JUDICIAL CONFERENCE ON JURY SELECTION

TESTIMONY OF DOMENICK CARMAGNOLA ON BEHALF OF THE NJSBA

Friday, Nov. 12, 2021

May it please the Court. Chief Justice Rabner, Honorable Justices of the Supreme Court, members of the Judiciary, members of the Legislature, the many assembled dignitaries and judges from New Jersey, as well as those who have joined us from around the country to share their insights, experiences and suggestions on the issues of jury selection, thank you for this opportunity. And welcome to everyone who has joined us virtually to share in this historic event as we examine the jury selection process, consider steps needed to prevent discrimination in the way we select juries and recommend improvements to our system of justice.

Thank you for the opportunity to address this Judicial Conference on Jury Selection. I am Domenick Carmagnola, and it is an honor to be here today representing the New Jersey State Bar Association (NJSBA), the state's largest organization of judges, lawyers and legal professionals.

Let me start by commending Chief Justice Rabner, the Supreme Court and the Administrative Office of the Courts for deciding to take on this incredibly important issue. I want to be clear on something — we agree that a review and assessment of the jury selection process is warranted and that steps are necessary to reduce the effect of bias and discrimination on New Jersey's judicial system and its capacity to assure fair and impartial trials. Please know that the NJSBA stands ready, willing and able to fully participate and assist in that review.

As we begin this important endeavor, we must ensure that this historic moment is not wasted in the race for expedience. As Chief Justice Rabner stated in *State v. Andujar*, "It is important for the New Jersey Judiciary to focus with care on issues related to implicit bias." 234 N.J. 275, 303 (2021). It would be particularly disappointing if an effort, which has as its stated purpose to address implicit bias, would fail to do that which is essential to any meaningful reform: as the distinguished Professor of Law, Jerry Kang, would say, give ample time and deliberate carefully.

Chief Justice Rabner, we heard your challenge as you started this conference to keep an open mind and to listen – and we have done that and will continue to do that. You noted that there are consequences to inaction and consequences to not being open to change. We understand both of those sets of consequences, as well as the critical importance of the issues that we are attempting to address; but we also understand that action for the sake of action is not the answer, and the wrong action could damage our justice system significantly and have dire consequences for the lives and the liberty of participants in it. We agree that this is the time to act – but we must do so with the goal of getting it right.

Because my time is limited today, I will focus my comments on a few important issues, but I do urge everyone participating here today and watching to read the Interim Report the NJSBA Working Group on Jury Selection submitted to the conference. The report was prepared by an exceptionally talented and diverse group of trial attorneys who made up the NJSBA Working Group which was formed shortly after the decision in *State v. Andujar* was released. The report provides additional information, resources, and observations on the issues being discussed at this conference and looks more expansively at the pathways forward. I want to publicly thank the co-chairs Raymond M. Brown and Michael G. Donahue III, and all of the members of that Working Group for their tireless effort in reviewing these issues and producing our report. I am further humbled that the work and findings of this report were adopted by over 20 bar associations around the state, and I am proud to speak on behalf of my colleagues in the profession from our county, specialty and affinity bar groups.

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As we have already come to learn from just over one day of testimony and panel discussions at this conference, the broad challenge of race and fairness in the criminal justice system in New Jersey is profound.

And now, New Jersey is poised on the cusp of a historic moment to balance the scales of justice for generations ahead and enact meaningful reform to address the systemic affliction of bias and prejudice in the jury selection process.

The NJSBA and its members are unequivocal in their embrace of such reform and of the elimination of bias, including implicit bias, in the justice system.

We welcome and advocate for a holistic look at the systemic issues all toward the goal of determining the best and most effective ways to address and eliminate bias in the jury selection process. We believe this conversation and effort should be expansive, thoughtful, and comprehensive in its focus on rooting out bias – both implicit and explicit. The pursuit of a representative justice system, one that all of our citizens can trust and believe in – and be proud of – requires a complex, deep dialogue in order to determine the best ways to rid our system of the systemic and harmful presence of implicit bias and prejudice in jury selection.

This process should start at the beginning and include an analysis of the entire process and not just peremptory challenges.

As has been discussed throughout this conference, an appropriate starting point is the means which the pool of jurors is created; greater diversity can most immediately be achieved by the expansion of that pool, and by an examination of the persons who are excused from jury duty, as the Supreme Court required in *Dangcil*. A critical area of study should be the voir dire

process and how courts address challenges, both for-cause and peremptory. Reducing or eliminating peremptory challenges, which have long been viewed as the only tool available to Black and other criminal defendants of color to ensure unbiased juries, should certainly not be viewed as the only available mechanism when, as we have heard, and as we discuss in our interim report, other means achieve these essential goals.

Our report highlighted a disturbing fact: as data from the Criminal Sentencing and Disposition Commission reveals, the incarceration rate for Black people in New Jersey is 12 times that for white people – the highest disparity of any state in the nation. Notably, New Jersey Public Defender Joseph Krakora's presentation highlighted that with a real-world example. It is one of the reasons that Professor Elisabeth Semel wrote to the conference and stated: "The New Jersey Judiciary should act to ensure that criminal defendants, who are predominantly men and women of color, can participate meaningfully in the selection of their juries and that explicit and implicit barriers to jury service for men and women of color are removed."

Indeed, peremptory challenges are among a criminal defendant's most meaningful substantive rights. The use of peremptory challenges is often the only way a defendant has to level the playing field. They are a safeguard in a system that relies so heavily on a juror's self-diagnosis of bias. Even more importantly, the exercise of those challenges is one of the only truly participatory moments of a trial for a litigant. Through peremptory challenges, a defendant has the opportunity to directly participate in selecting the people who will decide their fate. That is a critical aspect of a just system and it is one that should not be eroded.

> As the U.S. Supreme Court held in *Pointer v. United States*: "The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused."

Reducing peremptory challenges is not a panacea, and indeed, not even an appropriate incremental step at this stage, to address the important problem we are all attempting to solve. It is premature to suggest a reduction or elimination of peremptory challenges until we try other available mechanisms to address bias and make the system more fair.

Finally on this subject I am constrained to point out that the discussions of peremptories in the conference have all proceeded on the sometimes articulated but often *sub silentio* assumption that peremtories are an ill that must be tolerated because trial lawyers are set in their ways. We directly challenge this assumption by pointing out that the most vulnerable segment of the population concerned with criminal justice, Black criminal defendants, are often left with peremptory as the only line of defense against potentially biased juries. We hope that this will not always be the case – but as long as we are in the early stages of designing a process that can help eradicate discrimination, illicit bias and practices that produce unintended race disparities we should dispense with this assumption which corrodes our ability to reach our intended goal.

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Rather than dwell on what should not be done, I would rather focus on the concrete and constructive ways significant change can be made. The NJSBA is committed to exploring changes that may be helpful in solving the problems identified in *State v. Andujar*. There are many things that can be done to make juries more representative and several are explored in the report the NJSBA submitted to the conference.

Our recommendations include:

1. Reforming the Batson/Gilmore standard which is applied to for-cause challenges;
2. Making the law regarding for-cause challenges reflect the importance of rooting out jurors who cannot be fair, as other states have done through concrete rules and more demanding standards of review;
3. Expanding attorney-conducted voir dire;
4. Expanding the scope and source of summoned jurors to produce a more representative panel;
5. Providing implicit bias training for jurors, judges and lawyers;
6. Gather the demographic information ordered in *State v. Dangcil*, so it can be maintained and analyzed.

One of the most obvious and consequential is reform of the *Batson/Gilmore* standard.

While the *Batson* guidance is widely viewed as broken, as is evidenced by the ongoing trial of the men who killed Ahmaud Arbery, there is a fix. We recommend that New Jersey modify the *Batson/Gilmore* framework, including implementing necessary rule changes, to strengthen the guarantee of a fair jury selection process. *Batson/Gilmore* reform, rather than reducing peremptory challenges, is the appropriate approach to remedy concerns regarding challenges that are discriminatory in nature.

California and Washington have already chosen this path, and it has been proposed in Connecticut. New Jersey would be wise to review and analyze their experiences and to follow suit.

Both California and Washington have reformed the *Batson* guidance to insert an objective, rather than purposeful discrimination, standard. The objective test set forth in these reforms modifies the analysis so that the inquiry is not focused on overt, purposeful racial animus by the party striking the juror. Using an objective test has the added benefit of reducing legal friction by eliminating the accusatory flavor of the current structure.

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I would be remiss if I did not also speak briefly about jurors who are summoned to the courthouse, but do not get the opportunity to serve. The Judiciary appears particularly focused on this issue based on the presentations at this conference, the resources it has posted on its website and in its social media postings in the days leading up to this conference. But we believe that it is wrong to regard jurors who do not get to serve have been referred to as "wasted jurors."

As we all know and have come to experience, and as Professor Chernoff noted, not everyone relishes jury duty. And those who are not required to serve may be inconvenienced but are not wasted. We must change this perception of jury duty and find ways to encourage our citizens to serve and to properly compensate those who want to serve but would suffer adverse financial impact if they do. We must also be careful not to lay blame exclusively at the feet of the number of peremptory challenges. Dr. Rose's data shows that most attorneys do not use all of their challenges and the analysis fails to consider such factors that may result in a juror not sitting, including the inability to serve, hardship, an excusal for actual cause, a plea bargain or a settlement, among others.

More importantly, we ask that the conference focus less on the number of people who are called but do not ultimately serve and more on creating a justice system with juries that truly represents the community. I would think we would all agree that the idea of reducing "wasted jurors" a bad one if the result is that litigants do not ultimately receive a fair trial with a fair, impartial and representative jury

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Dr. Glaude opened our conference with a challenge that we recognize and confront the gaps in our justice system. Interestingly, he confirmed and supported several requests that we make here today and in our report. He stated, "Deal with the question in its fullest sense; don't refuse to do this." We have asked that we look at the entire process and not simply make piecemeal changes. He also stated, "If we are going to salvage our country, we have to be as deliberate in our efforts to dismantle racial inequality as we were when we built it." I say, if we are going to improve our system of justice and the jury selection process, we have to be open-minded, deliberate, careful and holistic in our review, in our analysis and in identifying efforts that can truly reform it for the better.

As I close today, I say with the full power and authority of our over 15,000 members as well as those over 20 bar associations around the state that support our report, that the legal community stands ready to be a full partner in the path ahead. We ask that like us, you approach this effort with an open mind, and we sincerely hope these matters are not pre-ordained and that this is the start of a meaningful journey to reform and improve our system of justice.

We are here to explore the ways we can address the problems with how juries are summoned and selected. We believe that this conference can be a thoughtful and comprehensive start of a noble effort. Simply put, while the NJSBA believes there is no quick fix, we applaud the Court

and its effort to address these significant issues. We stand and remain ready to work with you in this effort.