COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-12349

COMMONWEALTH

v.

KENYA DABNEY

BRIEF FOR THE MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE, AND THE CRIMINAL JUSTICE INSTITUTE, AS AMICI CURIAE

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ISSUE PRESENTED

Whether a trial court's decision to preclude an attorney from asking a proper question during voir dire pursuant to G.L. c. 234A, § 67D is an abuse of discretion that creates a presumption of prejudice.

STATEMENT OF INTEREST OF AMICI CURIAE

Amici are associations of criminal defense attorneys committed to ensuring the rights of the accused in the criminal justice system.

The Massachusetts Association of Criminal Defense Lawyers ("MACDL") is an incorporated association representing more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. This case raises questions of importance to the administration of justice.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in

1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in this case as NACDL believes this case raises important questions of due process and the fair administration of justice.

The Charles Hamilton Houston Institute for Race and Justice ("CHHIRJ") at Harvard Law School was launched in 2005 by Charles J. Ogletree, Jr., Jesse Climenko Professor of Law. The Institute honors and continues the unfinished work of Charles Hamilton Houston, one of the 20th century's most important legal scholars and litigators. Houston engineered the multi-year legal

strategy that led to the unanimous 1954 Supreme Court decision, Brown v. Board of Education. CHHIRJ's long-term goal is to ensure that every member of our society enjoys equal access to the opportunities, responsibilities and privileges of membership in the United States. To further that goal, CHHIRJ seeks to eliminate the excessive punishment that created mass incarceration, particularly in communities of color, while simultaneously promoting investments in the communities that have been most deeply harmed by these policies. We have also done extensive work on the operation of implicit bias toward people of color that contaminates our society, including especially our justice system. In light of this bias we are particularly concerned about efforts that would serve to limit access to justice by constraining the effective operation of voir dire.

The Criminal Justice Institute ("CJI") is a curriculum-based clinical program in criminal law at Harvard Law School. Five clinical instructors supervise third-year law students, who represent indigent children in delinquency proceedings and indigent adults in district court criminal proceedings. Since its founding in 1990, the instructors and students of CJI have

represented indigent defendants in the Commonwealth, and presented issues and debates about the criminal and juvenile justice systems in order to effect local and national reform. The issues that are raised in this case - considering the protections necessary to ensure a meaningful opportunity for attorneys to discover juror biases - are directly relevant to constitutionally adequate representation of indigent defendants, and thus present questions of immediate importance to CJI. It is in the interest of the clients of CJI and the fair administration of justice that the views of amici be presented to contribute to this Court's full consideration of the case.

STATEMENTS OF THE CASE AND FACTS

Amici adopt the statement of the case and the statement of facts set forth in the defendant's brief.

SUMMARY OF THE ARGUMENT

Voir dire is a uniquely American legal innovation that is fundamental to ensuring that the jury seated for a case is unbiased and impartial. (pp. 6-9) Social science reveals that many jurors hold views incompatible with the basic constitutional guarantees for defendants, fail to disclose pertinent information to the court, and fail to answer questions honestly, either due to

perceived social pressure to conform their answers to what is expected of them or because they are unaware of their own biases. Indeed,

> [t]he most characteristic feature of prejudice is its inability to recognize itself. It is unrealistic to expect that any but the most sensitive and thoughtful jurors (frequently those least likely to be biased) will have the personal insight, candor and openness to raise their hands in court and declare themselves biased. Voir dire is intended to provide a tool for counsel and the court to carefully and skillfully determine, by inquiry, whether biases and prejudices, latent as well as acknowledged, will interfere with a fair trial if a particular juror serves in it.

State v. Ball, 685 P.2d 1055, 1058 (Utah 1984). (pp. 9-19)

The legislature adopted G.L. c. 234A, § 67D to ensure that lawyers could participate actively in selecting impartial jurors. The statute requires a trial court to allow attorney participation in voir dire upon request. While judges retain discretion to manage voir dire and to provide reasonable time limits on voir dire, attorneys should be given latitude to ask questions to root out bias or otherwise elicit information that may lead to intelligent use of their peremptory challenges. (pp. 20-29)

This Court should hold that a trial court abuses its discretion where it disallows a proper voir dire

question and that such abuse of discretion is presumptively prejudicial because it precludes a party from discovering potential juror biases. (pp. 29-34)

ARGUMENT

V. THE RIGHT TO CHALLENGE JURORS AND THE COMMITMENT TO AN IMPARTIAL JURY ARE CORE PRINCIPLES OF THE AMERICAN LEGAL SYSTEM

Voir dire is a unique feature of the American trial by jury right that represents a sharp break with our English common-law heritage. "[T]he common-law rule provided for no preliminary examination [of jurors] in advance of challenge[.]" Millar, Civil Procedure of the Trial Court in Historical Perspective 291 (2005). Instead, jurors were selected from the neighborhood in which a cause of action arose and such jurors "were supposed to know beforehand the character of the parties and witnesses, and therefore ... better knew what credit to give to the facts alleged in evidence." William Blackstone, 3 Commentaries 359. The parties, in turn, were expected to know the potential jurors by reputation, allowing them to issue challenges for cause without prior examination. Id. at 355. Jurors could be examined only after a challenge, Millar, at 292, and even then, would not necessarily be subject to questioning: "[c]hallenges are seldom tried; the officer

of the court, upon the objection being intimated to him, refrains from calling the juror," Blackstone, 3 Commentaries 331 n.19; see also Swain v. Alabama, 380 U.S. 202, 218-220 (1965) (noting that "in England ... both peremptory challenge and challenge for cause have fallen into disuse"), overruled on other grounds by Batson v. Kentucky, 476 U.S. 79 (1986). Indeed, in addition to relying on local knowledge, the English rule also marked a preference for biased jurors: "[a]s one fourteenth century justice once said, 'Certainly if indictors (persons who have already concluded as to defendant's guilt) be not there (on the petit jury) it is not well for the King." Russell H. McGuirk & Stephen L. Tober, Attorney-Conducted Voir Dire: Securing an Impartial Jury, 15 N.H.B.J. 1, 4 (1973).

American colonists rejected the English approach as early as 1760, when Massachusetts passed An Act for Better Regulating the Choice of Petit Jurors, which required that the jury panel be chosen through the Town Meeting, where the venire could be questioned by the accused. S. Mac Gutman, The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right, Crim. Justice Sys. Rev. 454, 458 (1974). Debates over the ratification of the Constitution reflected a shared understanding of the

value of this American innovation. Patrick Henry noted that Virginia had enshrined a right to challenge juries, describing such right as one "as valuable as the trial by jury itself," and James Madison asserted that the phrase "trial by jury" in the Constitution necessarily included the "right to challenge," as one "incident to the trial by jury." Id. at 460-61. By the 1807 trial of Aaron Burr, "Chief Justice Marshall had no difficulty in allowing extensive examination of jurors as to their previous opinion of the guilt of the accused." Millar, supra, at 292-293.

The right to an impartial jury - and the concomitant commitment to voir dire - is enshrined in the Sixth Amendment, which explicitly protects a criminal defendant's right to an "impartial jury," and the Seventh Amendment, which guarantees the right to trial by jury for civil litigants in federal court, as well as the mandates of due process. See Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946) ("[t]he American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community"); Turner v. Murray, 476 U.S. 28, 36 n. 9 (1986) ("The right to an impartial jury is" also

"guaranteed ... by principles of due process."); see also In re Murchison, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). Thus, while practices, policies, and procedures vary in the fifty states, the fundamental principle that juror bias must be explored before jurors are seated is a bedrock American legal principle.

VI. SOCIAL SCIENCE HAS DEMONSTRATED THAT ROBUST AND SEARCHING VOIR DIRE IS REQUIRED TO IDENTIFY JUROR BIAS

Empirical analyses of voir dire and juror attitudes establish not only that voir dire is critical to ensuring a fair trial, but also that if voir dire is to be meaningful, it must be robust, searching, and include active attorney participation. Jurors' attitudes and beliefs matter: jurors who do not believe in fundamental legal principles such as the presumption of innocence may not follow judges' instructions, even if they say they will. Without searching voir dire, jurors may not volunteer information relevant to bias. Jurors may be unaware of their own implicit biases and therefore unable to articulate them. Jurors are less candid with judges than with attorneys and tend to tell judges what they want to hear, both due to social pressures to conform with what a judge wants (and the rule of law)

and because of how judges word their questions. And last, but not least, jurors may not answer questions honestly.

A. Many Prospective Jurors Both Hold Views About the Law that Are Incompatible With Core Legal Principles and Do Not Respond to Judicial Instructions That Accurately State the Law

Studies show that some potential jurors struggle to understand the presumption of innocence and proof beyond a reasonable doubt. Substantial pluralities believe that a person charged with a crime is guilty of some crime. Vida B. Johnson, Presumed Fair? Voir Dire on the Fundamentals of our Criminal Justice System, 45 Seton Hall L. Rev. 545, 557-58 (2015) (citing two different sources where 30 or 31 percent of people held this belief); cf. Herald P. Fahringer, In the Valley of the Blind: A Primer on Jury Selection in a Criminal Case, 43 Law & Contemp. Probs., 116, 123 (1980) (citing findings that "25 percent of the people selected for jury duty believe that an accused person is guilty"). In one study, "50 percent of prospective jurors believed that it was the defendant who had to prove his innocence," and "49.9 percent of people *who had previous jury experience*" – and therefore presumably had been instructed on basic legal principles – "agreed that defendants had to prove their innocence." Johnson, supra, at 557. In other

studies in two major metropolitan areas, "more than 40 percent of people eligible for jury service ... expected a defendant to prove his innocence despite a judge's instructions on the matter." Id. at 558.

Because these "studies show that instructions alone do not serve to enforce the principles that are the foundation of a fair trial ... the jury selection process, through voir dire, must produce juries composed of individuals who are willing and able to apply the presumption of innocence, the standard of proof, and the burden of proof." Id. at 558-59.

B. Limited Voir Dire Fails to Elicit Important Responses From the Venire

General questioning of jurors, without probing follow-up, may fail to uncover information critical to bias determinations. In one experiment, a judge decided to individually interview every potential juror regardless of that juror's response to preliminary questions - that is, even if the juror had not responded affirmatively to his initial questions - and to probe that lack of response. In doing so, the judge discovered that "a significant minority" who had failed to respond in fact had relevant responses, including "disturbing information that led to their removal for cause," such

as: "I do not understand your questions or remember the past very well." "I was frightened to raise my hand. I have taken high blood pressure medications for twenty years. I am afraid I'll do what others tell me to do in the jury room." "I was on a hung jury before - I don't know if I can follow instructions of the court for gun possession [in a trial for gun offenses] - that was the problem in my other trial." "My grandson was killed with a gun so the topic of guns makes my blood pressure go up." "I'm the defendant's fiancée." Valerie P. Hans & Alayna Jehle, Avoid Bald Men & People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection, 78 Chi.-Kent L. Rev. 1179, 1187 (2003). Thus, adequate voir dire requires probing why jurors fail to respond to questions, as well as why they respond.

C. Searching Voir Dire Is Particularly Important to Ensure that Jurors Are Free of Implicit Bias

Not all juror bias is explicit. Jurors may also hold implicit biases, which are particularly hard to uncover. A summary of a long-term Harvard University study of implicit bias notes the following key findings: (1) "Implicit biases are pervasive," with "statistically 'large' effects that are often shown by majorities of samples of Americans"; (2) "People are often unaware of

their implicit biases," and many honestly report that they believe they lack such biases; (3) "Implicit biases predict behavior;" and (4) "People differ in levels of implicit bias." Hon. Mark W. Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of *Batson*, and Proposed Solutions, 4 Harv. L. & Pol'y Rev. 149, 153 (2010).

Other studies confirm the effects of implicit bias. See Justin D. Levinson et. al., Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test, 8 Ohio St. J. Crim. L. 187 (2010) (strong associations found between "black" and "guilty," relative to "white" and "guilty," and such implicit associations predicted how mock jurors would assess ambiguous evidence); Tara Mitchell, et al., Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment, 29 Law & Hum. Behav. 621, 627-28 (2005) (meta-analysis of thirty-four mock jury studies revealed a statistically significant association between defendants' race and verdicts). Meaningful voir dire therefore requires probing not merely jurors' professed beliefs, but attitudes and beliefs jurors may not even aware they hold.

D. Life Experiences and Attitudes Have Substantial Effects on Jurors Determinations

While lawyers frequently rely on demographic characteristics to make assumptions about jurors, "[a]ttitudes tend to be more powerful predictors of verdict choices than demographic characteristics." Hans & Jehle, supra, at 1180.

> [S]tudies show that jurors' life experiences and attitudes are prime factors in shaping perceptions of evidence. Life experiences and preconceptions contribute to the narrative or story that jurors develop as they listen to evidence and decide the case. Evidence that is inconsistent with jurors' preconceptions and the developing story may be discounted or ignored.

Id. (footnote omitted). Thus, robust protection of the right to an impartial jury requires recognizing the need for voir dire on a broader array of topics than constitutional rights or potential racial biases.

E. Attorney-Conducted Voir Dire is More Effective Than Judge-Led Voir Dire Because Jurors Respond Differently to Judges and Attorneys and Attorneys' Understanding of the Nuances of Their Cases May Permit a More Focused Voir Dire

Research shows that attorney-conducted voir dire is more effective at discovering potential juror biases than judge-conducted questioning.

Status differences between members of the venire and judges leads some potential jurors to conform their

answers to what they believe the interviewer – here, the judge – expects or wants to hear. David Suggs & Bruce D. Sales, Juror Self-Disclosure in the Voir Dire: A Social Science Analysis, 56 Ind. L.J. 245, 253 (1980); Susan E. Jones, Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor, 11 Law & Hum. Behav. 131, 143 (1987) ("during judge conducted voir dire, jurors attempted to report not what they truly thought or felt about an issue, but what they believed the judge wanted to hear").[1] Pressure to conform answers to what a judge appears to want to hear can be particularly acute where there is follow-up questioning by a judge:

> If a judge asks if the prospective juror could be impartial and the prospective juror replies no, the judge may continue that it is the juror's duty to follow the law and ask the question again. Prospective jurors may give in to the pressure to comply and say they can be impartial, even though their real feelings have not changed. The judge's approval is important to a lot of prospective jurors and many will alter their responses or hide certain attitudes in order to be perceived favorably.

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[1] Even when the status differential between a juror and the judge is less, answers may be biased for a separate reason: fear of alienating a peer. Suggs & Sales, supra, at 254.

Hans & Jehle, supra, at 1194. The status differential – a perceived lack of "similarity" – can also lead to less candor and less complete disclosure in answering questions. Suggs & Sales, supra, at 254.

Judges may also ask less probing questions. Id. at 252. As one federal judge admitted, "There is also a temptation, not always resisted on my part, to pose questions with the intent of educating jurors about proper responses, in light of the presumption of innocence or other considerations in the trial," an approach that is unlikely, the judge conceded, to lead to the discovery of bias. Bennett, supra, at 160.

Lawyers, on the other hand, are not stymied by the same status differential that judges face. Even when lawyers are seen as higher status than potential jurors, they are more relatable to jurors than judges are, and may thus elicit more information from the potential jurors. Suggs & Sales, supra, at 254; Jones, supra, at 144-145. Attorneys are also more likely than judges, who must be the neutral arbiters and exhibit more formality, to present as outgoing and generally friendly. Jurors may therefore respond more openly and more honestly to

attorneys who behave in this manner.[2] Suggs & Sales, supra, at 254-55. While jurors may feel compelled to give judges the answers they think they want to hear, "jurors tend not to feel the same social pressure to please lawyers that they do with judges, so they are more likely to provide lawyers with candid responses and less likely to cooperate with attempts at rehabilitation." Comment, Limited Voir Dire: An Inadequate Safeguard of the Constitutional Right to an Impartial Jury, Mich. J. Race & Law, Jan. 21, 2016, https://mjrl.org/tag/limited-voir-dire/ (last visited Oct. 29, 2017).

Furthermore, at the time of voir dire, lawyers know much more than judges do about the legal issues and evidence involved in their cases. This allows lawyers to ask questions - and follow-up questions - that are more specific to the nuances of their cases and may thus

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[2] Interestingly, even when judges assume a warm and friendly demeanor, this does not improve juror self-disclosure. Jones, supra, at 144 ("[I]t appears that interpersonal style does not make a difference for judges in facilitating self-disclosure, although it does positively influence liking. Apparently, the judge's role as an authority figure outweighs any influence that interpersonal style might have. A warm, friendly judge is just as much a judge as a cool, aloof judge, and apparently role-identity remains salient in the minds of jurors.")

result in more fruitful answers. Suggs & Sales, supra, at 252.

F. Jurors May Conceal Relevant Biases

Jurors' answers to voir dire questions may not be accurate, whether because jurors are deliberately concealing information or are unaware of their lack of candor. In one instance, seventy-one percent of a community of eligible jurors had fixed opinions about guilt in a high-profile murder prosecution, but "only 15 per cent of the jurors admitted any form of predisposition" during voir dire. Fahringer, supra, at 118. As one analysis put it, "[t]his disparity between the survey results and the uncovering of bias during the voir dire can be explained only by a lack of honesty on the jurors' part." Id.

Other studies have found that jurors' beliefs and their accounts of their deliberation processes are inconsistent with their answers in voir dire. For example, even after "extensive questioning," jurors were seated "who disagreed with the presumption of innocence." Hans & Jehle, supra, at 1189. After deliberation, "[o]ther jurors admitted they had not been able to set aside their personal feelings or biases during the trial." Id. Jurors interviewed after trials

have disclosed "substantially different answers" than those they provided in voir dire. Fahringer, supra, at 118.

These studies bear out Justice O'Connor's observation in Smith v. Phillips, that a "juror may have an interest in concealing his own bias" or "may be unaware of it." 455 U.S. 209, 221-22 (1982). Indeed, the Supreme Court has recognized that in certain cases, even jurors' sincere claims that they can put aside their feelings and beliefs "should not be believed." Mu'Min v. Virginia, 500 U.S. 415, 429 (1991) (quotation omitted); see, e.g., Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966); Rideau v. Louisiana, 373 U.S. 723, 727 (1963). And courts have recognized that jurors may even be deceiving themselves: "No doubt each juror was sincere when he said he would be fair and impartial ... but the psychological impact of requiring such a declaration before one's peers is often its father." Irvin v. Dowd, 366 U.S. 717, 728 (1961).

VII. THE MASSACHUSETTS VOIR DIRE STATUTE MANDATES ATTORNEY-CONDUCTED VOIR DIRE

A. The Massachusetts Voir Dire Statute Changed and Was Intended to Change Massachusetts Voir Dire Practice

With the enactment of Chapter 254 of the Acts of 2014, Massachusetts joined the many states already permitting attorney-conducted voir dire. *See generally* Hon. Gregory E. Mize, et al., Nat'l Ctr. for State Courts, "The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report" 27-31 (Apr. 2007) [hereinafter "NCSC Rep"]. Before enactment of the statute, Massachusetts voir dire was conducted primarily by the trial judge and a national survey rated Massachusetts as having the fourth most judge-dominated voir dire process in the nation. SJC Comm. Rep., App. 2, at 1 (July 12, 2016); NCSC Rep. at 79. While individual judges were not precluded from permitting attorneys to participate in voir dire, counsel had no right to participate. See Commonwealth v. Gee, 60 Mass. 174, 178 (1850).

That changed with the enactment of the voir dire statute, which specifically requires the court to permit an attorney or self-represented party to conduct voir dire: upon request, "the court *shall* permit" such voir

dire. G.L. c. 234A, § 67D (emphasis added).[3] The statute "grant[s] attorneys and self-represented parties *the right* to question potential jurors in all Superior Court trials." SJC Comm. Report at 1 (emphasis added).

In deciding to adopt the bill, the legislature heard testimony that highlighted several crucial issues: (1) jurors' assertions that they lack prejudice cannot be relied upon; (2) as a result of their trial preparation, attorneys invariably have a better sense of the issues in their case and a better ability to ferret out bias; (3) jurors' answers to judges are less complete and less candid than their answers to attorneys; and (4) attorney-conducted voir dire is more effective in uncovering bias and provides more bases to strike jurors for cause.[4]

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[3] The statute was originally codified as G.L. c. 234, § 28, but was subsequently relocated verbatim to G.L. c. 234A, § 67D. The statute will be cited to its current location

[4] Testimony on behalf of the Massachusetts Academy of Trial Lawyers ("MATA") on H. 1211 (attached). With respect to the first point above, MATA specifically quoted Justice Marshall's discussion of voir dire in the Burr treason case:

> Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony. He may declare that notwithstanding

The purpose of the statute, as articulated by key legislators involved in its passage, is to "help ensure we pick good juries so that we have fair trials," Colleen Quinn, Bill Targets Juror Bias, Awards in Mass. Civil Cases, Boston Globe, July 24, 2014 (quoting Senator Stanley Rosenberg, "who steered the bill through the Senate), and to help lawyers "size up potential jurors," id. (quoting Rep. Christopher Markey, who helped move the bill forward in the House).

B. Attorney-Conducted Voir Dire in Massachusetts Has Improved Jury Selection

The introduction of attorney-conducted voir dire in Massachusetts has thus far confirmed the insights of social science about the benefits of attorney-conducted voir dire: it tends to result in fairer, more impartial juries. In the year following the statute's enactment, the SJC Committee collaborated with the National Center for State Courts ("Center") to analyze the impact of attorney-conducted voir dire on judges, attorneys, and

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> these prejudices, he is determined to listen to the evidence, and be governed by it; but the law will not trust him ... He will listen with more favor to that testimony which confirms, than to that which would change his opinion.

MATA Testimony at *5-6 (quoting United States v. Burr, 25 F. Cas. 49 (C.C.D. Va. 1807)).

jurors. SJC Comm. Rep., supra, at 4. The Center facilitated discussions with a group of Superior Court judges, reviewed the data obtained by the SJC Committee's Data Collection Working Group, and concluded that "overall the judges tend to agree that the transition to [attorney participation in voir dire] has been smoother than expected." SJC Comm. Rep., supra, at 5.

Not only has the transition been largely seamless, but attorney-conducted voir dire has resulted in substantive and meaningful changes to the voir dire process that have, in turn, resulted in fairer juries. More than a quarter of challenges for cause occurred while the attorney was questioning the potential jurors, and of those, 62% were allowed. SJC Comm. Rep., supra, at 7-8. There was also a decrease in the number of peremptory challenges exercised in criminal cases, id. at App. 2, at 3, seeming to indicate that lawyers were better able to uncover explicitly-stated biases and relied less on assumptions about perceived biases. The survey of judges, which was conducted as part of this year-long process of examination of the impact of attorney-conducted voir dire, supported the data. Judges indicated that attorneys "were not necessarily asking

different questions than judges would have asked, but they were asking questions in ways that appeared to elicit more meaningful information for determining each juror's impartiality." Id., at App. 2, at 6.

Moreover, the principal concerns expressed by critics of the new law, that it would substantially increase the amount of time needed for jury selection and affect juror participation rates, id., at App. 2, at 1, have not materialized. "The length of time expended on jury selection in cases in which the attorneys participated in voir dire increased by approximately 30 seconds per juror in criminal cases and one minute per juror in civil cases." Id., at App. 2, at 3. Data revealed a "slight increase in the number of multi-day empanelments," but noted that this was part of a larger-term trend "that cannot clearly be associated" with attorney participation. Id. at 8.

As to concerns about juror participation in the process, the survey answers of potential jurors revealed that they "perceive that judges and attorneys are deeply committed to the preservation of juror dignity and privacy." Id. at 9. Of the jurors surveyed, 94% reported understanding why judges and lawyers asked the questions they did. Jurors also perceived attorneys, judges, and

clerks as "operat[ing] with a high degree of professionalism and respect for jurors, while facilitating a jury selection process committed to fairness and impartiality." Id.

C. The Statutory Mandate Requiring Attorney-Conducted Voir Dire Must Be Construed to Permit Meaningful Attorney-Conducted Voir Dire

As both the social science and the Massachusetts experience with attorney-conducted voir dire confirm, limited voir dire does not successfully ferret out all potential juror bias. Thus, the legislature's mandate that attorneys be permitted to engage in voir dire can only be given meaningful effect by permitting robust and searching voir dire, subject to appropriate judicial limitations on scope. Judicial discretion to manage voir dire cannot, however, be construed in a manner that nullifies the statute's fundamental mandate.

Indeed, Standing Order 1-15, now codified as Superior Court Rule 6, defines the parameters in which judicial discretion should operate. "[T]he trial judge should generally approve a reasonable number of questions" relating to a juror's background and issues expected to arise in the case, regarding preconceptions

or biases,[5] regarding the juror's willingness to accept and apply legal principles, and to elicit information on "subjects that controlling authority has identified as preferred subjects of inquiry." Super. Ct. R. 6(3)(c) (emphasis added). Thus, while the statute permits judges to "pre-approve" questions, the Standing Order and Rule nonetheless make clear that approval should generally be granted, unless those questions reach the "disfavored subjects" identified in the Rule, Super. Ct. R. (6)(3)(d), or are posed in a format disallowed by the rule, *see* Super. Ct. R. 6(3)(e). Judges may also impose

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[5] Both Superior Court Rule 6 and the recommended "Best Practices" for implementing attorney-conducted voir dire emphasize the need to consider both explicit and implicit bias during voir dire. Pursuant to Rule 6, voir dire should "identify explicit and implicit bias," Super. Ct. R. 6(1), and judges reviewing questions proposed by attorneys should specifically "consider whether questions or methods proposed by the attorneys or parties may assist in identifying explicit or implicit bias," Super. Ct. R. 6(3)(g). "Best Practices" identified by an SJC Working Group included a reminder that "[t]rial judges should recognize the importance of identifying bias – explicit and implicit - in all cases where a party, a significant witness, or an attorney may be subject to such bias." SJC Comm. Rep., supra, App. 5, at 7. Indeed, the Working Group noted that while such biases "may be difficult to uncover, judges and attorneys can and should make efforts to do so," and should not limit consideration of such biases to those involving cases serious "interracial" allegations, because "bias may impact the fairness of any trial in which potential bias is implicated." Id. at 8.

"reasonable restrictions on the subject matter, time, or method." Super. Ct. R. 6(3)(f).

Neither the statute nor the rule limits the appropriate scope of attorney inquiry to matters that support for-cause challenges. Indeed, the rule specifically permits inquiry into areas "not absolutely required." Super. Ct. R. 6(3)(c). As such, the scope of inquiry should extend both to matters pertinent to for-cause challenges and to matters that would allow intelligent exercise of a peremptory challenge.

In determining how to balance this broad statutory mandate and the exercise of judicial discretion, this Court should look to the example of the Supreme Court of Utah, which has concluded that judicial discretion over voir dire functions on a continuum. It

> is most broad when it is exercised with respect to questions that have no apparent link to any potential bias. However, the trial judge's discretion narrows to the extent that questions do have some possible link to possible bias, and when proposed voir dire questions go directly to the existence of an actual bias, that discretion disappears. The trial court must allow such inquiries.

State v. Saunders, 992 P.2d 951, 963 (Utah 1999). Thus, "although a trial judge has discretion in limiting voir dire examination, that discretion must be liberally exercised in favor of allowing counsel to elicit

necessary information for ferreting out bias, whether for a for-cause or a peremptory challenge." Id. at 961 (quotation marks and citation omitted).

> [T]he fairness of a trial may indeed depend upon the right of counsel to ask voir dire questions designed to discover and explore biases that would affect a juror's decision (even if such biases do not support a for-cause challenge): All that is necessary for a voir dire question to be appropriate is that it allow defense counsel to exercise his peremptory challenges more intelligently.

Id. at 961-62 (quotation marks and citations omitted).

Because jurors answer questions posed by attorneys differently than those posed by judges, meaningful voir dire must permit attorneys to ask questions on topics addressed by judges. In the first year of implementation of the Massachusetts voir dire statute, the experience of state court judges confirmed what the social science has found: attorneys were asking questions similar to those judges would have posed, but were asking the questions differently and eliciting "more meaningful information for determining each juror's impartiality." SJC Comm. Rep, supra, at App. 2, at 6.

Because jurors' claims that they will follow instructions and the law cannot be relied on in all cases and because jurors are known to succumb to judicial pressure to conform their answers to the requirements of

the law, meaningful voir dire must permit attorneys to inquire about juror attitudes and beliefs even in areas where jurors have asserted that they will follow the law. A juror's statement

> that he or she can decide a case fairly pursuant to the law given by the trial court is not a sufficient basis for qualifying a juror to sit when the prospective juror's answers provide evidence of possible bias and the trial court does not allow further questions designed to probe the extent and the depth of the bias.

Saunders, 992 P.2d at 962. "The mere fact" that jurors have asserted that they will follow the law is "not necessarily sufficient to enable counsel to determine whether peremptory challenges should be exercised," because "[t]here are very few people bold enough to say that they will not follow the law," and "[i]n many instances, counsel decides whether to use a peremptory challenge not so much on what a venireman may say, but on how he says it." Fauna v. State, 265 Ark. 934, 935 (1979).

D. This Court Should Conclude that Disallowing an Appropriate Question is an Abuse of Discretion

This court should presume prejudice where a trial court exceeds the discretion set forth in Superior Court Rule 6 and disallows an appropriate question (whether the court permits the question to be asked to select

jurors and then disallows it or simply disallows it from the outset). Reaching this conclusion is consistent not only with ensuring that the statute is meaningfully implemented, but with the approach employed in other states that have recognized that to balance a court's "considerable discretion in determining the extent of counsel's examination of prospective jurors" with the need to "allow counsel the opportunity to ascertain latent or concealed prejudgments by prospective jurors" requires concluding that the refusal to allow inquiry into an appropriate area is "fundamental error." Hillsman v. State, 159 So. 3d 415, 419-20 (Fla. 2015); see also Fauna, 265 Ark. at 935 (abuse of discretion to restrict questioning regarding insanity defense).

While G.L. c. 234A, § 74 requires a showing of special injury or prejudice before certain jury selection errors are reversible, this Court has held that where the error involved is structural, prejudice is presumed and the error requires reversal. See Commonwealth v. Sheehy, 412 Mass. 235, 238-40 (1992) (reversible error to allow alternates in deliberation); Commonwealth v. Gonzalez, 86 Mass. App. Ct. 253, 254 (2014) (prejudicial error to not voir dire jurors when evidence indicated that one juror fell asleep during the

trial). Denial of the right to an impartial jury is a structural error, because denial of that right strikes at the heart of a defendant's right to a fair trial.

> A structural error is one that so infringes on a defendant's right to the basic components of a fair trial that it can never be considered harmless. Such errors include, for example, deprivation of the right to counsel, trial before a biased judge, and unlawful exclusion of members of the defendant's race from the jury.

Commonwealth v. Villanueva, 47 Mass. Ct. App. 905, 906 (1999) (citations omitted); see also Arizona v. Fulminante, 499 U.S. 279, 309-10 (1991) ("These are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards."); Amy Knight Burns, Insurmountable Obstacles: Structural Errors, Procedural Default, and Ineffective Assistance, 64 Stan. L. Rev. 727, 733 (2012) ("the usual harmless error analysis of looking at all the evidence and assessing the strength of the case simply does not answer the question of whether reversal is necessary in these cases, since the problem is not with the quantity or quality of evidence, but rather with some other aspect of the process").

It is impossible to gauge the effect of a failure to ask a relevant voir dire question once a juror has been seated. "[O]nce biased jurors are seated, the

effect of their bias is essentially undiscoverable and unremediable." Saunders, 992 P.2d at 961. It is impossible to know how jurors would have responded to an unasked proper question and whether further biases would have been revealed. Recognizing this, at least one court has explained that a rule requiring actual prejudice cannot be applied to the failure to allow a voir dire question: "it would be impossible, practically speaking, to apply" an actual prejudice rule, because to show prejudice from the failure to elicit information at voir dire, a defendant would "necessarily" have to rely "on information elicited at voir dire because voir dire is the only opportunity a party has to learn about jurors. Therefore, if the information is not revealed at voir dire, parties would have no information on which to base" a showing of actual prejudice. Depew v. Sullivan, 71 P.3d 601, 612 (Utah Ct. App. 2003); see also State v. Anthony, 172 Conn. 172 (1976).

VIII. DABNEY'S COUNSEL ASKED AN APPROPRIATE QUESTION AND THE COURT'S DECISION TO DISALLOW IT WAS PRESUMPTIVELY PREJUDICAL

Counsel's voir dire question in this case was appropriate. The judge asked jurors the following: "The defendant in a criminal trial has the absolute right not to testify. If this defendant chooses not to testify,

would you hold that against him in any way?" [I/44] Defense counsel asked, "If someone was innocent, would you expect that they would testify or would not testify?" [I/46]

Counsel's question addressed a basic constitutional right and not a "disfavored" topic. It did not commit jurors to a result based on a certain set of facts or evidence, e.g., Would you tend to believe someone was guilty if you learned these facts?[6] While it addressed a similar topic to the judge's question – not itself a basis for disallowing a question – counsel's question probed a juror's underlying beliefs about that presumption, whereas the judge's question reached only the juror's willingness to follow the judge's instructions. Even assuming that prospective jurors' answer to counsel's question had not provided cause to strike any jurors, jurors' answers to the question would have been relevant to counsel's intelligent exercise of peremptory strikes, because counsel was entitled to rely

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[6] If the Court determines that this is a commitment question, it is not an improper commitment question where it seeks to commit the potential juror to a principal that is mandated by law, e.g. a defendant's right to remain silent. See Standefer v. State, 59 S.W.3d 177, 181 (Tex. 2001).

on "how" a juror answered the question. See, e.g., Fauna, 265 Ark. at 935.

CONCLUSION

For the foregoing reasons, and the reasons articulated by defendant Dabney, amici urge this Court to conclude that disallowing a proper attorney voir dire question is an abuse of discretion that creates a presumption of prejudice, and that the judgments against Dabney must therefore be reversed.

Respectfully Submitted,

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ADDENDUM

Constitutional Provisions

Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by. an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of.the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Seventh Amendment to the United States Constitution:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Fourteenth Amendment to the United States Constitution, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions

G.L. c. 234A, § 67D:

Notwithstanding section 67A, the following procedures shall govern in all criminal and civil superior court jury trials:

(1) In addition to whatever jury voir dire of the jury venire is conducted by the court, the court shall permit, upon the request of any party's attorney or a self-represented party, the party's attorney or self-represented party to conduct an oral examination of the prospective jurors at the discretion of the court.

(2) The court may impose reasonable limitations upon the questions and the time allowed during such examination, including, but not limited to, requiring pre-approval of the questions.

(3) In criminal cases involving multiple defendants, the commonwealth shall be entitled to the same amount of time as that to which all defendants together are entitled.

(4) The court may promulgate rules to implement this section, including, but not limited to, providing consistent policies, practices and procedures relating to the process of jury voir dire.

G.L. c. 234A, § 74:

Any irregularity in compiling any list of jurors or prospective jurors; or any irregularity in qualifying, selecting, summoning, confirming, postponing, excusing, cancelling, instructing, impanelling, challenging, discharging, or managing jurors; or any irregularity in limiting any term of juror service, in length or other incident of the term; or the fact that a juror shall be found to be not qualified under section four of this chapter; or any defect in any procedure performed under this chapter shall not be sufficient to cause a mistrial or to set aside a verdict unless objection to such irregularity or defect has been made as soon as possible after its discovery or after it should have been discovered and unless the objecting party has been specially injured or prejudiced thereby.

Rules and Other Orders

Mass. Super. Ct. R. 6 (effective Sept. 1, 2017)
Jury Selection

1. Subject to applicable statutes, rules, and controlling authority, the trial judge in each case has discretion to determine a procedure for examining and selecting jurors designed to maintain juror privacy and dignity, identify explicit and implicit bias, and foster efficiency in the session and among sessions using the same jury pool. This rule provides a standard procedure for each civil and criminal case unless otherwise ordered by the trial judge, while permitting attorneys and self-represented parties a fair opportunity to participate in voir dire so as to identify bias.

2. Conference With the Trial Judge

   a. In civil cases, unless otherwise ordered, the court shall schedule a final trial conference in accordance with Standing Order 1-88, as may be amended from time to time. In criminal cases, unless otherwise ordered, a final pretrial conference shall be scheduled in accordance with Standing Order 2-86. These conferences with the trial judge shortly before trial serve as the primary opportunity to discuss empanelment, including without limitation: the statement of the case to be read to the venire; the extent of any pre-charge on significant legal principles; the method and content of the judge's intended voir dire of jurors; the method and content of any attorney or party participation in voir dire; judicial approval or disapproval of proposed questions or subject matters; any time limits on attorney or party voir dire; the number of jurors to be seated; any agreement to allow deliberation by fewer jurors if seated jurors are dismissed post-empanelment; the content and method of employing any supplemental juror questionnaire; the number of peremptories; and the order and timing of the parties' assertions of challenges for cause and peremptory challenges.

b. If the court has not scheduled a final trial conference in a civil case or a final pre-trial conference in a criminal case, any party planning to submit a request, proposal, or motion regarding jury selection should request such a conference or submit a motion requesting voir dire procedures in time for a pretrial ruling by the trial judge. All parties shall avoid proposing jury selection procedures (including attorney/party voir dire) for the first time on the day of trial.

3. Voir Dire by Attorneys and Parties

a. On or before the final trial conference in a civil case or final pre-trial conference in a criminal case, or 5 business days before trial if no such conference is scheduled, the parties shall submit in writing any requests for attorney/party voir dire; motions in limine concerning the method of jury selection; proposed subject matters or questions for inquiry by the parties or trial judge; any proposed supplemental questionnaire; any proposed preliminary legal instructions to the venire or juror panels; the location within the courtroom where jurors and parties will stand or sit during voir dire; and any other matter setting forth the party's position regarding empanelment.

b. The trial judge shall allow attorney or party voir dire if properly requested at or before the time set forth in paragraph 3(a), above. The trial judge may deem any subsequent request for attorney or party voir dire untimely, but may in the judge's discretion allow the request in the absence of prejudice to any other party or significant impact on trial efficiency or on other sessions using the same jury pool.

c. When attorney or party voir dire is allowed, the trial judge shall, at a minimum, allow the attorneys or parties to ask reasonable follow-up questions seeking elaboration or explanation concerning juror responses to the judge's questions, or concerning any written questionnaire. After considering the goals set

forth in paragraph 1 above, the trial judge should generally approve a reasonable number of questions that (i) seek factual information about the prospective juror's background and experience pertinent to the issues expected to arise in the case; (ii) may reveal preconceptions or biases relating to the identity of the parties or the nature of the claims or issues expected to arise in the case; (iii) inquire into the prospective jurors' willingness and ability to accept and apply pertinent legal principles as instructed; and (iv) are meant to elicit information on subjects that controlling authority has identified as preferred subjects of inquiry, even if not absolutely required.

d. At the final trial conference in a civil case, or final pre-trial conference in a criminal case (or in a written submission in lieu of such conference), any attorney or party wishing to inquire into any of the following disfavored subjects must explain how the inquiry is relevant to the issues, may affect the juror's impartiality, or may assist the proper exercise of peremptory challenges:

i. The juror's political views, voting patterns or party preferences;

ii. The juror's religious beliefs or affiliation.

e. Counsel and Parties May Not Ask:

i. Questions framed in terms of how the juror would decide this case (prejudgment), including hypotheticals that are close/specific to the facts of this case (any hypotheticals that may trigger this rule must be presented to the judge before trial).

ii. Questions that seek to commit juror(s) to a result, including, without limitation, questions about what evidence would cause the juror(s) to

find for the attorney's client or the party.

iii. Questions having no substantial purpose other than to argue an attorney's or party's case or indoctrinate any juror(s).

iv. Questions about the outcome in prior cases where the person has served as a juror, including the prior vote(s) of the juror or the verdict of the entire jury.

v. Questions in the presence of other jurors that specifically reference what is written on a particular juror's confidential juror questionnaire.

f. The trial judge may impose reasonable restrictions on the subject matter, time, or method of attorney or party voir dire and shall so inform the attorneys or parties before empanelment begins.

g. In approving or disapproving voir dire questions and procedures, the trial judge, on request, should consider whether questions or methods proposed by the attorneys or parties may assist in identifying explicit or implicit bias.

h. If employing panel voir dire, the trial judge shall determine the procedure and may elect to follow the method set forth in Addendum A or adopt variations thereof. The trial judge may also elect to use some of the methods set forth in Addendum A even if not employing panel voir dire. Nothing in Appendix A restricts the trial judge from selecting an alternative method of voir dire, including but not limited to:

i. Filling empty seats as they arise due to challenges for cause or the exercise of peremptories. The trial judge may do this by clearing additional prospective jurors or filling in from additional already cleared jurors;

ii. The "Walker method": Through panel voir dire or otherwise, the trial judge may clear as indifferent a number of prospective jurors that equals or exceeds the total number of jurors needed, plus alternates, plus the total number of peremptory challenges held by the parties. See Commonwealth v. Walker, 379 Mass. 297, 299 n.1 (1979). But see Commonwealth v. Johnson, 417 Mass. 498, 507-508 (1994).

4. Empanelment

a. The trial judge shall ask all voir dire questions specifically required by statute, court rule, or controlling authority, but retains discretion as to when and how to do so. The trial judge may allow individual voir dire, panel voir dire, or any combination.

b. Questioning shall occur through individual voir dire if (i) required by statute, rule, or controlling authority; (ii) inquiry concerns private or potentially embarrassing information; or (iii) questioning would specifically reference what is written on a particular juror's confidential juror questionnaire.

c. The trial judge should consider some individual voir dire in all cases to (i) determine whether any juror has an impediment concerning hearing, language or visual ability, mental health, or comprehension and to determine whether a reasonable accommodation would enable the juror to serve; (ii) address any private or embarrassing information not disclosed in public portions of the voir dire; or (iii) identify any other impediment to jury service that the trial judge and parties might not observe without personal contact with the juror.

d. Attorneys and parties shall limit their questioning of any juror(s) to such subject matters and methods as previously approved by the trial judge and shall avoid questions set forth

in paragraph 3(e) above, even as follow-up, without court approval.

e. Questions about the Law

i. If the parties have obtained approval to ask voir dire questions about the law, the trial judge shall take appropriate measures to ensure that the jury is accurately and effectively instructed on the law. Such measures may include, but are not limited to: a brief pre-charge; requiring the questioner to use the words specifically approved by the judge; stating the law in a written supplemental questionnaire; or contemporaneous instructions by the trial judge at the time the question is asked.

ii. If a juror asks counsel a question to clarify an aspect of the law, counsel shall request that the trial judge answer the question; the trial judge may interrupt if counsel attempts to respond to a juror question by instructing on such a point of law.

f. Any party may object to a question posed by another party by stating "objection," without elaboration or argument. The trial judge may rule on the objection in, or outside of, the juror's presence. The trial judge may, on the judge's own motion, strike or rephrase a party's question and may interrupt or supplement a party's questioning to provide the juror(s) with an explanation of the law or the jury trial process, or to ask any additional questions that the trial judge believes will assist the trial judge in determining the juror's impartiality.

g. Counsel and the parties must ensure an accurate record of attorney or party voir dire. In an electronically recorded courtroom, counsel must stand near a microphone at all times. During panel voir dire in any courtroom, counsel must also call out the juror seat number (or juror number) of any individual juror who is questioned individually or who responds audibly. Failure to

do so may constitute a waiver of any claim of error arising from any inaudible or unattributable portions of the record.

h. Challenges for Cause

i. The court will consider all its observations, including the juror's responses, to determine whether or not the juror will be fair, focus on the facts of the case and follow the law despite a particular viewpoint or experience.

ii. Whether at side bar or during panel inquiry, a juror's "yes" or "no" answer to a question about a viewpoint or experience may not, by itself, support a challenge for cause. If intending to challenge a juror for cause as a result of attorney or party voir dire, the questioner ordinarily should lay an adequate foundation showing that, in light of the information or viewpoint expressed, the juror may not be fair and impartial and decide the case solely on the facts and law presented at trial. The court may inquire further or may decide without further questioning, if the judge believes that the existing record is sufficient to resolve the challenge for cause.

i. Peremptory Challenges

i. After the trial judge finds that each juror stands indifferent, the parties shall exercise their peremptory challenges. The trial judge may require exercise of peremptory challenges after completion of side bar inquiry of an individual juror, after filling the jury box with jurors found to stand indifferent, or at some other time after the trial judge's finding of indifference.

ii. If the trial judge does not expressly rule on a juror's bias or impartiality, the trial judge's direction for the parties to exercise peremptory challenges constitutes

an implicit finding that the juror stands indifferent. On request, made after the trial judge's direction but before exercise of a peremptory challenge, the trial judge shall make an explicit finding as to the juror's impartiality.

5. Supplemental Juror Questionnaires

a. Supplemental juror questionnaires are not protected by G.L. c. 234A, § 23 and cannot be kept confidential without complying with the impoundment procedures set forth in Trial Court Rule VIII. If using supplemental juror questionnaires, the judge shall consider methods to ensure the juror's personal privacy and to promote the candor of responses, including but not limited to asking jurors whether they wish to keep responses confidential, asking the grounds for any such request, and complying with applicable impoundment procedures.

Superior Court Standing Order 1-15, Part C: Procedure

1. Any attorney or self-represented party who seeks to examine the prospective jurors shall serve and file a motion requesting leave to do so. In civil cases such motion shall follow the procedure provided by Superior Court Rule 9A, and shall be filed with the Court, along with any opposition or other response received, not later than the earlier of (a) the final trial conference if such a conference is scheduled in the case, or (b) fourteen days prior to the date scheduled for trial. In criminal cases the motion shall be served on all parties at least one week before filing, and the motion and any opposition or other response shall be filed with the Court not later than two business days prior to the scheduled date of the final pretrial conference, or, in the event that no final pretrial conference is scheduled, five business days before the scheduled trial date.

2. The motion shall identify generally the topics of the questions the moving party proposes to ask the

prospective jurors. Topics identified shall be interpreted to include reasonable follow-up questions. Any opposition or response to any such motion may address the proposed topics. The trial judge may, in the exercise of discretion, and after notice to the parties, require attorneys and self-represented parties to submit the specific language of the proposed questions for pre-approval. The motion and any responsive filing shall also include any proposed language for brief preliminary instructions on principles of law to be given pursuant to paragraph 5(b) hereof.

3. The trial judge shall approve or disapprove the topics of questions proposed, or, if the trial judge requires pre-approval of the specific language of the proposed questions, shall approve or disapprove each proposed question. In doing so the judge shall give due regard to the goals of: (a) 2 selecting jurors who can and will decide the case based on solely the evidence and the law, fairly and impartially to all parties, without in the process exposing jurors to any extraneous matter that would undermine their impartiality; (b) conducting the selection process with reasonable expedition, in proportion to the nature and seriousness of the case and the anticipated length of the trial, and with due regard for the needs of other sessions that draw on the same jury pool for access to potential jurors; and (c) respecting the dignity and privacy of each potential juror.

4. (a) Questions that should generally be approved are:

(1) those seeking factual information about the prospective juror's background and experience pertinent to the issues expected to arise in the case, along with reasonable follow-up questions regarding whether and how such background or experiences might influence the juror in the case, provided that questions that would elicit sensitive personal information about a juror, or that specifically reference information provided in a juror's statutory Confidential Juror Questionnaire, shall be permitted only outside the presence or hearing of other jurors, so as to preserve the confidentiality required by G. L. c.234A, s. 23.

(2) those regarding preconceptions or biases relating to the identity of the parties or the nature

of the claims or issues expected to arise in the case.

(3) those inquiring about the prospective jurors' willingness and ability to accept and apply pertinent legal principles as instructed, after consultation with the judge regarding the principles of law on which the judge will instruct the jury.

(b) Questions that should generally be disapproved are those:

(1) that duplicate the questions that appear on the statutory Confidential Juror Questionnaire, or any other written juror questionnaire used in the case, but questions seeking further detail regarding information provided on a juror's questionnaire, or completion of any uncompleted answers on the 3 questionnaire, should generally be approved, subject to the limitation stated in paragraph (a)(1) hereof;

(2) regarding the prospective juror's political views, voting patterns, party preferences, religious beliefs or affiliation, reading or viewing habits, patterns of charitable giving, opinions on matters of public policy, hobbies or recreational activities, or similar matters, or regarding insurance, except insofar as such matters may be relevant to issues expected to arise, or may affect the juror's impartiality in the case;

(3) regarding the outcome of any trial in which the prospective juror has previously served as a juror, or deliberations in or the prospective juror's vote in such trial;

(4) purporting to instruct jurors on the law;

(5) that make arguments on any issue of fact or law; that tend to indoctrinate or persuade; that encourage the juror to identify with a party, victim, witness, attorney, or other person or entity, or to send a message; or that encourage the juror to prejudge any issue in the case, to make a commitment to support a particular result, or to do anything other than remain impartial and follow the Court's instructions.

(6) that require a juror to guess or speculate about facts or law.

(7) that would tend to embarrass or offend jurors or unduly invade jurors' privacy.

5. Prior to any questioning by attorneys or self-represented parties, the trial judge shall:

(a) provide the venire with a brief description of the case, including the nature of the facts alleged

and of the claims or charges, including the date and location of the pertinent alleged event(s), and the identity of persons or entities significantly involved;

(b) provide the venire with brief, preliminary instructions on significant legal principles pertinent to the case. Such instructions should include a brief recitation of: the burden and standard of proof; the elements of at least t11e primary civil claim or at least the most serious criminal charge, and, 4 if appropriate to the case and requested by counsel or a self-represented party, the elements of any i affirmative defense that will be presented to the jury; and, in criminal cases, the defendant's right not to testify.

(c) explain to the venire the empanelment process, including, in cases where attorneys and/or self-represented parties will pose questions, the nature and topics of the questions that will be posed, and that any juror who finds either a particular question or the process of questioning by attorneys or self-represented parties intrusive on the juror's privacy may request to be permitted to decline to answer and/or that steps be taken to protect the privacy of any information disclosed. Upon request, the judge may permit each party to make a brief introductory statement to the venire limited to explaining the process and purpose of the questioning of jurors by attorneys or self-represented parties.

(d) ask all questions required by statute or case law, and any additional questions the judge deems appropriate in light of the nature of the case and the issues expected to be raised. The judge may ask questions of the venire as a group, but should conduct at least part of the questioning of each prospective juror individually outside the presence or hearing of other jurors.

(e) as to each prospective juror questioned individually, excuse the juror if the judge determines that service would pose a hardship, or if the judge has doubt as to the juror's impartiality; otherwise find the juror indifferent and able to serve.

6. After the judge has found an individual juror indifferent and able to serve, the judge shall permit questioning by attorneys or self-represented litigants if and to the extent that the judge has previously approved such questioning upon motion submitted in the

manner provided herein. Such questioning shall begin with the party having the burden of proof.

(a) Except as provided in paragraphs C(6)(b) and C(9) hereof, the judge may require that such questioning be conducted of each prospective juror individually, outside the presence or hearing of 5 other jurors. Parties may assert challenges for cause based on the juror's responses to questions posed by attorneys or self-represented parties, notwithstanding that the judge has previously found the juror indifferent based on the judge's questioning and information provided in the statutory Confidential Juror Questionnaire. If the juror is not excused for cause upon such challenge, the judge may require the exercise of any peremptory challenge at that time, beginning with the party who has the burdeq of proof and, in civil cases, the judge may alternate sides thereafter. Alternatively, the judge may seat the juror subject to the parties' later exercise of peremptory challenges.

(b) Upon request of one or both parties, the trial judge may permit counsel or self-represented parties to question jurors as a group, in a so-called "panel voir dire" procedure. Such questioning shall occur of those jurors whom the judge has already questioned individually and found indifferent and able to serve, after the judge has so found with respect to at least the number of jurors that will be seated for trial. If questioning occurs in this form, the judge shall not permit any questions that would elicit sensitive personal information about an individual juror, or that would specifically reference information provided in a juror's statutory Confidential Juror Questionnaire. Jurors to whom questions are addressed, or who respond to questions, shall be identified on the record by juror number only. After completion of questioning the parties may assert challenges for cause based on responses to' questions posed by attorneys or self-represented parties, although the judge has previously found the challenged juror indifferent. The judge shall require that such challenges for cause, as well as peremptory challenges, be asserted outside the hearing of other jurors. Upon any challenge for cause, the judge may allow opposing counsel further opportunity to question the juror.

7. Whether questioning of jurors by attorneys or self-represented parties occurs individually or in a group, any party may object to a question posed by another party by stating "objection," without elaboration or argument. The judge may rule on the objection in the presence of the juror or jurors, or 6 may hear argument and rule on the objection outside the presence or hearing of the juror or jurors.

8. The trial judge may set a reasonable time limit for questioning of prospective jurors by attorneys or self-represented parties, giving due regard to (1) the objective of identification of inappropriate bias in fairness to all parties; (2) the interests of the public and of the parties in reasonable expedition, in proportion to the nature and seriousness of the case and the length of the anticipated evidence, and (3) the needs of cases scheduled in other sessions drawing on the same jury pool for access to prospective jurors.

9. The Court will establish a pilot project, in which judges who volunteer to do so will conduct so-called "panel voir dire," according to a consistent procedure to be determined and described in a separate document. During the course of the pilot project, the Court will compile data regarding identified measures. Upon completion of the pilot project, the Court will issue a public report of such data.

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MASSACHUSETTS ACADEMY OF TRIAL ATTORNEYS

HOUSE BILL NO. 1211

An Act Relative to Certain Judicial Procedures

MATA Supports This Bill

The Massachusetts Academy of Trial Attorneys (MATA) supports House Bill 1211.

This Bill would assist the Court in moving cases through the legal system in a faster, more efficient, and more equitable manner.

This Bill would assist the Courts in bringing cases that should be resolved to an end result in a more timely and efficient manner. It would also eliminate situations where cases have to be tried because a lien holder is being unreasonable while the plaintiff and the defendant have come to an agreement on what is fair and reasonable to resolve the claim. This Bill would allow the Court the discretion to deal with the liens in an equitable manner.

Section 1

Section 1 would allow the Court to assess costs and reasonable attorney fees to the plaintiff for having to bring a civil action when an insurer does not pay the amount that is due and payable. This section would encourage insurers to resolve

claims that should be resolved earlier and avoid needlessly wasting the Court's time.

Sections 2 and 3

Sections 2 and 3 would require hospitals, health maintenance organizations or medical or dental services corporations, and the plaintiff in a personal injury action to divide the costs and expenses incurred in enforcing the liability of a tortfeasor, including attorney's fees and court costs, in an equitable manner. This bill seeks to undo the injustice which has resulted following the Supreme Judicial Court's decision in Pierce v. Christmas Tree Shops, 429 Mass. 91 (1999).

Massachusetts General Laws, Chapter 111, Section 70A and 70B are the medical lien statutes. In Pierce v. Christmas Tree Shops, the SJC held that an individual or entity that was a medical lienholder under these statutes could not be required to pay a portion of the injured plaintiff's attorney's fees and costs incurred in pursuing a tortfeasor because the medical lien statutes do not require the lienholder to pay any portion of the fees or costs for services of recovering judgment from a third-party. In Pierce, the SJC acknowledged the injustice of its decision, but held that it could reach no other conclusion and pointed out that it cannot interpret a statute so as to avoid injustice and/or hardship if the language is clear and unambiguous and requires a different construction.

House Bill 1211 seeks to address the unfairness of the medical lien statutes. The present statutes have created an unjust inequity between the lienholder and the injured person and placed the health insurer or the hospital lienholder in a better position than other lienholders, including Medicare and workers' compensation carriers. The statutes creating liens for Medicare and workers' compensation carriers specifically recognize that lienholders will pay their fair share of attorney's fees and expenses associated with recovering the compensation.

House Bill 1211 would correct this injustice by placing medical lienholders in the exact same position as Medicare, workers' compensation carriers and other lienholders. It would properly apportion the financial burden and risk of obtaining recovery on all entities that benefit from that recovery.

This Bill would help facilitate the progression of cases through the court system. Currently, many cases that should settle do not because the medical

lienholders, relying on the Pierce decision, refuse to reduce the amount of their liens. They do so despite the obvious unfairness of their position.

No one disputes the right of an HMO or medical insurer to be reimbursed for benefits provided out of a personal injury settlement or award as long as they pay their fair share of the costs of recovery. The existing law is fundamentally unfair because it gives the medical lienholder "a free ride" placing them in a better position than Medicare, workers' compensation carriers and other lienholders.

Section 4

Section 4 of this Bill would allow plaintiffs, through their counsel, to ask at trial in the Superior Court for a specific monetary amount for damages. Allowing plaintiffs to do so is fair to the plaintiffs and will assist juries in their attempts to determine the fair amount that should be awarded to plaintiffs who are successful at the time of trial. There is no prejudice to defendants by allowing plaintiffs to do so. Allowing plaintiffs to ask for a specific monetary amount of damages will help juries to focus on the damages and to more quickly determine what is fair and reasonable in each specific case.

Section 5

Section 5 of this Bill allows the Court to exercise its discretion to address situations in a case where the plaintiff received workers compensation benefits and the parties cannot agree on a fair and reasonable amount to resolve the lien. This Bill allows the Court to exercise its discretion and reduce the amount to a number that is fair and reasonable under the circumstances of a particular case.

This Bill would empower a judge (in court or at the Department of Industrial Accidents) to determine the amount a workers' compensation insurer may receive from the proceeds of a third party settlement or judgment where the amounts recovered are less than the injured employee's total damages. Such situations occur most often due to limitations of available liability insurance or where questions exist as to the degree of the defendant's liability.[1]

[1] It should be pointed out that according to G.L. c. 152 §46A, the Department of Industrial Accidents has been empowered by the legislature to determine the fair and reasonable amount to be paid out of the proceeds of a workers' compensation claim to lien holders such as the Department of Transitional Assistance, Department of Revenue's Child Support Unit and Health and Disability Income Providers. A similar provision giving such powers relative to workers' compensation liens under G.L. c. 152 §15 would be consistent with the longstanding practices embodied in §46A.

An intransigent or reluctant workers' compensation insurer, by refusing to negotiate or compromise its statutory lien, may force cases to trial which otherwise might have been settled, risking both its and the plaintiff's certain recovery by settlement against the uncertainties of the results at trial.

Section 6

Section 6 would prohibit the use of certain liability waivers as against public policy.

When workers' compensation laws were first enacted, almost one century ago, an employer in exchange for providing compensation coverage as mandated by law was given immunity from being sued by its employee. This quid pro quo was justified by the benefits of swift and certain payments without regard to issues of fault or negligence.

Negligent third parties, however, not being participants in the employee/employer relationship were and are still liable for the results of their negligence. The principles creating this liability are at the core of our civil legal justice system- holding wrongdoers accountable for their acts, making their victims whole, and encouraging safety and the avoidance of negligent conduct.

Certain employers, to gain a competitive advantage, have been known to require prospective workers to sign liability waivers at the time of their hire, releasing and absolving a person or companies other than their employers from financial responsibility for future negligent conduct.

This practice is wrong for several reasons including the following:

1. It deprives employees of financial recovery against a negligent party where that party has not provided benefits to the injured worker;

2. It deprives the employer's workers' compensation carrier from its statutory recovery, which will only serve to increase the employer's workers' compensation costs;

3. For employees who understand this waiver, it forces them to give up their legal rights under pressure of gaining employment; for

those who do not understand the waiver, it unfairly deprives them of their established legal rights; and

4. Anticipatory releases of defendants from their misconduct are inherently suspect and should only be contemplated with great care and under very unusual, limited, and necessary circumstances.

House Bill 1211 would eliminate this unfair practice.

Section 7

Section 7 would allow counsel to conduct *jury voir* dire in civil cases.

The goal is to provide a more meaningful opportunity, under the direction of the trial judge, for *voir dire* examination of prospective jurors by allowing each party or his counsel, upon request, to conduct his or her own examination of the prospective jury.

- **Discussion**

United States Chief Justice John Marshall discussed *voir dire* at length in the famous treason case of United States v. Burr, 25 F. Cas. 49 (C.C.D. Va. 1807), in which he was the trial judge. His statements regarding personal bias laid a foundation for judicially protecting a rigorous *voir dire:*

> Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony. He may declare that notwithstanding these prejudices, he is determined to listen to the evidence, and be governed by it; but the law will not trust him... He will listen with more favor to that testimony which confirms, than to that which would change his opinion. Id.

Massachusetts G.L. c. 234, § 28 requires the striking of a potential juror who will bring preconceived opinions, biases, or prejudices that will influence his or her ability to decide a case impartially. The issue for Massachusetts judges and attorneys, therefore, is not whether biased jurors should be removed from the jury panel, but how to best accommodate this statutory mandate.

- **Other States**

Of the forty-eight (48) states that were contacted in a survey, i.e. excepting only Oklahoma and South Dakota, data show that at least thirty-nine (39) states

provide the parties and their counsel with a more liberal opportunity for *voir dire* examination of prospective jurors. Among those states, four that are contiguous to Massachusetts have provisions that are worthy of special note:

1) Connecticut has *voir dire* of individual prospective jurors, conducted without time limits by the attorneys, often without a judge present in civil cases.

2) New York State now has some time limits on attorney conducted *voir dire* of the venire en masse.

3) Rhode Island and Vermont have no time limits, and the trial judge participates to an extent determined by his or her own preference.

- **Argument**

The argument for this legislation is based on the proposition that by virtue of their own necessarily extensive preparation for trial, the attorneys for the parties inevitably have a more detailed understanding of the issues and the evidence in the case, and thus are in a better position to frame questions that will ferret out information relating to potential juror bias. Jurors also tend to be less intimidated by lawyers than judges and, thus, more likely to answer candidly and completely to questions posed during *voir dire*. Furthermore, direct participation of counsel in *voir dire* heightens litigants' perceptions that the trial proceedings are fair and enhances their confidence in the justice system.

There is empirical evidence showing that judge-conducted *voir dire* is less effective than attorney-conducted *voir dire* in discovering bias. A study conducted in the Second Circuit, entitled "Report of the Committee on the Juries of the Judicial Council of the Second Circuit August 1984," examined a series of experiments conducted by District Judges in that Circuit, and found that statistically, the greatest number of successful challenges for cause occur where there is attorney-conducted *voir dire*. The study found that most District Judges favor attorney-conducted *voir dire,* because it gives them the greatest amount of information upon which to exercise their power to strike jurors for cause.

After a 1999 survey of civil verdicts in forty-five (45) of the largest counties in the country, data from the U.S. Department of Justice proves that verdicts in the Massachusetts counties in the study were skewed markedly in favor of defendants. Selected for the study were the counties of

Essex, Suffolk, Middlesex, Worcester and Norfolk. Those five counties ranked 36th, 39th, 43rd, 44th, and 45th in the percentage of plaintiff's verdicts, in declining order, among the 45 counties in the sample. One of the most striking differences between trying jury cases in Massachusetts as compared to elsewhere is the absence of *voir dire* here. Because attorney-conducted *voir dire* was available in most other counties in the study, this data strongly suggests that the absence of the opportunity for the parties' counsel was an important, if not decisive, factor in Massachusetts verdicts.

- **Court Supervision**

The most frequently mentioned argument against attorney-conducted *voir dire* is to save the time of the court. Alleviation of court congestion is, in such instances, a legitimate goal to be balanced against the desirability of conducting the most effective *voir dire.* In comparison to the other New England states identified above, the proposed bill seeks to accommodate these concerns by allowing the court to impose reasonable time limitations.

Judges who regularly grant lawyers a substantial role in *voir dire* report that setting clear guidelines about appropriate examination during the pretrial conference helps curb excessive or inappropriate advocacy by the lawyers during *voir dire.* For example, firm time restrictions on *voir dire* examination, mandatory pretrial disclosure of the lawyers' expected lines of inquiry, and judicial review of juror questionnaires, provide the judge with effective tools for exercising appropriate control over the process. See **Jury Trial Innovations,** Chapter III, "Voir Dire (Or, In Plain English, Jury Selection)", Sec. III-1, p.54 (Published by the National Center for State Courts in 1997).

Under the proposed legislation, the trial judge would have the option to preside at the commencement of the parties' *voir dire* examination, at which time he or she would establish "reasonable limitations upon the questions allowed," and then depart the bench while examination is conducted in the presence of the clerk. This option was explicitly sanctioned by the court rules of the State of New York in 1994, when judges were required to more actively supervise civil *voir dire,* which previously had been conducted in that state without judicial supervision.

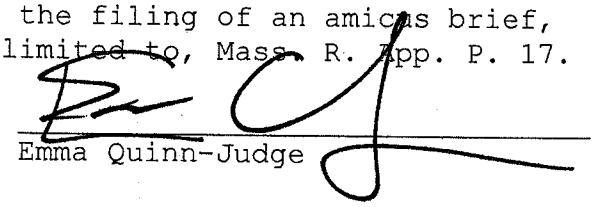
In summary, attorney-conducted *voir dire* will create minimal burdens on judges' time in the conduct of trials and, in exchange, will provide all parties with a greater likelihood of getting the unbiased jury they are entitled to expect.

Conclusion

In closing, MATA fully supports each section of this Bill. We are confident that it will provide judges with greater discretion to move cases through the legal system and a faster, more efficient, and more equitable manner.

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. App. P. 16(k), I hereby certify that this brief complies with the rules of court pertaining to the filing of an amicus brief, including, but not limited to, Mass. R. App. P. 17.



Emma Quinn-Judge