

# Arizona's Groundbreaking Venture... Eliminating Peremptory Challenges

January 27, 2022

*NAPCO Monthly Webinar Series*



# Presenters



Hon. John J. Russo, Moderator  
Common Pleas Court of Ohio  
in Cuyahoga County  
Chair, NAPCO Board of Directors



Paula Hannaford-Agor  
Director  
Center for Jury Studies  
National Center for State Courts



Hon. Joseph C. Welty  
Presiding Judge  
Arizona Judicial Branch  
in Maricopa County



Jessica M. Salerno, Ph.D.  
Associate Professor  
Social and Behavior Sciences  
Arizona State University

# Agenda

1. **Background / National Perspective**
2. **Arizona Eliminates Peremptory Challenges**
3. **The Planned Path Forward**
4. **Q & A**



During jury selection, judge and attorneys question prospective jurors to eliminate persons who cannot serve impartially

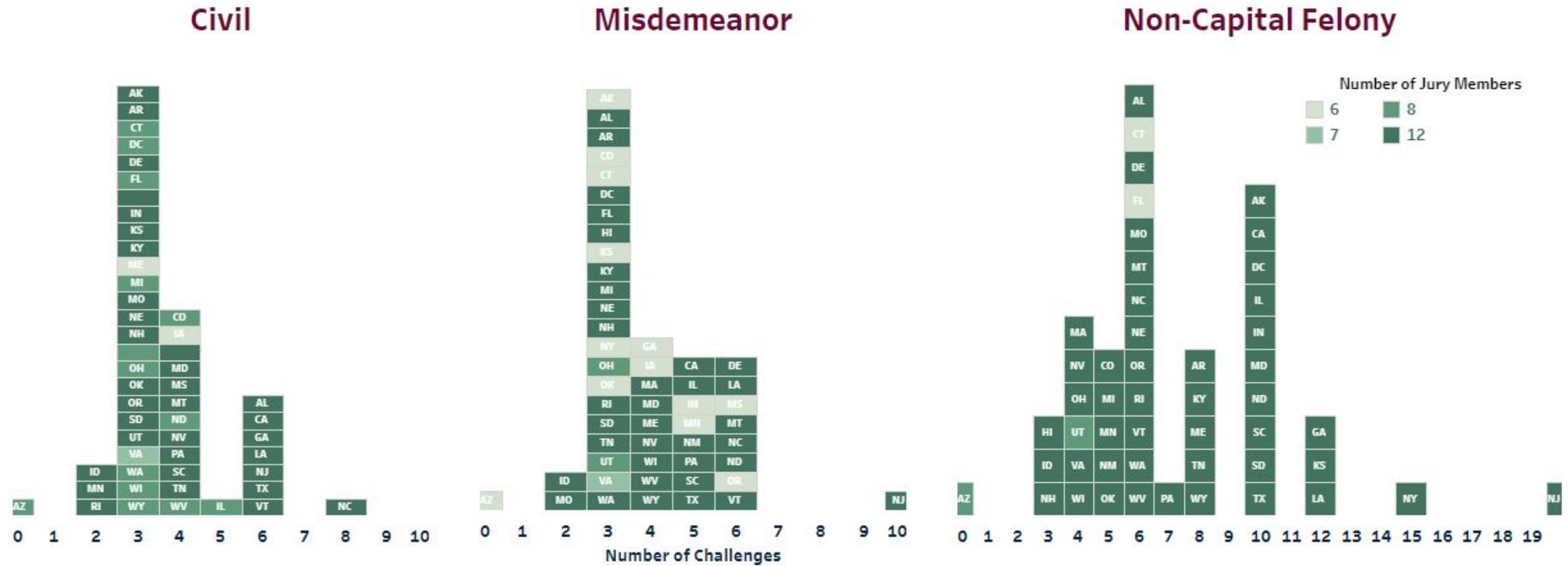
Based on objective factor (statute or rule), juror is presumptively biased: Removed for Cause

Reasonable doubt that juror can be impartial: Removed for Cause

Juror is suspected of bias: Removed by Peremptory Challenge

Presumptively Impartial: Sworn Jurors and Alternates

# Peremptory Challenges



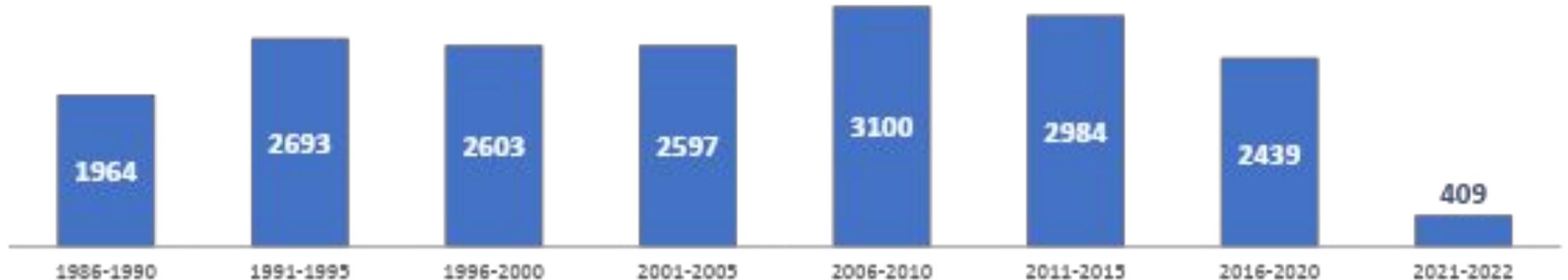
*Batson v.  
Kentucky, 476  
U.S. 79 (1986)*

- Prohibits the exercise of peremptory challenges to exclude prospective jurors on the basis of race
- Subsequently extended to criminal defendants (1991), parties in civil cases (1991), and gender (1994)
- Creates a three-step procedure to determine whether a peremptory challenge has been used unlawfully
  - Movant makes prima facie showing that juror was removed on basis of race
  - Opposing party offers race-neutral reason for the peremptory challenge
  - Judge determines whether proffered reason is race-neutral or pretextual

# *Batson v. Kentucky*, 476 U.S. 79 (1986)

“While the peremptory challenge occupies an important position in trial procedures, the above-stated principles will not undermine the contribution that the challenge generally makes to the administration of justice. Nor will application of such principles create serious administrative difficulties.” *Id.* at 98-99.

Number of written opinions in Lexis/Nexus database citing *Batson v. Kentucky* (n=18,818)



# Pros and Cons of Peremptory Challenges

## PROS

- Parties have a role in jury selection
- Essential safeguard against biased or unreasonable judge
- Bolsters public confidence in impartial jury

## CONS

- Easily used to discriminate based on race / ethnicity
- Ineffective use by (most) attorneys
- Wasteful use of juror time, court resources
- Undermines public confidence in impartial jury

# Washington General Rule 37

Replaces subjective determination of intent with objective observer standard

- “If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge.”

## Reasons Presumptively Invalid

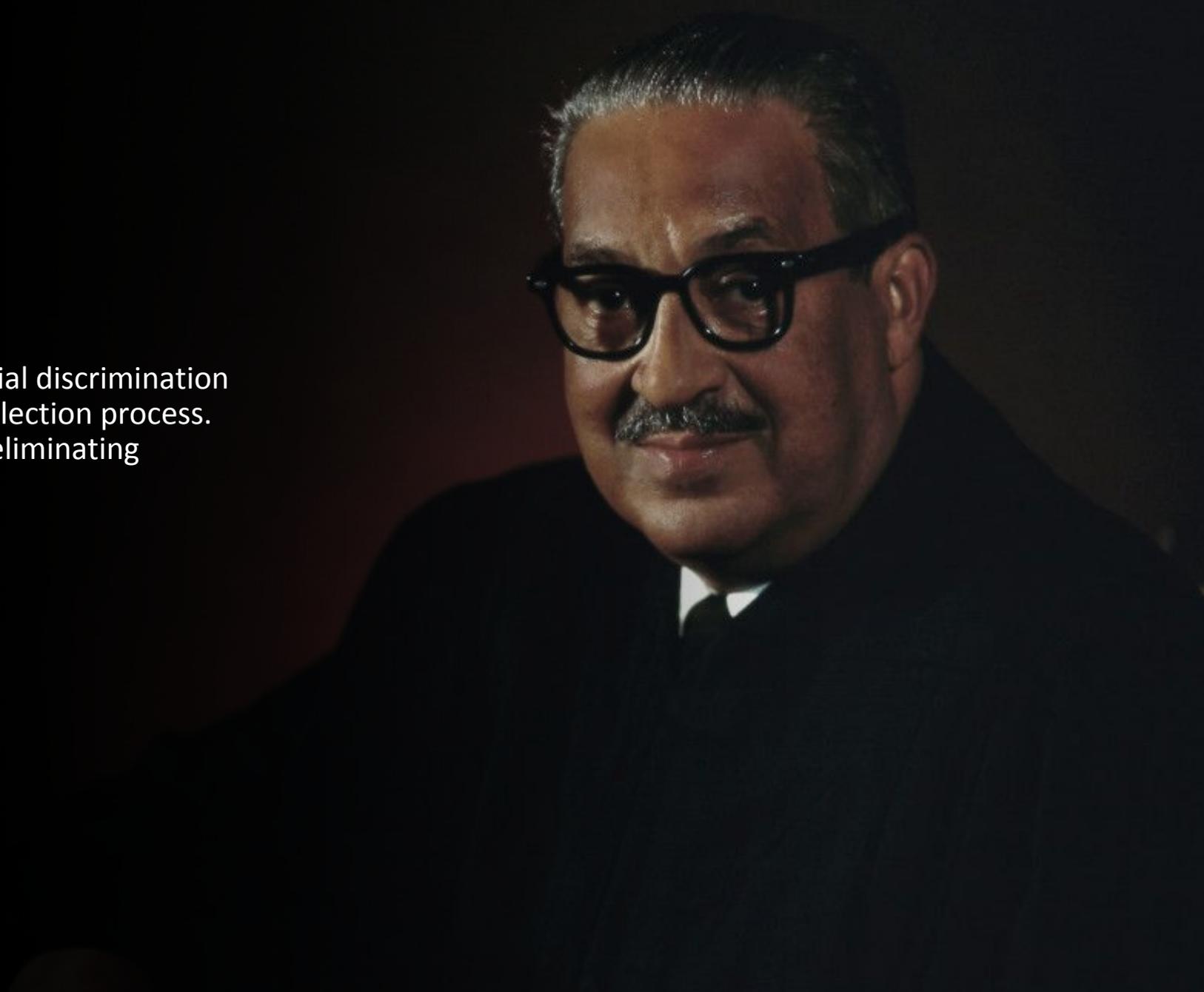
1. Prior contact with law enforcement officers
2. Distrust of law enforcement or belief that law enforcement officers engage in racial profiling
3. Close relationship with people who have been stopped, arrested, or convicted of a crime
4. Living in a high-crime neighborhood
5. Having a child outside of marriage
6. Receiving state benefits
7. Not being a native English speaker.



## Justice Thurgood Marshall

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- “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.”
- *Concurring opinion at 92.*





**HOW DID WE GET HERE?**

**On August 24, 2021...**

**The Arizona Supreme Court eliminated peremptory challenges to prospective jurors in all cases.**



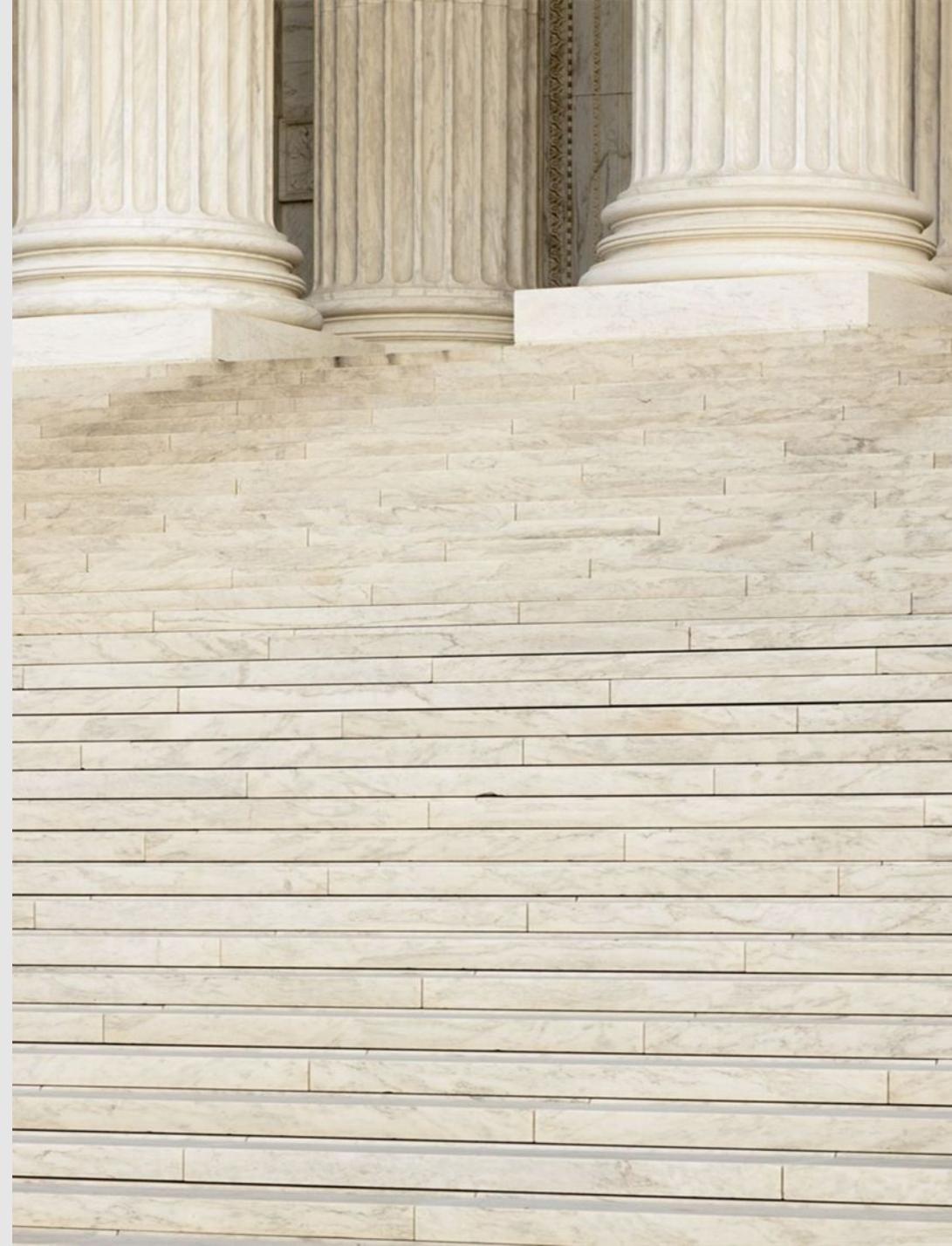
## Peremptory Challenges in Arizona were solely authorized by various Arizona Rules of Court

- Criminal
  - Civil
  - Other
- 

# Pandemic Operations

Peremptory Challenges were narrowed by Administrative Orders of the Supreme Court to facilitate health and safety while continuing court operations...

Felony	6 to 2
Civil	4 to 2
LJ Courts	2 to 1







**In January 2021...**

**Two Rule Petitions were filed with the Arizona Supreme Court relating to preemptory challenges.**

- R-21-0008 advocated retaining but modifying**
- R-21-0020 advocated elimination**

## Petition R-21-0008

Submitted by a State Bar committee that studied *Batson* for over a year.

Advocated for the adoption of a modified version of Washington State's General Rule 37.

- Removed finding of purposeful discrimination.
- If any reasonable person considering the totality of the circumstances could view race or another protected status as motivating the strike, it would be disallowed.
  - Expanded protected categories.
  - Identified specific presumptively invalid reasons for strikes.

Public Comment.



310

Jury  
Deliberation  
In Progress

## Petition R-21-0020

Submitted by Judges Peter Swan and Paul McMurdie.

Advocated for the elimination of peremptory challenges. Arguing that the strikes are exercised in a discriminatory fashion and that the Court should eliminate them to fix an obvious source of racial injustice in the trial courts.

Argued that the Batson Committee's proposal was too nuanced to reach desired effect and would invite litigation.

Public Comment.



310  
Jury  
Deliberation  
In Progress

# Arizona Supreme Court

## Access to Justice | Diversity and Inclusion Initiatives

### Jury Statistics

- Administrative Office of the Courts (Statewide)
- Juror participation relative to population
  - Judicial Branch in Maricopa County (Greater Phoenix)
- Racial and ethnical breakdown of jurors removed by peremptory strikes



# Jury Representativeness Throughout the Jury Process – Maricopa County AZ – CY2019

## Criminal Jury Representativeness Throughout the Jury Process

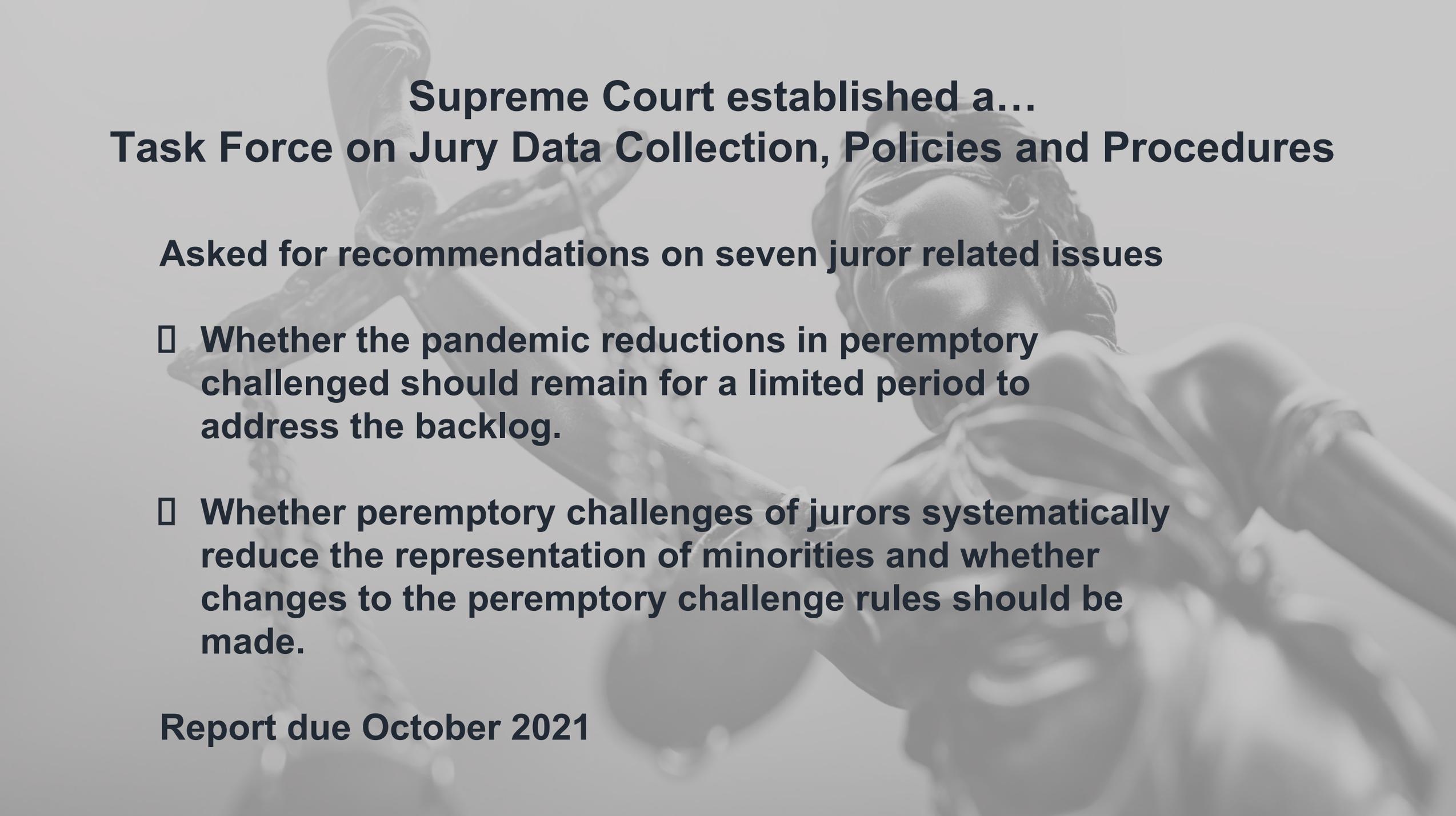
Race and Ethnicity	Responded to Summons <sup>1</sup>		Reported for Service - Panel Cancelled		Jury Venire		Released for Cause or Hardship		Peremptory Challenge									
									Defense		Prosecution		Total Peremptory Challenges		Mathematically Ineligible		Empaneled Jurors	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%		
White	61,639	78.6%	3,491	76.1%	23,861	76.6%	13,326	74.2%	1,980	86.5%	1,762	74.9%	3,742	80.6%	2,977	79.2%	3,816	80.0%
Other/Missing	9,168	11.7%	626	13.7%	4,064	13.0%	2,637	14.7%	176	7.7%	330	14.0%	506	10.9%	429	11.4%	492	10.3%
Black/African American	3,483	4.4%	210	4.6%	1,317	4.2%	746	4.2%	42	1.8%	137	5.8%	179	3.9%	154	4.1%	238	5.0%
Asian	2,860	3.6%	174	3.8%	1,332	4.3%	904	5.0%	67	2.9%	67	2.8%	134	2.9%	135	3.6%	159	3.3%
American Indian/Alaskan	905	1.2%	62	1.4%	422	1.4%	253	1.4%	22	1.0%	48	2.0%	70	1.5%	50	1.3%	49	1.0%
Native Hawaiian/Pacific	320	0.4%	23	0.5%	146	0.5%	103	0.6%	3	0.1%	9	0.4%	12	0.3%	16	0.4%	15	0.3%
<b>Total</b>	<b>78,375</b>	<b>100%</b>	<b>4,586</b>	<b>100%</b>	<b>31,142</b>	<b>100%</b>	<b>17,969</b>	<b>100%</b>	<b>2,290</b>	<b>100%</b>	<b>2,353</b>	<b>100%</b>	<b>4,643</b>	<b>100%</b>	<b>3,761</b>	<b>100%</b>	<b>4,769</b>	<b>100%</b>
Hispanic (any Race)	14,222	18.1%	963	21.0%	6601	21.2%	4187	23.3%	325	14.2%	520	22.1%	845	18.2%	721	19.2%	848	17.8%

<sup>1</sup>Not specific to criminal trials.

## Civil Jury Representativeness Throughout the Jury Process

Race and Ethnicity	Responded to Summons <sup>1</sup>		Reported for Service - Panel Cancelled		Jury Venire (Total)		Released for Cause or Hardship		Peremptory Challenge									
									Defense		Plaintiff		Total Peremptory Challenges		Mathematically Ineligible		Empaneled Jurors	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%		
White	61,639	78.6%	198	83.9%	3,502	79.1%	1,686	76.9%	275	76.4%	318	83.7%	593	80.1%	588	82.0%	635	81.6%
Other/Missing	9,168	11.7%	20	8.5%	519	11.7%	294	13.4%	49	13.6%	36	9.5%	85	11.5%	61	8.5%	79	10.2%
Black/African American	3,483	4.4%	8	3.4%	168	3.8%	81	3.7%	16	4.4%	5	1.3%	21	2.8%	31	4.3%	35	4.5%
Asian	2,860	3.6%	9	3.8%	169	3.8%	98	4.5%	11	3.1%	15	3.9%	26	3.5%	22	3.1%	23	3.0%
American Indian/Alaskan	905	1.2%	1	0.4%	47	1.1%	26	1.2%	4	1.1%	5	1.3%	9	1.2%	8	1.1%	4	0.5%
Native Hawaiian/Pacific	320	0.4%	0	0.0%	23	0.5%	8	0.4%	5	1.4%	1	0.3%	6	0.8%	7	1.0%	2	0.3%
<b>Total</b>	<b>78,375</b>	<b>100%</b>	<b>236</b>	<b>100%</b>	<b>4,428</b>	<b>100%</b>	<b>2,193</b>	<b>100%</b>	<b>360</b>	<b>100%</b>	<b>380</b>	<b>100%</b>	<b>740</b>	<b>100%</b>	<b>717</b>	<b>100%</b>	<b>778</b>	<b>100%</b>
Hispanic (any Race)	14,222	18.1%	38	16.1%	868	19.6%	471	21.5%	85	23.6%	46	12.1%	131	17.7%	120	16.7%	146	18.8%

<sup>1</sup>Not specific to criminal trials.



**Supreme Court established a...  
Task Force on Jury Data Collection, Policies and Procedures**

**Asked for recommendations on seven juror related issues**

- Whether the pandemic reductions in peremptory challenges should remain for a limited period to address the backlog.**
- Whether peremptory challenges of jurors systematically reduce the representation of minorities and whether changes to the peremptory challenge rules should be made.**

**Report due October 2021**

August 30, 2021

## Arizona Supreme Court Announces the Elimination of Peremptory Challenges

“The Court considered the vigorous debate over the best approach to jury service and trial management. All of the petitions and comments had the goal of improving our justice system, and the Court respects the importance of lawyers choosing the best possible jury to hear their client’s case. The Court’s rule changes are consistent with Arizona’s long history of pioneering jury system improvements, such as allowing jurors to take notes and to ask questions during trial. Eliminating peremptory strikes of jurors will reduce the opportunity for misuse of the jury selection process and will improve jury participation and fairness.”

Hon. Robert M. Brutinel, Chief Justice

## **Recognizing the Significance of the Change**

**FURTHER ORDERED:** In light of this rule amendment, the Task Force on Jury Data Collection Practices and Procedures is requested to consider whether Rules of Civil Procedure, Rule 47(c) (3) (Extent of Voir Dire) and Rules of Criminal Procedure, Rule 18.5(d) (Voir Dire Examination) and (e) (Scope of Examination) should be expanded or otherwise modified with respect to for-cause challenges to accommodate the abolition of peremptory strikes. The Task Force shall propose any needed revisions by November 1, 2021.

# Arizona's Response: Reforms to Jury Selection

- Task Force on Jury Data Collection, Policies, and Procedures (Judge Gates)
- December 8, 2021: the Arizona Supreme Court adopted the Statewide Jury Selection Workgroup's Rule Petition on an emergency basis.



## Report and Recommendations

Statewide Jury Selection Workgroup: A Workgroup of  
the Task Force on Jury Data Collection, Practices, and  
Procedures

*November 1, 2021*

# The new rules attempt to...



- Encourage case-specific, written juror questionnaires;
- Permit extended oral *voir dire* with participation from the parties and an emphasis on open-ended questions;
- Discourage attempts by the trial judge to rehabilitate prospective jurors through leading, conclusory questioning;
- Respect for the difference in summoning practices of each court;
- Maintain proportionality in the length of jury selection to the complexity of the case;
- Ensure a comprehensive record of all case-specific answers provided during *voir dire*; and
- Maintain juror privacy.

# Why Case Specific Questionnaires?

- Barriers:

- Unawareness of bias
- Unwillingness to admit bias
- Socially desirable responding

## **Research on how to increase juror candor:**

- Online questionnaires (vs. oral voir dire)
- Specific (vs. general self-identification questions)
- Attitudes, opinions & life experiences (vs. if will follow court's instructions)

# Why Discourage Judicial Rehabilitation?

- Many practitioners express concern regarding judges “rehabilitating” jurors by asking leading questions and the research suggests this “rehabilitation” is not effective

## **Research: Judicial Rehabilitation is not Effective**

- Judicial rehabilitation does not reduce the impact of pre-trial attitudes on final judgments in mock jury settings (e.g., Salerno et al., 2021, Crocker & Kovera, 2010)
- Also interviews with real jurors who were rehabilitated (Johnson & Haney, 1994):
  - Didn’t know what “impartial” meant or gave incorrect decision
  - “no person alive could do that”
  - “it’s a worthwhile goal, but cannot be achieved”

# The Impact of Minimal Versus Extended Voir Dire and Judicial Rehabilitation on Mock Jurors' Decisions in Civil Cases

Jessica M. Salerno<sup>1</sup>, John C. Campbell<sup>2</sup>, Hannah J. Phalen<sup>1</sup>, Samantha R. Bean<sup>1</sup>, Valerie P. Hans<sup>3</sup>,  
Daphna Spivack<sup>4</sup>, and Lee Ross<sup>4</sup>

<sup>1</sup> School of Social and Behavioral Sciences, Arizona State University

<sup>2</sup> Sturm College of Law, University of Denver

<sup>3</sup> Cornell Law School, Cornell University

<sup>4</sup> Department of Psychology, Stanford University



# Minimal *Voir Dire* Predicting Verdicts and Damages

	n (%) Yes (N = 2,014)	Effect on Verdicts		Effect on Damages	
		$\chi^2$ (1, 2037)	P	$\chi^2$ (1, 1241)	P
Have you previously served as a juror either in a criminal or civil case?	316 (15.5%)	.22	.64	0.00	.88
Have you served as either a state or federal grand juror?	66 (3.2%)	.54	.46	0.50	.46
Do you know of any reason you may be prejudiced for or against the plaintiffs or defendants because of the nature of the case, or otherwise?	40 (2.0%)	.48	.49	.20	.64
Are you a lawyer, married to a lawyer, or in a substantial relationship with a lawyer?	37 (1.8%)	.03	.86	1.00	.32
Have you studied law or worked in a law office?	129 (6.3%)	.50	.48	.10	.71
Have you or a close family member sued or been sued by someone?	316 (15.5%)	.55	.46	0.00	.96
Have you or a close family member ever testified in a lawsuit?	184 (9.0%)	.43	.51	0.80	.38
You may be called upon in this case to decide liability and/or award money damages. Do any of you have any religious, philosophical, or other belief that prevents you from acting as an impartial juror in this case?	23 (1.1%)	2.41	.12	0.00	.96
Do you have any qualms about attempting to come to a verdict at the end of the case?	36 (1.8%)	1.07	.30	0.10	.79
Have you, any member of your family, or any very close personal friend ever engaged in investigating or otherwise acting upon claims for damages?	82 (4.0%)	.06	.81	.90	.34
Do you know of any reason that would prevent you from sitting in this case with complete fairness and impartiality and decide the case based only on the evidence presented in court and the law as given at the conclusion of the trial?	28 (1.4%)	3.92	.05	0.90	.33

Note. Questions are taken from Mollway (n.d.).

- Less than 2% answered “yes” to questions about whether they might have trouble being impartial
- No minimal *voir dire* responses predicted verdicts
- No minimal *voir dire* responses predicted damage awards

## Takeaway:

Minimal *voir dire* questions were not helpful in identifying biased jurors, or predicting case judgments

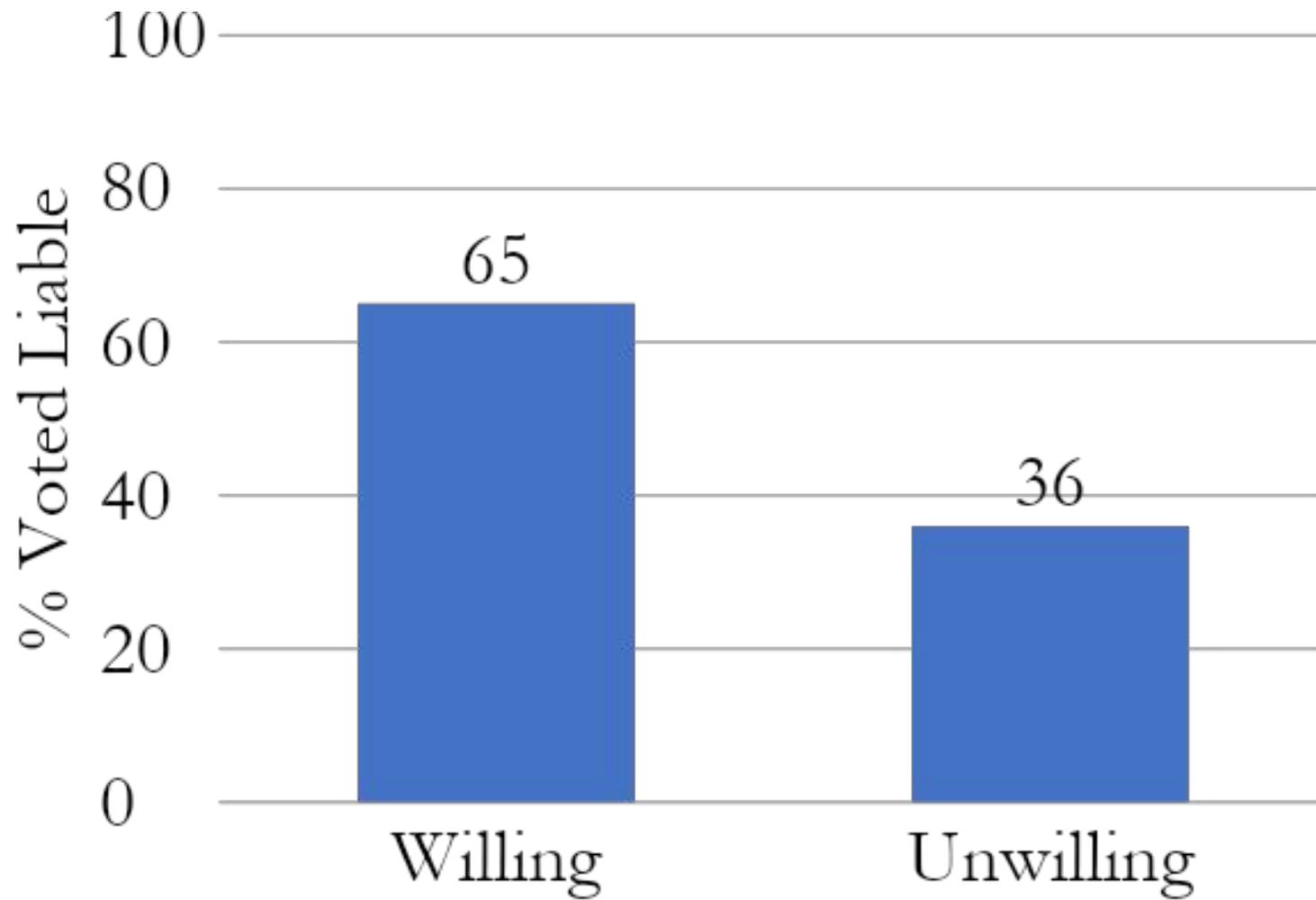
# Extended *Voir Dire* Predicting Verdicts

**11/13 extended *voir dire* responses significantly predicted verdicts:**

1. Skepticism toward Plaintiffs Scale
2. Unwillingness to Award Non-Economic Damages
3. Burden of Convincing on Plaintiffs
4. Negative Attitudes toward Lawsuits Scale
5. Limit Litigation Scale
6. Burden of Proof is too low
7. Trust in Plaintiffs
8. Trust in Doctors
9. Political Attitudes Scale
10. Trust in Insurance Companies
11. Plaintiff attorneys are liars

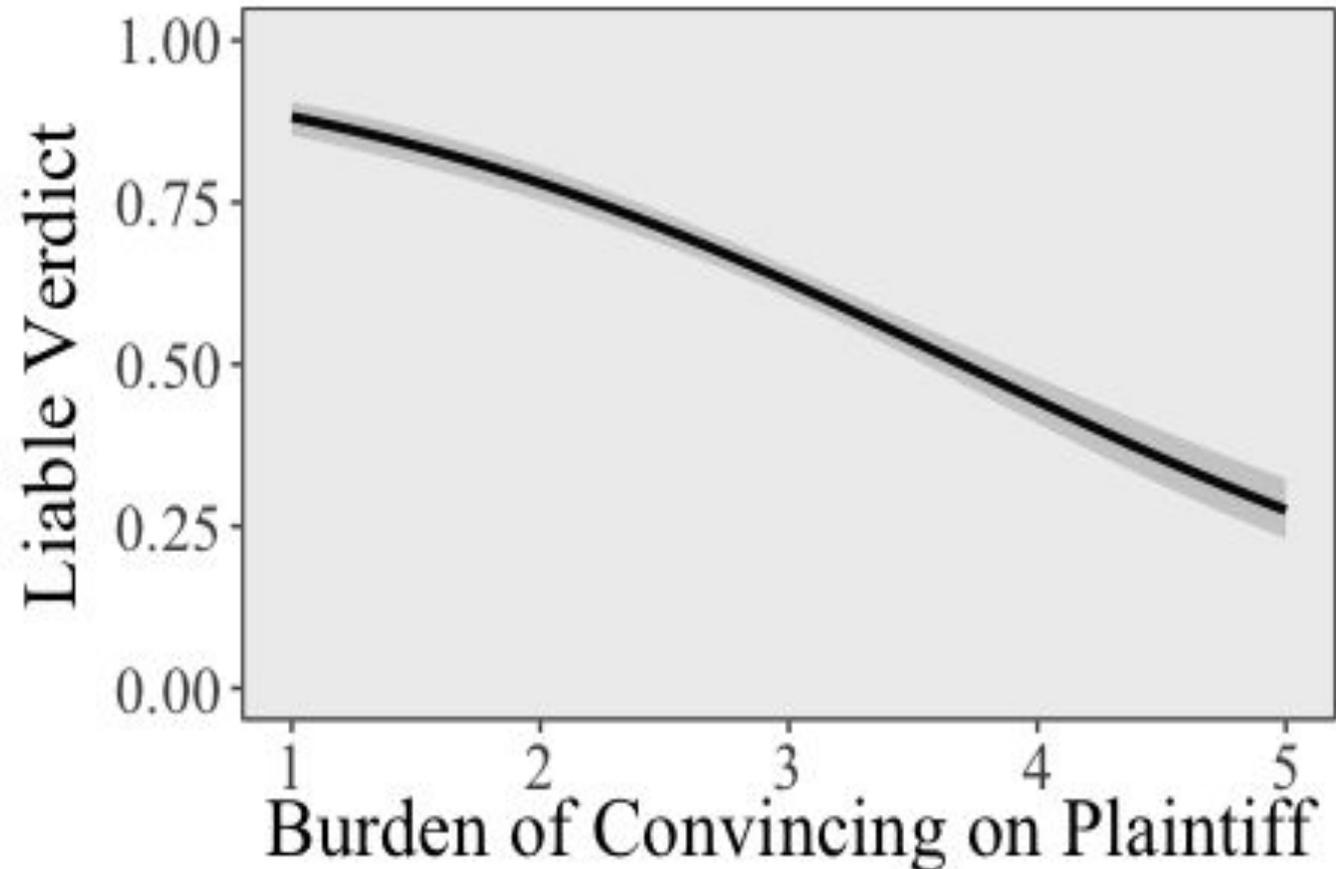
**\*\*The link between pre-existing attitude and verdicts not reduced by judicial rehabilitation.**

# Willing vs. Unwilling to Award Non-Economic Damages



- Those who say they are unwilling to award non-economic damages in *voir dire* are a third as likely to vote liable (Odds Ratio = .33).
- This effect is not reduced for those who went through judicial rehabilitation (vs those who did not).

In a case like this, do you think the plaintiff or defense is going to have a harder time convincing you?



The defense will have a much harder time

The plaintiff will have a much harder time

- Each step up the scale: they are half as likely to vote liable (Odds ratio = .47).
- This effect is not reduced for those who went through judicial rehabilitation (vs those who did not).

# How many mock jurors admitted bias?

## Minimal *Voir Dire*

Self-identifying questions (e.g.,  
“Can you think of anything  
that might prejudice you?”)

< 2%

## Judicial Rehabilitation

The judge asked if they were  
able to set aside bias.

< 2%

## Extended *Voir Dire*

When asked about specific  
attitudes in extended voir dire

42%

Jurors are *willing* to admit bias—but need to be asked the  
right questions: specific and without “bad” words.

# Other AZ Reforms

1. Revised voir dire scripts with input from social scientists and trial consultants (myself, Dr. Lisko and Dr. Frederick).
  - Ask about personal opinions, attitudes, beliefs, or life experiences.
  - Encourage candor and truthfulness.
  - Explain there are no right or wrong answers.
  - Refer to filters or lenses rather than biases and prejudice.
  - Avoid socially desirable response bias (e.g., “Any bias or prejudice” “Can you be fair and impartial?” “Do you understand that...”)
  - Focus on difficulty, reservations, concerns rather than ability (e.g., “Can you...”)
  - Ask about undesirable/prohibited behavior (e.g., “Would you lean in favor...?”) rather than bias
2. Various courts have created online tools to administer juror questionnaires
3. Educational Trainings for judges and attorneys (i.e., rule changes, research behind the changes, questionnaires).
4. In Maricopa, ipads and computers provided to jurors and parties who need them.

# How will we test the impact of the ban?

- Does the ban have its intended impact on jury racial diversity?
  - Racial representativeness on juries (pre vs. post ban)
  - Racial composition of those who are excluded for hardship, cause (pre vs. post ban)
- Does the ban have unintended consequences?
  - Time spent
  - Costs, # of Jurors excluded
  - Exacerbating racial bias in challenges for cause
    - “Presumed invalid” reasons for exclusion from WA, CA
- Methodology
  - Collect court data on racial composition pre vs. post ban
    - Maricopa, Pima, rural counties
  - Quantitative coding of voir dire practices
  - Qualitative analysis of interviews with Attorneys and Judges



National Science Foundation  
WHERE DISCOVERIES BEGIN

# NCSC

# EVALUATION

- Overlap with ASU
  - Impact on demographic composition of juries
  - Dynamics of voir dire
- Unique to NCSC
  - Impact on voir dire in rural jurisdictions
  - Impact on jury operations
  - Impact on jury deliberations



Next NAPCO Webinar:  
Thursday, February 24, 2022 – 3 p.m. EST

*Courts, Democracy and the Polarization of America...  
Ways to Strengthen Public Trust in the Rule of Law*

<https://napco4courtleaders.org/>

