

**REPORT OF THE  
AJS SPECIAL COMMITTEE ON THE JURY**

**AMERICAN JUDICATURE SOCIETY  
HAWAII CHAPTER**

DECEMBER 14, 2009

## REPORT OF THE SPECIAL COMMITTEE ON THE JURY

At the request of the Supreme Court, the Hawaii Chapter of the American Judicature Society created the Special Committee on the Jury. The Special Committee on the Jury received its charter, attached as Appendix A, and held an introductory meeting on September 28, 2009. The Committee was comprised of five judges, five attorneys, five community members, one law professor and two AJS board liaisons; the Committee roster is attached as Appendix B. The Honorable Judge David Ezra and Constance Lau were appointed co-chairs of the Committee.

Because the Supreme Court's request to the American Judicature Society was prefaced in terms of cost savings, the Committee considered the potential cost savings of a jury size reduction, and researched and analyzed whether this savings would be offset by harms created by the reduced jury size.

The Committee met on October 14, 2009 and agreed to form two subcommittees, one to evaluate jury size in civil cases and one to evaluate jury size in non-serious criminal cases. Sidney Ayabe chaired the civil subcommittee and Douglas Chin and Jack Tonaki co-chaired the criminal subcommittee.

For the next six weeks, both subcommittees met extensively, researched and reviewed written legal and social science research, and solicited and considered comments from interested parties as described in their subcommittee reports. The full committee met again on December 1, 2009 to review and discuss both subcommittee reports. Thereafter, the criminal subcommittee revised its report. The conclusions of the subcommittees are as follows:

**Civil subcommittee summary:** *The subcommittee unanimously opposes a reduction of the size of the jury from 12 persons to 6 persons.*

**Criminal subcommittee summary:** *As to whether significant cost savings would actually result from such a reduction, the projected amount saved appears small in comparison to the Judiciary's overall fiscal budget, while the consequences to*

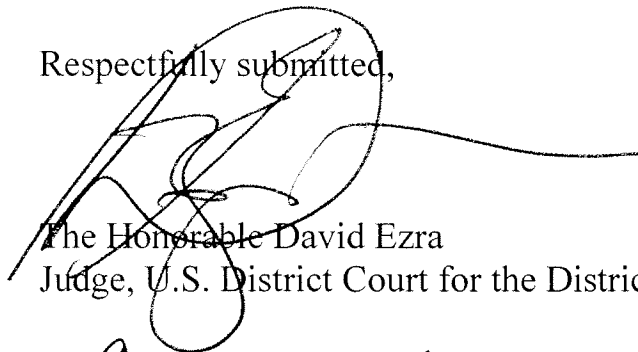
*criminal defendants, as noted within the group, are arguably considerable, particularly for misdemeanor offenses imposing mandatory jail terms upon conviction. However, these types of cases historically proceed to jury trial with very low frequency, with the projected immediate savings to the Judiciary representing an even smaller fraction of its overall budget.*

*In view of the charge to the subcommittee to analyze the issue in terms of whether the cost savings to the Judiciary during the current budget crisis outweighs the concerns raised regarding reduced jury sizes, the subcommittee recommends against reduction at this time, though as a further step some members of the group respectfully suggest further discussion on whether implementation of compromise as a "pilot" should be considered to test these concerns and/or determine actual savings.*

The subcommittee reports are attached as Appendices C and D.

We are pleased to report that the full Special Committee on the Jury has accepted and endorsed the recommendations of both subcommittees. **The Special Committee on the Jury respectfully recommends that the jury size remain at 12 persons and that no action be taken by the introduction of legislation, or otherwise, to reduce the size of the jury from 12 persons to 6 persons.**

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'David Ezra', with a long horizontal flourish extending to the right.

The Honorable David Ezra  
Judge, U.S. District Court for the District of Hawaii

A handwritten signature in black ink, appearing to read 'Constance H. Lau', written in a cursive style.

Constance H. Lau  
President & Chief Executive Officer  
Hawaiian Electric Industries, Inc.

# **APPENDIX A**

## AJS Hawaii Chapter Reduction of Members on Jury Panels

As budget issues predominate our State and our deficit threatens to change “how government does business” in significant ways, each branch of government has been charged to assist with the deficit, and balance fiscal prudence with the needs of the public and the administration of justice. At the Hawaii Judiciary, one possibility for reducing costs is to decrease the number of members on jury panels to six, instead of twelve-members in civil trials and in non-serious criminal trials. This could result in significant cost savings and does not appear to violate constitutional guarantees.

Potential legislation has been drafted for AJS’s consideration. The legislation proposes to amend Article I, Section 13 of the State Constitution, relating to jury trials in civil cases, and makes conforming amendment to HRS Section 635-26, relating to impaneling a jury. The proposed legislation is based, in part, upon a 1997 Attorney General Opinion (Attachment “1”) that concludes that the use of six-member jury panels in civil cases, where the parties do not stipulate to using a jury panel smaller than twelve, requires a constitutional amendment.

Two versions of possible legislation may be considered by AJS for reducing the number of jurors in civil trial panels: (1) The first version (Attachment “2”) establishes a requirement in the Constitution for a six-member jury in civil cases; and (2) the second version (Attachment “3”) authorizes the legislature to provide by law for six-member juries in civil cases. The latter option provides for more flexibility than the first should it be determined in the future that twelve-member jury panels are preferable to six-member panels. A change to a larger jury panel would require legislative action, but not a constitutional amendment. Also, the legislature may be more receptive to a measure that reserves for its determination and policymaking the issue of jury size.

If the law is amended to provide for six-member juries in civil cases, Rule 48 of the Hawaii Rules of Civil Procedure would also need to be amended. A draft of this proposed rule change is also attached as Attachment “4”.

We are also providing proposed legislation (Attachment “5”) that defines “serious crime” as a felony, for the purpose of determining when a jury in a criminal case shall consist of twelve members; for all other criminal cases in which a right to jury trial attaches, the proposed legislation requires a jury of six. A supporting memorandum that addresses a potential constitutional objection to the legislation is also provided. (Attachment “6”).

# **APPENDIX B**

**AJS Hawaii Chapter  
Special Committee on the Jury**

**Committee Members**

<b>Co-Chairs</b>	The Hon. David Ezra	Judge U.S. District Court for the District of Hawaii Room C-300 300 Ala Moana Boulevard Honolulu, HI 96850 Tel: 541-1907 Fax: 541-3575 Email: david_ezra@hid.uscourts.gov
	Constance Lau	President and Chief Executive Officer of Hawaiian Electric Industries, Inc.; Chairman Hawaiian Electric Company, Inc.; Chairman and Chief Executive Officer American Savings Bank, F.S.B. P.O. Box 730 Honolulu, HI 96808-0730 Tel: 543-7601 Fax: 543-7602 Email: clau@hei.com
<b>Co-Reporters</b>	The Hon. Virginia Crandall	Judge First Circuit Court State of Hawaii 777 Punchbowl Street Honolulu, HI 96813 Tel: 539-4054 Email: virginia.l.crandall@courts.state.hi.us
	Justin Levinson Co-Founder, Culture and Jury Project	Associate Professor of Law University of Hawaii William S. Richardson School of Law Room 248 2515 Dole Street Honolulu, HI 96822 Tel: 956-3287 Fax: 956-5569 E-mail: justinl@hawaii.edu
<b>Judges</b>	The Hon. Craig Nakamura	Chief Judge Intermediate Court of Appeals State of Hawaii Room 201 426 Queen Street Honolulu, HI 96813 Tel: 539-4206 Fax: 539-4644 Email: craig.h.nakamura@courts.state.hi.us

<b>Judges (continued)</b>	The Hon. Colleen K. Hirai	Judge First Circuit Court State of Hawaii 777 Punchbowl Street Honolulu, HI 96813 Tel: 539-4640 Fax: 539-4108 Email: colleen.k.hirai@courts.state.hi.us
	The Hon. Colette Garibaldi Deputy Chief Judge (Administrative Judge for the District Courts)	Judge District Court, First Circuit State of Hawaii 1111 Alakea Street Honolulu, HI 96813 Tel: 538-5009 Fax: 538-5232
<b>Lawyers</b>	Sidney Ayabe Former Chair, Hawaii Judicial Selection Commission; former President, Hawaii State Bar Association	Ayabe Chong Nishimoto Sia & Nakamura Suite 2500 Pauahi Tower 1003 Bishop Street Honolulu, HI 96813 Tel: 537-6119 Fax: 526-3491 E-mail: sidney.ayabe@hawadvocate.com
	Ronette Kawakami HSBA designee	Office of the Public Defender Suite A-254 1130 North Nimitz Highway Honolulu, HI 96817 Tel: 586-2200 Fax: 586-2222 E-mail: ronette.m.kawakami@hawaii.gov
	William Meheula	Winer, Meheula & Devens LLP PH1 Ocean View Center 707 Richards Street Honolulu, HI 96813 Tel: 528-5003 Fax: 254-6872 E-mail: meheula@pacificlaw.com
	Carrie Okinaga Co-Chair, AJS Sidebar Program	Corporation Counsel Honolulu Hale 530 South King Street Honolulu, HI 96813 Tel: 768-5100 Fax: 768-5104 Email: cokinaga@honolulu.gov
	Richard Turbin Former President, Hawaii State Bar Association; former Chair, ABA Section on Tort Trial and Insurance Practice	Turbin Chu Suite 2730 Pacific Guardian Center 737 Bishop Street Honolulu, HI 96813 Tel: 528-4000 Fax: 599-1984 E-mail: richturbin@aol.com



<b>Community Leaders</b>	Kyle Chock	Executive Director The Pacific Resource Partnership Suite 1501 ASB Tower 1001 Bishop Street Honolulu, HI 96813 Tel: 528-5557 ext 224 Fax: 528-0421 Email: kchock@prp-hawaii.com
	Walter Heen Former Associate Judge, Intermediate Court of Appeals	Trustee Office of Hawaiian Affairs Suite 500 711 Kapiolani Boulevard Honolulu, HI 96813 Tel: 594-1888 Fax: 594-1865 Email: walterh@oha.org
	The Hon. Brian Taniguchi Chair, Senate Judiciary Committee	State Senate Room 219 415 South Beretania Street Honolulu, HI 96813 Tel: 586-6460 Fax: 586-6461 E-mail: sentaniguchi@capitol.hawaii.gov
	Lee P. Webber	President and Publisher The Honolulu Advertiser 605 Kapiolani Boulevard Honolulu, HI 96813 Tel: 525-7474 direct Fax: 525-8685 Email: lwebber@honolulu.gannett.com
<b>AJS Hawaii Chapter Board Liaison</b>	Douglas Chin	First Deputy Dept. of the Prosecuting Attorney City and County of Honolulu 9th Floor 1060 Richards Street Honolulu, HI 96813 Tel: 527-6490 Fax: 547-7515 E-mail: dchin1@honolulu.gov
	John M. Tonaki	Chief Defender Office of the Public Defender Suite A-254 1130 North Nimitz Highway Honolulu, HI 96817 Tel: 586-2200 Fax: 586-2222 E-mail: john.m.tonaki@hawaii.gov

# **APPENDIX C**

## REPORT OF THE SUBCOMMITTEE ON CIVIL JURIES

AJS Hawai'i Chapter  
Special Committee on the Jury

### *Summary and Recommendation*

*Members of the subcommittee regarding civil juries, comprised of five attorneys, one judge and two community leaders, met on November 2 and 12, 2009 to discuss the issues regarding the size of juries in civil trials. The subcommittee unanimously opposes a reduction of the size of the jury from 12 persons to 6 persons.*

The Civil Subcommittee was tasked to make a recommendation whether a reduction in the size of the jury panel should be considered as a cost saving measure. At the outset, the subcommittee noted that civil jury expenses made up just eight percent (8%) of the total jury expenses for the First Circuit in fiscal year 2008. Therefore, the subcommittee considered whether the amount of cost savings would be warranted or worthwhile when weighed against the issues of jury performance, diversity, representation and reliability.

The subcommittee, whose members were plaintiff and defense civil trial attorneys, judges, and community members, met two times, sought input from the plaintiff's bar, defense bar and trial judges, and reviewed both legal and social science research concerning jury size and selection.

The consensus of the subcommittee, based on input received from legal and judicial members of community and review of literature regarding impacts of difference in jury size, is that the size of the jury in civil cases should remain at 12 persons.

The subcommittee sought input from plaintiff trial attorneys, defense trial attorneys and judges regarding the proposal to reduce the size of the jury. The vast majority of the members of the plaintiffs' bar, defense bar and judges who responded to the request for opinions recommended that jury size remain at 12. The responses were fairly consistent and the following are some of the responses received:

1. A twelve person jury provides for more input, a more contemplative deliberation, and ultimately a verdict more consistent with the evidence.
2. I have tried cases in federal court, where the juries can be as small as six persons. I have found that these juries seem to be less deliberate in their decision making, and tend to come to a decision much more quickly. This also means that one or two more vocal jurors can have an undue influence in the process. I have found that, with 12 person juries, there seems to be more time taken by the jury, and I assume that there is a greater amount of deliberation taking place. The trial verdicts also seem to reflect a more deliberative process, in my experience.
3. I agree that six is too few for a civil case as one juror can sway the rest.<sup>1</sup> Ten is about the minimum to offset a dominant juror.
4. I am also concerned that a dominant person with only a 6 person jury can turn it into a 1 person jury. Requiring all 6 to agree like the Feds do might prevent domination, but I doubt it. A couple of years ago I had the opportunity to sit on a 12 person jury in a criminal case and observe the interaction with 2 or 3 dominant persons. Better to stick with 12.
5. A twelve person jury is the way to go. –better able to collectively recall the testimony and evidence – better representation of the community at large and ensures return of verdicts that are more reflective of community standards, i.e., more voices from the community represented – no indication that a twelve person jury is more susceptible to a hung jury -- minority viewpoints more likely to be multiple in a 12 person jury and would foster more in depth discussion and evaluation of the issues, i.e., ensure the quality of jury deliberation. –jury of 12 is less likely to be erratic as a 6 person jury would be given the fact that the margin of error increases as the sample size decreases (rule of statistics).

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<sup>1</sup> Although it is not discussed elsewhere in this subcommittee report, this comment is supported by empirical evidence. For example, one study found that single jurors hold “inordinate power” in smaller juries. Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 5 L. & HUM. BEHAV. 451 (1997), citing J. R. Snortum et al. *The Impact of an Aggressive Juror in Six- and Twelve-Member Juries*. 3 CRIM. JUST. & BEHAV. 255 (1976).

The views expressed by members of the bar and bench are consistent with the conclusions made by the subcommittee after review of legal and social science scholarship.

### Cost analysis

The number of jury and jury-waived trials for the State of Hawaii for the Fiscal Year 2007 – 2008 is set forth in the Judiciary’s 2008 Statistical Information Supplement. For the fiscal year 2007 – 2008, there were 41 jury-waived trials which were completed and 27 jury-waived trials which did not proceed to completion. For the same fiscal year, there were 17 jury trials which proceeded to verdict and 14 jury trials which did not proceed to verdict. For the 17 jury trials to verdict, 15 were conducted in the First Circuit and one each in the Second and Third Circuits. Unofficial figures for the First Circuit for fiscal year 2008 – 2009 show 17 jury trials where jurors were summoned, 2 trials were cancelled; it is unknown how many of the remaining 15 trials proceeded to verdict.

The following sets forth juror fees/expenses for civil cases for fiscal years 2008 and 2009 for the First Circuit:

Fiscal Year 2008:	Juror fees and mileage	\$87,841
	Meals	1,805
	Parking	4,379
	Total	\$94,025
Fiscal Year 2009:	Juror fees and mileage	\$109,441
	Meals	1,675
	Parking	7,603
	Total	\$118,719

The projected cost savings to be gained from reducing the size of a jury for civil trials from 12 persons to 6 persons for first circuit for one year might be in the range of \$50,000 to \$60,000. Based on the limited number of civil jury trials in the second, third, and fifth circuits, savings for those circuits would be minimal.

The subcommittee also considered whether there would be additional savings in judicial resources which would add to the projected costs savings. In other words, would a 6 person jury result in shorter jury selection time or

jury deliberation time which would further decrease the fees for meals, parking, days of service and would shorter trials result in more cases proceeding to trial and thus decrease pending caseloads. Although there is some research to indicate that additional cost savings may be realized in these areas, overall there is insufficient data regarding savings in court time and judicial resources to support a conclusion that there were be these additional costs savings if there is a reduction in size of jury.

The subcommittee considered empirical social science research (published both in law journals and social science journals) demonstrating the potential risks of reducing the number of jurors below twelve. This research confirmed two important findings. First, the diversity of the community is represented better in larger juries than in smaller juries. And second, larger juries process information better than smaller juries.

### Larger Juries are More Diverse than Smaller Juries

Studies have confirmed the statistical expectation that larger juries are more diverse compared to smaller juries. A meta-analysis by Michael J. Saks and Mollie Weighner Marti examined the results of seventeen independent empirical studies (testing approximately 15,000 jurors) that tested differences between twelve-person and six-person juries.<sup>2</sup> Confirming the results that would be expected by standard sampling theory analysis, their study found that more large juries than small juries included at least one minority member.

A more recently published empirical study supports these results. This 2009 study, conducted by Shari Seidman Diamond and her colleagues, found that six person juries are consistently less diverse compared to twelve person juries.<sup>3</sup> Studying 89 six person juries and 188 twelve person juries in an Illinois courtroom, the authors found that six person juries had significantly fewer minorities than twelve person juries. One striking example: whereas 28.1 percent of six person juries had no black jurors, only 2.1 percent of

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<sup>2</sup> Saks & Marti, *supra* note 1. See also Alisa Smith & Michael J. Saks, *The Case for Overturning Williams v. Florida and the Six-Person Jury: History, Law, and Empirical Evidence*, 60 FL. L. REV. 441 (2008).

<sup>3</sup> Shari Seidman Diamond et al., *Achieving Diversity on the Jury: Jury Size and The Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425 (2009).

twelve person juries lacked at least one black juror. The results of the study further showed that the lack of minority representation on smaller juries was not just a result of sampling theory, either. As jurors were selected and seated, the lack of minority representation on six person juries became amplified. The results were similarly compelling when the authors compared how many juries had at least two minority members. Whereas 82.2 percent of twelve person juries had at least two black members, only 41.7 percent of six person juries had at least a two person minority.

Other studies on how juries deliberate underscore the importance of avoiding reductions to minority representation on juries. For example, study by Samuel Sommers found that racially heterogeneous juries have more meaningful deliberations than racially homogenous juries.<sup>4</sup> Sommers compared jury deliberations between heterogeneous and homogenous juries, and measured various aspects of deliberations, including the number of case facts discussed, the number of factual inaccuracies mentioned, the number of uncorrected inaccurate statements, the amount of “missing” evidence cited, as well the length of deliberations. The results of the study confirmed that racially heterogeneous juries functioned better in each of these categories. It is worth noting that, for purposes of his study, Sommers categorized heterogeneous juries as those having two minority members. Based on social science evidence on the effect of the majority on minorities of only one, Sommers did not believe that juries containing one minority member would demonstrate such benefits.<sup>5</sup> In light of the compelling proof that larger juries will be more representative of the diversity in the population, Sommers study shows that smaller juries will not simply be less representative, but because of their lost diversity, that they will likely perform less well.

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<sup>4</sup> Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006).

<sup>5</sup> As Diamond and her colleagues explained, “evidence that the ability of a juror to withstand majority pressure and to influence the majority process is substantially strengthened when the juror has an attitudinal ally, that is, when the minority position in the group is represented by at least two members.” Diamond et al., *supra* note 3 at 443, citing Robert T. Roper, *Jury Size and Verdict Consistency: “A Line has to be Drawn Somewhere?”* 14 LAW & SOC’Y REV. 977 (1980).

## Larger Juries Function Better than Smaller Juries

Numerous empirical studies have sought to compare the performance of larger versus smaller juries. The meta-analysis by Saks and Marti found, among other things, that juries of 12 (compared to juries of 6) remembered and discussed trial testimony more accurately and deliberated somewhat longer than 6 person juries. These findings support the conclusion that 12 person juries probably perform better than 6 person juries.

Considering the empirical evidence supporting the benefits of 12 person juries over 6 person juries, recent commentary, highlighted by a report by the American Bar Association, recommends using 12 person juries in civil cases, regardless of projected cost savings.<sup>6</sup>

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<sup>6</sup> See generally AMERICAN BAR ASSOCIATION PRINCIPLES FOR JURIES AND JURY TRIALS, AMERICAN JURY PROJECT. See also Diamond, *supra* note 3; Smith & Saks, *supra* note 2.



# **APPENDIX D**

**REPORT OF THE SUBCOMMITTEE**  
**ON NON-SERIOUS CRIMINAL JURIES**

AJS Hawai'i Chapter  
Special Committee on the Jury  
(amended Summary and Recommendation dated December 3, 2009)

***Summary and Recommendation***

*Members of the subcommittee regarding non-serious criminal juries, comprised of three attorneys, three current or former judges and one community leader, met on October 28, November 6, November 10 and November 20, 2009 to discuss the Judiciary's proposed bill reducing the size of juries in misdemeanor trials from 12 to 6 persons. As to the size reduction itself, individual opinions were diverse and fairly split down the middle, with 4 persons either opposed to a reduction or expressing reservations and 3 persons in support or finding persuasive reasons to consider a reduction.*

*As to whether significant cost savings would actually result from such a reduction, the projected amount saved appears small in comparison to the Judiciary's overall fiscal budget, while the consequences to criminal defendants – as noted within the group – are arguably considerable, particularly for misdemeanor offenses imposing mandatory jail terms upon conviction. As a compromise, the subcommittee strongly considered, but did not unanimously endorse, a "pilot program" in which the reduced jury size would apply only to misdemeanor offenses with no mandatory jail provisions upon conviction. However, these types of cases historically proceed to jury trial with very low frequency, with the projected immediate savings to the Judiciary representing an even smaller fraction of its overall budget.*

*In view of the charge to the subcommittee to analyze the issue in terms of whether the cost savings to the Judiciary during the current budget crisis outweighs the concerns raised regarding reduced jury sizes, the subcommittee recommends against reduction at this time, though as a further step some members of the group respectfully suggest further discussion on whether implementation of compromise as a "pilot" should be considered to test these concerns and/or determine actual savings.*

**Arguments Opposing Reduction**

The members of the subcommittee who were either opposed to the reduction in the size of criminal juries or expressed reservations about the reduction had the following concerns.

**Representativeness**

A jury of one's peers must be representative of the community. Maintaining the representative nature of the jury is essential to preserving its fairness and legitimacy in the eyes of the public. The smaller the size of the jury, the less representative it becomes. Twelve person juries are significantly more likely to facilitate representation of minority groups. AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES AND JURY TRIALS, Principle 3, Comments.

In the article, *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, published recently (September 2009) in the Cornell Law School's Journal of Empirical Legal Studies, the authors support a return to the 12-person jury. The authors collected data regarding jury composition from 89 six-person juries and 188 12-person juries in Cook County, Illinois. Based upon their study, they determined that the 12-member jury produced greater heterogeneity than did the six-member jury. The 12-member jury thus increased diversity to better represent the population in that particular area.

Professor Jon M. Van Dyke of the William S. Richardson School of Law met with the subcommittee and cited the reduction in community representation as one of the reasons that he opposes smaller jury sizes. His treatise, Jury Selection and Procedures, contains a section on this issue and refers to a statistical analysis by Professor Hans Zeisel of the University of Chicago Law School which demonstrates that the smaller the size of the jury, the less likely it is to represent a fair cross-section of the community viewpoints.

### Reliability

The American Bar Association has stated that larger juries deliberate longer and have better recall of trial testimony. Thus, they are more likely to produce accurate results and in criminal cases, larger juries are more likely to return verdicts in accord with community values. AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES AND JURY TRIALS, Principle 3, Comments. Professor Van Dyke also alluded to the increased reliability of larger juries. Twelve decision makers are better than six. It is also easier for a single juror with a strong personality to dominate a smaller jury to the detriment of an accurate verdict. The evidence that reliability is reduced in smaller juries was gathered through experiments using probability theory as well as studies of trials according to Professor Van Dyke and Professor Justin Levinson of the Richardson School of Law who also met with the subcommittee.

### Serious nature of certain misdemeanor cases

Even though six-person juries are being considered only for non-felony cases, the subcommittee recognized that certain misdemeanor offenses carry penalties which include mandatory prison terms. Through these mandatory prison terms, the legislature has indicated that these offenses are considered more serious than other offenses within the misdemeanor classification. Presently, the vast majority of non-felony jury trials are on the charge of Abuse of Family or Household Members, H.R.S. § 709-906. Although this offense is classified as a misdemeanor, a first conviction for this offense carries a mandatory minimum prison term of *two days without the possibility of probation or suspension*. A second conviction carries a mandatory minimum prison term of 30 days. The penalties for this misdemeanor offense are thus heavier than other offenses of the same general classification.

The offense of Violation of an Order for Protection, H.R.S. § 586-11 also carries a first-conviction mandatory penalty of two days in prison even though the offense is classified as a misdemeanor. Assault Against a Law Enforcement Officer in the Second Degree, H.R.S. § 707-712.6 is classified as a misdemeanor offense. However, a conviction results in a minimum 30-

day term of imprisonment. As the foregoing offenses illustrate, the consequences attached to certain misdemeanor offenses, while not as severe as felony convictions, can be quite serious to the person who is before the court.

#### “Slippery slope” effect

A concern expressed by some members of the subcommittee is that the establishment of six-person juries for any type of misdemeanor offense will initiate a “slippery slope” which will result in attempts to extend such smaller juries to felony cases. The subcommittee therefore recommends that the full committee’s final report include a strong statement that, given the legitimate concerns regarding six-person juries, those smaller juries be limited to non-felony cases and that six-person juries are not recommended for felony cases under any circumstances, even if the full committee were to support six-person juries for misdemeanors.

#### Cost savings do not justify the drastic change

The Judiciary of the state of Hawai‘i requested that the AJS study the reduction in size of juries for non-serious criminal trials for the purpose of achieving cost savings. There is no question that a reduction in jury size from 12 persons to six in non-felony cases would constitute a major change in the manner in which criminal trials are held.

The change in the size of juries, however, would not generate monetary savings in an amount that some might suspect. Members of the subcommittee with trial experience observed that while there would be some court time saved in the voir dire process, most of the time used to pick a 12-person jury would be needed, as the judge would still be required to address the jury venire and time would still need to be allocated for the voir dire questioning by the attorneys. The main savings to the Judiciary would occur in the lessened number of jurors being summoned for a six-person jury case and the associated costs (per diem, parking, etc.).

As stated earlier, the vast numbers of non-felony jury trials occur in the family court on the charge of Abuse of Family or Household Members. One of the current judges who presides over these cases estimated annual cost savings caused by a move to six-member juries to be in the neighborhood of \$50,000. Even if that figure were conservatively increased to \$80,000, this is a small savings when compared to the total operating budget of the Judiciary (approximately \$150 million). The amount of savings generated does not warrant decreasing the size of juries.

#### Compromise position

While there was not unanimous agreement on the subcommittee, a compromise position has been identified for submission to the committee of the whole. This position is that even if six-person juries are instituted for non-felony offenses, the right to 12-person juries should remain for misdemeanor offenses which carry the possibility of a mandatory minimum term of imprisonment. This would recognize the added seriousness of these offenses that has been legislatively recognized.

## Arguments Favoring Reduction

The members of the subcommittee who supported a reduction in the size of criminal juries for misdemeanor offenses or who felt that persuasive reasons existed to consider a reduction noted the following:

### State practice

In 1970, the U.S. Supreme Court addressed a challenge to the constitutionality of six-person juries used by Florida to try all criminal defendants, except for those facing capital punishment. *See Williams v. Florida*, 399 U.S. 78 (1970). In upholding Florida's statute, Justice White concluded that the practice of requiring a 12-member jury was "an historical accident, unrelated to the great purposes which gave rise to a jury in the first place." *Id.* at 89. Finding no historical or doctrinal mandate requiring 12-member juries, the Supreme Court held that juries consisting of six members were constitutional. *Id.* at 102.

Nearly 40 years later, only three states (Connecticut, Indiana and Massachusetts) have joined Florida in allowing six-person juries to try all or some criminal defendants accused of committing felony offenses. DAVID B. ROTTMAN & SHAUNA M. STRICKLAND, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 2004, 233 tbl. 42 (2006), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf>. However, this is not the case as to misdemeanors. Today, *34 out of 50 states allow juries of reduced sizes of less than 12 members to hear misdemeanor trials:*

Alaska (6)	Indiana (6)	Minnesota (6)	New York (6)	Utah (6)
Arizona (6)	Iowa (6)	Mississippi (6)	North Dakota (6)	Virginia (7)
Colorado (6)	Kansas (6)	Montana (6)	Ohio (8)	Washington (6)
Connecticut (6)	Kentucky (6)	Nebraska (6)	Oklahoma (6)	West Virginia (6)
Florida (6)	Louisiana (6)	Nevada (6)	Oregon (6)	Wisconsin (6)
Georgia (6)	Massachusetts (6)	New Hampshire (6)	South Carolina (6)	Wyoming (6)
Idaho (6)	Michigan (6)	New Mexico (6)	Texas (6)	

*Id.* To the extent over two-thirds of the states already allow reduced-size juries to deliberate in misdemeanor cases, a similar adjustment in Hawai'i would arguably reflect the pervading practice, as opposed to an unexplored judicial innovation.

### Conservation of court resources

Reducing the jury size in misdemeanor trials decreases the number of citizens called to serve as jurors. NICOLE L. WATERS, PH.D., NATIONAL CENTER OF STATE COURTS, DOES JURY SIZE MATTER?: A REVIEW OF THE LITERATURE, 1 (2004). This arguably saves money and resources for courts in terms of fewer individuals paid and/or required to sit and hear a misdemeanor trial. *Id.* In live remarks made before the subcommittee, a First Circuit judge with a case load comprised primarily of misdemeanor jury trials confirmed that a smaller jury size would most likely significantly decrease the number of citizens assigned to a jury pool.

A smaller jury size requirement would also improve efficiency in the courts' use of jurors. Subcommittee members observed that citizens called to appear in the jury pool for a misdemeanor offense by statute are generally released from service in another trial – i.e. a felony or civil matter – for the remainder of the year. In court jargon, this action is referred to as “burning a juror”. The problem is exacerbated in neighbor island jurisdictions with smaller populations and longer distances required for prospective jurors to travel from their residence to court. Subcommittee members contended that summoning fewer citizens for potential jury service in a misdemeanor would allow those same citizens to be available to hear more significant felony or civil matters.

#### Potential savings for citizens

Aside from possible savings to the courts, members of the subcommittee also observed that calling fewer citizens to serve as jurors in misdemeanor trials would lessen the number of individuals taking time from work or other activities or even sacrificing financially as a result of jury service. This particular sentiment was recently acknowledged in a National Public Radio report dated October 19, 2009 (“Recession Hits the Jury Box” by Gloria Hillard, *available at <http://www.npr.org/templates/story/story.php?storyID=113800461&ft=1&f=1003>*). In that report a Washington state court jury manager stated, “More and more now, we’re hearing from individuals [that] two days, even one day is going to be a hardship for them, that they’re not going to be able to handle that financially in any way.” *Id.* Though the AJS inquiry was ostensibly limited to consideration as to whether reducing jury sizes in misdemeanor trials would provide economic relief to the state Judiciary budget and not the public as a whole, this observation was raised more than once during the subcommittee’s discussions.

#### Simpler cases to resolve

During fiscal year (“FY”) 2008 (July 2007 to June 2008), it was reported to the subcommittee that within the First Circuit, misdemeanor offenses which proceeded to trial before 12-person juries as required under current law included the following: abuse of family or household member in violation of H.R.S. § 709-906, violation of a family court order for protection (H.R.S. § 586-11), sexual assault in the fourth degree (H.R.S. § 707-733), assault in the third degree (H.R.S. § 707-712), assault upon a law enforcement officer in the second degree (H.R.S. § 707-712.6), failure to disperse (H.R.S. § 711-1102), criminal trespass in the first degree (H.R.S. § 708-813), and terroristic threatening in the second degree (H.R.S. § 707-717).

During FY2009 (July 2008 to June 2009), misdemeanor offenses which proceeded to jury trial before 12-person juries in the First Circuit included the following: abuse of family or household members, violation of a family court order for protection, sexual assault in the fourth degree, assault in the third degree, violation of a district court restraining order (H.R.S. § 604-10.5), assault upon a law enforcement officer in the second degree, and consumption of liquor within a motor vehicle (H.R.S. § 291-3.1(a)).

A significant majority of reported cases – approximately 82% in each fiscal year – were for family abuse or family court restraining order violations, which the subcommittee noted to contain mandatory jail provisions, among other consequences that were arguably “serious” in

nature, upon sentencing. Putting that aside, several subcommittee members commented that a misdemeanor case tended to involve less complex police investigations, fewer witnesses and shorter case presentations than its felony counterpart. This was confirmed in live remarks before the subcommittee by a First Circuit judge assigned to one of two dedicated courtrooms handling the misdemeanor abuse calendar. (The same judge and other subcommittee members noted that the time taken to select and empanel a 12-person jury was on many occasions much longer than the misdemeanor trial itself.) In response to concerns from subcommittee members that a reduced jury size might compromise accuracy in recalling facts and/or reliability in reaching a verdict, the circuit court judge and others felt, in light of the foregoing, that these may be less of a discomforting factor in misdemeanor offenses. Further in this regard, a subcommittee member suggested a 12-person jury requirement might in fact pose a greater imposition on the public than the type of offense (i.e. a misdemeanor) warranted.

### Concerns untested in Hawai'i

As to reduced-size juries, the subcommittee members acknowledged the difficulty in evaluating and balancing the concerns brought forth in published materials and live presentations to the subcommittee with its potential benefits in terms of judicial efficiency and economy, as stated in the same or other publications or by other presenters. At least one subcommittee member declared the exercise to boil down to a “values” judgment, in which reaching a decision was entirely dependent on one’s opinion as to which factors carried more weight.

A few subcommittee members questioned the applicability of published studies regarding minority representation in juries of six persons versus 12 for their understandably limited focus upon mainland jurisdictions comprised of more discrete minority groups (i.e. “black” or “Hispanic” versus “white” dynamics) and an inability to comfortably transplant the studies’ conclusions into Hawai’i’s unique multiethnic and mixed-race, or naturally heterogeneous, population. Other empirical studies cited to or reviewed by the subcommittee were based primarily on civil jury experiences which might or might not be readily extrapolated into the criminal arena –in particular, misdemeanors – at issue here.

To the extent some subcommittee members felt a greater apprehension towards shifting to six-person juries in certain misdemeanor trials in which a conviction would lead to a mandatory jail sentence, the subcommittee considered a compromise addressing this specific concern. By crafting a recommendation in such a way as to isolate the reduced jury size to trials for misdemeanor offenses carrying *no* mandatory jail provision, the smaller jury concept would have an opportunity for presentation in Hawai’i state courts. It would then be subject to direct evaluation and comment as to its usefulness and/or whether any potential compromises to justice may have occurred. For the short term, this would represent a smaller fraction in cost savings to the Judiciary– an amount some subcommittee members feel is already too small to warrant change – than if all misdemeanor juries were impacted, but economic and other benefits from going forward might be realized over time.

*Respectfully submitted to the full Committee for its consideration,*

*Douglas S. Chin, Esq.*

*John M. Tonaki, Esq.*

*Co-Chairs*

*Subcommittee on Non-Serious Criminal Juries*

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