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Garden State CLE Presents:

Eliminating Bias in Criminal Jury Selection



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Lesson Plan

Introduction

The Cancer of Bias in Jury Selection

One of our most cherished rights is the right to trial by a fair and impartial jury. We zealously guard that right by, among other things, requiring that the jury selection process be free of racial or ethnic taint. When it has been discerned that impermissible bias has infected the selection of a jury, we have not hesitated to excise that cancer and require a new trial, one where prejudice and hatred have no place. State vs. Osario, 199 N.J. 486, 492(2009).

Part I

New Jersey Constitution of 1947

Article I, Paragraph 5

No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry, or national origin.

Article I, Paragraph 9

The right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons. The Legislature may provide that in any civil cause a verdict may be rendered by not less than five-sixths of the jury. The Legislature may authorize the trial of the issue of mental incompetency without a jury.

Article I, Paragraph 10

In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; 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 in his defense.

Supreme Court Commentary

State vs. Gilmore, 103 N.J. 508(1986)

Article I, paragraph 5 implicates not only the defendant's civil rights but also those of citizens generally-and, historically, one of the rights and obligations of citizenship has been to participate in the administration of justice by serving on grand and petit juries. Concomitantly, the representative cross-section rule not only promotes the overall impartiality of the deliberative process but also enhances the legitimacy of the judicial process in the eyes of the public by serving the following other essential functions: legitimating the judgments of the courts, promoting citizen participation in government, and preventing further stigmatizing of minority groups.

Read together, [paragraphs 5, 9 and 10] guarantee that in all criminal prosecutions the defendant is entitled to trial by an impartial jury without discrimination on the basis of religious principles, race, color, ancestry, national origin, or sex. This right to trial by an impartial jury, in our heterogeneous society where a defendant's "peers" include members of many diverse groups, entails the right to trial by a jury drawn from a representative cross-section of the community. The right to trial by an impartial jury [secured by the interplay of these three constitutional provisions] entails not a requirement that petit juries actually chosen must be an exact microcosm of the community, but rather the guarantee that the State's use of peremptory challenges may not restrict unreasonably the possibility that the petit jury will comprise a representative-cross section of the community.

Public Policy as Announced in Gilmore

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.

Part II
Statutes and Rules of Court

N.J.S.A. 2B:23-10
Examination of Jurors

In the discretion of the court, parties to any trial may question any person summoned as a juror after the name is drawn and before the swearing, and without the interposition of any challenge, to determine whether or not to interpose a peremptory challenge or a challenge for cause. Such examination shall be permitted in order to disclose whether or not the juror is qualified, impartial and without interest in the result of the action. The questioning shall be conducted in open court under the trial judge's supervision.

N.J.S.A. 2B:23-13
Number of Challenges

Upon the trial of any action in any court of this State, the parties shall be entitled to peremptory challenges as follows:

b. Upon an indictment for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree or perjury, the defendant, 20 peremptory challenges if tried alone and 10 challenges if tried jointly and the State, 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded the defendants if tried jointly.

c. Upon any other indictment, defendants, 10 each; the State, 10 peremptory challenges for each 10 challenges allowed to the defendants.

When the case is to be tried by a jury from another county, each defendant, 5 peremptory challenges, and the State, 5 peremptory challenges for each 5 peremptory challenges afforded the defendants.

Rule 1:8-3(a)

(a) Examination of Jurors. For the purpose of determining whether a challenge should be interposed, the court shall interrogate the prospective jurors in the box after the required number are drawn without placing them under oath. The parties or their attorneys may supplement the court's interrogation in its discretion.

Part III **Procedures For Contesting** **Improper Preemptive Challenges**

Batson vs. Kentucky, 476 U.S. 79, 86(1986)

In Batson vs. Kentucky, the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment “forbids the prosecutor to challenge potential jurors solely on account of their race.” A defendant asserting the State's improper use of peremptory challenges under Batson must first make prima facie showing that a peremptory challenge has been exercised on the basis of race. Once this burden has been met, the prosecutor “must offer a race-neutral basis for striking the juror in question. Thereafter, the trial court is tasked with determining whether the defendant has established intentional discrimination in light of the parties' submissions.

Batson's first two steps govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim. It is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.

Under the Batson framework, the defendant shoulders the ultimate burden of persuasion” to prove the existence of purposeful discrimination. Discriminatory intent may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination. However, the United States Supreme Court has cautioned that the inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question. Thus, if the trial court believes the prosecutor's nonracial justification, and that finding is not clearly erroneous, that is the end of the matter.

State vs. Gilmore, 103 N.J. 508(1986)

This landmark decision was decided three months after the publication of Batson and is based upon New Jersey constitutional Doctrine, giving more protection to defendants in our State than they would otherwise receive under the federal constitution.

Gilmore extends bias in the use of peremptory challenges to include religious principles, race, color, ancestry, national origin, or sex.

A challenge to the use of peremptory challenges under Gilmore requires a three-part test:

- 1) **Rebuttable presumption** - The analysis begins with the rebuttable presumption that the prosecution has exercised its peremptory challenges on constitutionally permissible grounds. This presumption may be rebutted upon a defendant's *prima facie* showing that the prosecution exercised its peremptory challenges on constitutionally impermissible grounds. To make out a *prima facie* claim, Gilmore requires a defendant to initially establish that the potential jurors wholly or disproportionately excluded were members of a cognizable group, and then that there is an inference that the peremptory challenges resulting in the exclusion were based on assumptions about group bias rather than any indication of situation-specific bias. The objection must be made during or at the end of jury selection, but before the jury has been sworn. A failure by the defense to produce evidence sufficient to rebut this presumption ends the inquiry.

2) **Rebuttal base prosecutor based upon permissible grounds** - Once the trial court is satisfied that the defendant has made this prima facie showing, the burden shifts to the prosecution to come forward with evidence that the peremptory challenges under review are justifiable on the basis of concerns about situation-specific bias. This is accomplished by the prosecutor presenting clear and reasonably specific explanations of his legitimate reasons for exercising each of the peremptory challenges. The State's explanations, if they appear to be genuine, should be accepted by the court, which will bear the responsibility of assessing the genuineness of the prosecutor's response and of being alert to reasons that are based upon a mere pretext.

3) **Judicial determination** - After the defendant has rebutted the presumption of constitutionality by making prima facie showing (step one) and the prosecutor has proffered an explanation based on permissible grounds (step two), Gilmore's third step is applied. In this last step of the analysis, the trial court must judge the defendant's *prima facie* case against the prosecution's rebuttal to determine whether the defendant has carried the ultimate burden of proving, by a preponderance of the evidence, that the prosecution exercised its peremptory challenges on constitutionally impermissible grounds of presumed group bias. In conducting this last phase of the analysis, the court must assess, among other things, whether the State has applied the proffered reasons even-handedly to all prospective jurors; the overall pattern of the use of peremptory challenges; and “the composition of the jury ultimately selected to try the case.

See also:

State vs. Watkins, 114 N.J. 259(1989)

State vs. Osario, 199 N.J. 486(2009)

State vs. Thompson, 224 N.J. 324(2016)

Part IV

Judicial Remedies

In order to correct Gilmore violations, trial judges may to choose from a broader set of remedies to address Batson/Gilmore violations on a case-by-case basis. Those remedies include dismissing the empanelled jury member(s) and the venire and beginning jury selection anew; reseating the wrongfully excused juror(s); reseating the wrongfully excused juror(s) and ordering forfeiture by the offending party of his or her improperly exercised peremptory challenge(s); permitting trial courts to require challenges to prospective jurors outside the presence of the jury; granting additional peremptory challenges to the aggrieved party, particularly when wrongfully dismissed jurors are no longer available; or a combination of these remedies as the individual case requires. State vs. Andrews, 216 N.J. 271, 293(2013).

Part V

Peremptory Challenges From

Defense Based Upon Race

In Georgia vs. McCollum, 505 U.S. 42(1992), The United States Supreme Court ruled that the prohibition against the use of peremptory challenges based upon racial criteria constitutes state action and violates the equal protection clause of the 14th Amendment. The Court established a “reverse-Batson” test for these cases:

We hold that the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges. Accordingly, if the State demonstrates a prima facie case of racial discrimination by the defendants, the defendants must articulate a racially neutral explanation for peremptory challenges.

This holding was recognized and adopted in New Jersey by the Law Division in State vs. Alvarado, 221 N.J.Super 324(LawDiv.1987). Although this decision has been cited several times but courts of appellate authority, it has yet to be officially approved by any such tribunals.

Part VI
Civil Trials
Peremptory Challenges Based Upon Race

The United States Supreme Court has extended Batson-type challenges to jury selection challenges in civil trials. See Edmonson vs. Leesville Concrete, 500 U.S. 614(1991).

The Court held that the equal protection rights of the excluded jurors are violated when race-based challenges are made. Moreover, when a private litigant in a civil trial selects a jury, he becomes a government actor for the limited purpose of using peremptory challenges. This is because jury selection is a uniquely governmental function delegated to private litigants by the government, and attributable to the government for purposes of invoking the constitutional protections against race discrimination. Further, because of the close relation between an excluded juror and the litigant opposing the exclusion because the litigant suffers an injury by virtue of the racial discrimination which infects the entire judicial process, and because excluded jurors have no means of protecting their own rights, the litigant should be granted third-party standing to challenge the exclusion on equal protection grounds. Russell vs. Rutgers Community Health, 280 N.J.Super 445(App.Div.1995).

Part VII

Examples of Improper Uses of Peremptory Challenges

1) **Religious garb worn by juror** - For purposes of establishing a *prima facie* case in this jurisdiction, the adherents of religions that encourage or require visible signs of identification or certain religion-based activities, will be deemed members of a cognizable group within the meaning of the representative cross-section rule. State vs. Fuller, 182 N.J. 174(2004).

2) **Presumed group bias** - Prosecutor used two of his challenges for cause and 7 peremptory challenges to remove nine jurors from the panel. The prosecutor stated that he wanted jurors who were (1) able to ignore theatrics; (2) more intelligent and of the professional type; and (3) without maternal family instincts. State vs. Gilmore, 103 N.J. 508, 518(1986).

3) **Prosecutor's reasons for challenging six jurors rejected** -

Juror Number 4, an African American male, was excused because his brother had been arrested for narcotics.

Juror Number 8, an African American female from Newark, who had been the victim of a car theft, whose father also had been the victim of a car theft, and who had both a friend and a close relative in law enforcement, was excused because her brother had been convicted of a crime and had been incarcerated for two years in a State prison.

Juror Number 9, from Newark, and *Juror Number 10*, from East Orange, both Hispanic females seated next to each other, were excused because they were “giggling [and] high [-] fiving when a juror in the back row was excused” and were “making faces[.]”

Juror Number 12, an African American woman from East Orange, who had two relatives in law enforcement, was excused because the person or persons responsible for her father's murder “got off.”

Juror Number 14, an African American male also from East Orange, was excused because he was sleeping and not paying attention during jury selection. State vs. Osario, 199 N.J. 486, 495(2009).

4) **Race-neutral reasons** - Here, the trial court failed to allow development of as complete a record as possible when it did not require the prosecutor to justify, before the jury was sworn, her use of seven out of nine peremptory challenges to remove African Americans. Although, in this instance, the prosecutor argued, and the trial court agreed, that defendant failed to make out a prima facie case of purposeful discrimination, we cannot condone the trial court's decision to summarily end the inquiry at this stage.

During the appeal, the prosecutor gave the following reasons for challenging the jurors:

Juror B, who initially asked to be excused out of concern that serving on the jury may affect her probationary work status, was excused because she was familiar with the address where the crime occurred, had a family member previously accused of drug possession, and had been dissatisfied with the prosecution in a prior case in which a family member was the victim of a hit-and-run accident.

Juror G was excused because her boyfriend, who is also the father of her child, had been convicted of and was on probation for weapons charges, and his prosecution was undertaken by Essex County, the same office prosecuting defendant's case.

Juror Gr, who indicated that she hosted adult-themed “passion parties,” was dismissed because she had been involved in a domestic violence case which had been initially prosecuted and subsequently dismissed by the Essex County Prosecutor's Office and “the aggregate effect of those statements ... cause[d] [the prosecutor] to have a reaction that she would not be a juror who would be equally open to the State's evidence in this matter.”

Juror H, who worked in a half-way house and had a daughter who had been laid off from her job as a Corrections Officer, was excused because she was once subpoenaed as a witness, but did not ultimately testify, in a trial where her brother was convicted of homicide.

Juror Go was excused because he had been previously prosecuted by the Essex County Prosecutor's Office in connection with a case that was eventually “thrown out” in which his son was the alleged victim.

Juror Mk, who expressed that she was very religious and indicated that she read daily meditations and regularly attended “meetings” of a possible religious nature, was excused because, after being denied an opportunity to ask follow-up questions, the prosecutor “felt that she might, in fact, be disturbed in sitting in judgment upon another individual, particularly in something as serious as a murder case.”

Juror Jn was dismissed because during voir dire he provided a “deliberately misleading” statement that neither he nor any member of his family had ever been charged with an offense. In actuality, the prosecutor was aware, and the juror subsequently admitted, that he and his brothers were facing assault charges in Essex County at the time of trial.

State vs. Thompson, 224 N.J. 324, 335-36(2016) (conviction affirmed)

5) **Gilmore procedures ignored by Court and counsel** - In this case, defendant was black, few blacks were included in the jury array, the prosecutor peremptorily challenged every black juror except one who was challenged for cause, and defendant was tried by an all-white jury. Valid reasons may or may not exist for the challenges to some or all of the black jurors. It is not for the courts, however, to provide reasons for a prosecutor. Rather, the prosecutor should have provided an explanation for the exercise of his peremptory challenges. Under the circumstances, we are satisfied that the defendant has established a *prima facie* case that the prosecutor exercised his challenges because of group bias. Consequently, we remand the matter to the Law Division for a Gilmore hearing, at which the prosecutor should explain his reasons for peremptorily challenging the three black jurors. State vs. Watkins, 114 N.J. 259, 268(1989). (Remanded for a Gilmore hearing)

6) **Gilmore procedures followed** - In the case before us, of the fifty to sixty people who were called for the jury selection process, five were minority females. Of those five, three were called to serve on the jury. All were black. They were eventually excused by the prosecutor and as a result no blacks served on the jury. As to one of the three, there is a clear basis to support the view that the excuse was not grounded in a presumption of group bias since the prospective juror acknowledged knowing a potential alibi witness for the defendant. As to the other two, although we are able to discern no rational justification for the excuses, in the last analysis what is involved is a judgment call by a trial judge who was closely involved in the situation as it unfolded and upon whose sense of fairness and impartial judgment, we *300 have been adjured to depend. Viewing the record from this perspective, we find no merit to defendant's contention that the State exercised its peremptory challenges so as to exclude minority representation from the jury. State vs. Hughes, 215 N.J.Super 295, 299(App.Div.1986).

7) Warrant check on prospective jurors after removal for cause rejected by the trial judge – The prosecutor acknowledged that the State was not in the habit of looking at random jurors' criminal histories. She asserted the check was conducted because of F.G.'s acknowledgement that he associated with people who “hustle drugs,” and the court's refusal to excuse him for cause. Her research revealed that F.G. had an open municipal warrant as well as two arrests in the past “both for domestic violence where it seems he has an alleged habit of beating up women.” The prosecutor also rejected defense counsel's assertion that her motion to remove F.G. for cause was based on racial bias. In making these statements, the prosecutor referred to a meeting in chambers that is not transcribed or otherwise contained in the record, in which defense counsel accused her of moving against F.G. because of racial bias.

In order to secure a defendant's right to a jury as guaranteed by the United States and New Jersey constitutions, we compel citizens by summons to come to the courthouse to be considered as potential jurors. For most, this is a disruption of their work and family lives. We ask them to disclose personal, often uncomfortable information. The compulsion to appear should not include the threat of arrest if we seek to convincingly assure the citizenry that jury service is an honor and a duty. Record checks run because of dissatisfaction with a judge's ruling, as was done here, undermine the framework within which the trial proceeds and alters the court's exclusive province in administration of the jury venire. Because the court made no findings of fact concerning the prosecution's selective use of a criminal record check and granted no relief to the defense whatsoever, defendant's conviction must be reversed, his sentence vacated, and the matter remanded for a new trial. State vs. Andujar, 462 N.J.Super 537, 548(App.Div. 2020).