savings from reducing peremptory challenges, alone, have been estimated between $1.2 and $5 million statewide.

Senator Loni Hancock, in her comments at the January 14, 2014 Senate Public Policy Committee Hearing on SB 794, acknowledged that the cost savings estimate of $1.2 million attached to SB 794 is, at best, speculative. If SB 794 passes, Senator Hancock stated her expectation that the Administrative Office of the Courts provide data about true cost savings for the legislature to review before the sunset date of the legislation, when the bill automatically becomes void.

Recommendation Number 3: Policymakers should help courts by educating and training jury managers on effective jury management practices.

More effective and immediate cost savings measures should be considered, such as making improvements and efficiencies in juror utilization. Courts can maximize juror utilization by analyzing summoning patterns, managing case panel size, and reducing zero panel days (days on which jurors come but are not used). Good jury management practices can be used to save courts money and staff time.

Training and education of jury managers is highly recommended. Jury managers focus primarily on summoning jurors, making sure enough jurors are available for courtrooms and running the day-to-day operations of a jury unit. With downsized staffing in most courts, little time is available for training and education, but it is critically important to the implementation of juror utilization methods that can realize cost savings.

Jury managers and administrators need to be trained on how to maximize jury utilization. The National Center for State Court's Jury Toolbox is an effective method to manage a court's jury utilization. It is a free online diagnostic tool to help jury managers and administrators more effective manage jury utilization. It can be found at: http://www.jurytoolbox.org/Login.aspx?ReturnUrl=%2f

Conclusion Number 4: There are strong, opposing viewpoints on the issue of reducing peremptory challenges.

Judges support reductions in peremptory challenges; district attorneys and public defenders are staunch in their opposition. The passionate discussion on the subject of peremptory challenges was heard from both sides at the SB 794 Senate Policy Committee Hearing on SB 794.

Recommendation Number 4A: Should SB 794 fail to pass, further discussion on issues related to peremptory challenges should focus on establishing a forum for dialogue and consensus-building.

Should SB 794 fail to become law, the Judicial Council should consider stepping in to create a neutral task force or advisory group consisting of representatives from interested groups, including judges, district attorneys and public defenders. The purpose of the group should be to establish meaningful dialogue and attempt to build consensus moving forward on issues involving peremptory challenges. The advisory group should be charged with reporting on the results of its work to the legislature.

Should the task force not reach the consensus needed to sponsor further legislation, perhaps another alternative is to give the Judicial Council rulemaking authority as discussed below.

Recommendation Number 4B: The legislature should give the Judicial Council rulemaking authority to determine the appropriate levels of peremptory challenges.

If an inclusive task force of judges, district attorneys, and public defenders cannot find consensus on reducing peremptory challenges, one strategy is to recommend that the legislature give certain rulemaking authority to the Judicial Council. The California Rules of Court provide instruction on many issues related to trials. The process to revise a Rule of Court does not require legislative action. Rules of Court are adopted through a transparent process, including the opportunity for public comment. Similar to the state of Tennessee, the California Rules of Court could be amended to: 1) determine appropriate levels of peremptory challenges, and 2) determine the process by which the peremptory challenges are used.

Conclusion Number 5: Legislation is not the only option to address improvements in the use of peremptory challenges.

One survey respondent discussed that the objective of peremptory challenges is to “ferret out bias”. That statement is representative of many attorneys’ opinions on the need to maintain peremptory challenges. However, other survey respondents discussed the gamesmanship that may occur in jury selection. If a prosecutor stops using peremptory challenges, sometimes the defendant believes that they should stop using peremptory challenges too, either taking their cues from the bench to move the trial along or because using more peremptory challenges might bias the jury against them.

Tennessee offers an approach to revising the use of peremptory challenges. Tennessee Criminal Procedure Rule § 24(d) outlines the manner in which attorneys

submit their requested peremptory challenges on paper to the judge without the other side knowing.

Recommendation Number 5: The legislature should consider giving the Judicial Council rulemaking authority to change the voir dire process regarding use of peremptory challenges so that perceived bias is reduced, similar to Tennessee Criminal Procedure Rule § 24(d).

Rule § 24(d) in Tennessee can be instructive for California, since blind submissions of peremptory challenges reduces the perceived bias in the courtroom. It can also work to reduce or eliminate the gamesmanship between the prosecution and defense teams in a trial. Further, blind submissions of peremptory challenges can streamline and speed up the jury selection process, which makes trial judges, jurors, and attorneys happy and improves public trust and confidence in the judicial system.

If California adopted a rule similar to Tennessee's Rule § 24(d), the perceived bias issue could be reduced or resolved and both public defenders and district attorneys may be more likely to consider supporting reductions to peremptory challenges.

SUMMARY

The role of peremptory challenges in California is well-established as documented in the conclusions and recommendations of this study. Since California is among the highest in the country for allowable peremptory challenges across all case types, the ongoing discussions about peremptory challenges have historically focused on reducing the number. Two states have made recent attempts to reduce peremptory challenges and have not been successful. Senate Bill 794, now active in the state legislature, may break the chain to introduce peremptory challenge reductions in misdemeanor case types.

The current momentum to pass SB 794 is gaining traction in a way which was not anticipated when this project commenced in the summer of 2013. At that time, the bill was languishing because it had not moved forward during its first legislative year.

Discussions on the bill began in January, 2014 when SB 794 was set for hearing in the Senate Public Safety Committee. At their January 14, 2014 hearing, it became apparent that the bill had the support of its chairperson, Sen. Loni Hancock, if amended to add a sunset clause, and would then move forward to a full vote by the Senate. This prompted supporters and opponents of the bill to step up marketing in the media to gain the attention of the legal and mainstream community. SB 794 passed the Senate and was moved forward to the Assembly, where it stands as of the completion of this study.

Even if the bill is not successful, the dialogue between judges, attorneys, legislators and policymakers should continue. Future dialogue should focus on new studies relevant to the issues surrounding peremptory challenges including those on

race, voir dire, impact on jury verdicts, and hung juries. Particular attention should be given to the notion that higher levels of peremptory challenges may negatively impact accurate jury verdicts and, in fact, reduce conviction rates. Attention should also be given to other approaches for using peremptory challenges, such as Tennessee's private submission of names to the judge, which takes the gamesmanship out of using peremptory challenges.

Finally, peremptory challenges should be considered, along with other jury utilization management tools, to monitor the ongoing costs of jury management. Using online tools, such as the National Center for State Court's Jury Managers Toolbox, a jury manager, administrator, or policymaker can now accurately measure costs and estimate, with real certainty, the impact of reductions in peremptory challenges.

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APPENDIX – SURVEY ON PEREMPTORY CHALLENGES

Survey on Peremptory Challenges and Jury Voir Dire

You are being asked to voluntarily participate in a 10 minute opinion survey The sole investigator for this survey is Kathleen Shambaugh, who is a candidate in the Institute for Court Management Fellows Program at the National Center for State Courts in Williamsburg, Virginia.

The purpose of this survey is to determine whether there is a meaningful relationship between how jury voir dire is conducted and peremptory challenges. It is also to measure opinions on reductions in peremptory challenges.

The information in this survey will be kept completely confidential. If you have any questions about the survey or would like information about the survey results, please contact Kathleen Shambaugh at (925) 822-8203 or at shambalaw@comcast.net.

INTRODUCTION

California Code of Civil Procedure Section 231(a) provides statutory authority for the number of peremptory challenges in criminal trials, as follows:

- If the offense charged is punishable with death or with life in prison, the defendant is entitled to 20 and the people are entitled to 20 peremptory challenges.

- In a trial for any other offense, the defendant is entitled to 10 and the state to 10 peremptory challenges.

Peremptory Challenges in Criminal Case Types

***1. In what percentage of capital (death penalty) trials, do you estimate that the parties exhaust their allotted number of peremptory challenges? Please enter percentage as number only.**

Prosecution _____

Defendant _____

***2. In what percentage of criminal felony (non-capital) trials, do you estimate that the parties exhaust their allotted number of peremptory challenges? Please enter percentage as number only.**

Prosecution _____

Defendant _____

***3. In what percentage of criminal misdemeanor trials, do you estimate that the parties exhaust their allotted number of peremptory challenges? Please enter percentage as number only.**

Prosecution _____

Defendant _____

Capital (Death Penalty) Cases

Survey on Peremptory Challenges and Jury Voir Dire

***4. In a capital (death penalty) case, the current number of peremptory challenges per side is 20. Do you think that this level is:**

- Too Low
- Appropriate
- Too High

***5. Would you support a reduction in peremptory challenges in capital cases?**

- Yes
- No

6. How would you reduce the level of peremptory challenges in capital cases? Capital (death penalty trials): From 20 per side to: ____

Please indicate number

Criminal (non-felony) Cases

***7. In a criminal felony (non-capital) case, the current number of peremptory challenges per side is 10. Do you think that this level is:**

- Too Low
- Appropriate
- Too High

8. Would you support a reduction of the current number of peremptory challenges (10 per side) in criminal felony (non-capital) trials?

- Yes
- No

***9. How would you reduce the level of peremptory challenges in criminal felony (non-capital) trials? From 10 per side to: _____**

Please indicate number

Criminal Misdemeanor Cases

Survey on Peremptory Challenges and Jury Voir Dire

***10. In a criminal misdemeanor case, the current number of peremptory challenges per side is 10. Do you think that this level is:**

- Too Low
- Appropriate
- Too High

***11. Would you support a reduction of the current number of peremptory challenges (10 per side) in criminal misdemeanor trials?**

- Yes
- No

***12. How would you reduce the level? From 10 per side to: ___**

Please indicate number

California State Study on Peremptory Challenges

***13. In a 2004 study prepared for the California Administrative Office of the Courts by the National Center for State Courts, it was concluded that across all case types, California attorneys only use about 50% of the peremptory challenges allowed to them. Does this result surprise you?**

- Yes
- No

***14. Would you consider revising your answers to the questions above to reduce the number of peremptory challenges allowed by law?**

- Yes
- No

Survey on Peremptory Challenges and Jury Voir Dire

15. Please describe your revised answers

In capital (death penalty) cases from 20 challenges to:

In criminal felony (non-capital) cases from 10 challenges to:

In criminal misdemeanor cases from 10 challenges to:

Peremptory Challenge and Jury Voir Dire

16. In a 2007 State of the States Survey conducted by the National Center for State Courts, jury voir dire was conducted predominantly or exclusively by judges in only 10 states (DC included). In 18 states, voir dire was shared by the judge / attorneys and in 23 states, voir dire was conducted predominantly by attorneys. Does this result surprise you?

- Yes
- No

17. Why?

***18. Why Not?**

19. After learning about the states that allow attorney involvement in voir dire, would you be in favor of more participation by attorneys in voir dire?

- Yes
- No

20. Why?

Survey on Peremptory Challenges and Jury Voir Dire

***21. Why Not?**

22. After learning about how often California attorneys use peremptory challenges, would any of your responses to reducing the levels of peremptory challenges change?

- Yes
- No

***23. How?**

***24. Why?**

Thank you for your participation in this survey. If you are interested in receiving the responses to the survey or the results of the analysis, please contact Kathleen Shambaugh at shambalaw@comcast.net