

Presentation by Hudson County Prosecutor Esther Suarez on Behalf of the County Prosecutors Association of New Jersey for the New Jersey Judicial Conference on Jury Selection

Chief Justice Rabner, Judge Grant and the honorable members of this Conference, thank you for allowing me the opportunity to participate and present before this Conference on behalf of the County Prosecutors Association of NJ or CPANJ.

We are at a critical moment in our nation's trajectory where issues of social justice and implicit bias are at the forefront of the conversation and where we have a real opportunity to make meaningful and lasting changes. We know racial and gender bias exist in all areas of our society and we know the criminal justice system has been acutely impacted. As stakeholders in a system that is so vital to our society, we appreciate the Court's attention to this matter. Public trust and confidence in the criminal and civil justice processes is paramount to their success. It is imperative that we utilize every measure in our

power to remove bias from our justice system -- which at its core is to provide all women and men equal justice under the law.

This two day conference is a unique and welcome opportunity to evaluate how we can improve our State's jury selection process.

I hope that this conference will be the beginning of a dialogue and decisive action. We come here with an open mind and a few thoughts that we would like to share about both peremptory challenges as well as other areas where we think that the jury selection process could be improved. We as prosecutors are guided by our professional duty, moral ethics and sense of fairness.

Peremptory Challenges

Of primary focus in this conference is the use of peremptory challenges in selecting a jury. We all value the Constitutional origins that guarantee the right to a jury trial by a group of ones' peers. While we believe a review of how our State utilizes peremptory challenges is necessary, we also would argue that it is not the only area in the

jury selection process that needs review and reform to ensure that everyone's Constitutional right to a fair trial is upheld.

Those who favor retention of the peremptory challenge point to its four purposes: The peremptory challenge allows the parties to secure a fair and impartial jury. It gives the parties some control over the jury selection process. It allows an attorney to search for biases during the selection process without concern for offending a potential juror. The peremptory challenge serves as an added layer of protection when a challenge for cause is denied by the judge and the challenging party still believes that the juror is biased.

The Rose Report – examined 95 cases in 14 counties and revealed some valuable insights into peremptory challenges. It found, for example, statistical evidence that defense attorneys in criminal cases were disproportionately likely to dismiss white jurors rather than African-American jurors. The Rose Report also found that in criminal cases, prosecutors used approximately four (4) challenges and defense on average used six (6). This is well below the allotment of

peremptory challenges allowed to the State and defense. In the most serious criminal cases, the State is allowed 12 peremptory challenges and the defense 20. It is important to note that New Jersey has the most peremptory challenges of any state in the nation.

The Rose Report also revealed a series of surprising and counterintuitive findings. Attorneys' use of peremptory challenges played only a case specific and attenuated role in explaining patterns of underrepresentation on juries. Additionally, New Jersey has to determine why jury pools consistently and substantially underrepresent African-Americans. But that being said, according to the Rose Report, African-Americans were NOT underrepresented on juries. Fully 10 of the 14 counties studied represented or over-represented African Americans on juries. For Latinos and Asians, as for African Americans, underrepresentation was sizeable and concerning in two or three counties; however, in the majority of all areas studies, these groups were not starkly underrepresented.

Further, the Rose Report found, criminal juries do a BETTER job of representing African American individuals than civil cases. Criminal juries which are larger in size, do a better job of representing minority group members than smaller sized civil juries.

In conclusion, the Rose Report found that peremptory challenges are not the problem. However, in the spirit of goodwill and compromise, we at CPAJ believe that abolishing the two-tier system in criminal cases and providing the State and the defense with an equal, but reduced number of peremptory challenges is prudent. We recognize that there are demands to move cases quickly and statistics that are used by the court system in order to effectuate that swiftness. We offer however that there is an inherent conflict in that objective and the desire to ensure that justice will be achieved through a fair trial by a diverse jury of ones' peers. It benefits all parties and is in the interest of justice to have a robust jury selection system which will inevitably take time. We would, therefore, not concede with elimination of peremptory challenges altogether.

In addition to changes to the peremptory challenges, CPANJ believes wholeheartedly that the entire jury selection process needs a head-to-toe review.

The Rose Report found that the data used “supports the conclusion that people who appear for jury service do not fully represent their communities.” This is concerning.

While New Jersey courts are doing an admirable job ensuring that minority group members in a jury pool participate on criminal and civil juries, there are areas that with the proper modifications could significantly improve the process and allow for broader and more diverse participation by New Jersey residents.

We currently select a jury pool from Motor Vehicle Commission records, voting records and property/tax records. We believe that we are definitely missing individuals who do not fit this criteria – particularly in urban areas where a large percentage of the population may be renters, may not vote, and do not drive. We could

greatly expand jury service to include those individuals who are on government assistance records and public housing data, amongst other available government records. Due to the largely transient population we have in our urban areas, relying solely on the U.S. Postal Service to deliver jury notifications seems like a system doomed for failure as individuals are frequently moving and sadly our mail system has its own set of challenges. Instead, we should look to modernize the jury notification system with email notifications or opt-in text message alerts.

Adequate financial compensation also is necessary to expand jury participation. While the amount paid to jurors varies widely from state to state, New Jersey which pays jurors \$5.00 per day – has one of the lowest stipends in the country. By contrast, New York State pays \$40.00 and Connecticut pays \$50.00. Federally impaneled jurors are paid \$50.00 per day. By contrast and only by contract, on Election Day, poll workers are now paid \$300.

We propose adopting some of the measures that have been adopted by other states, including Minnesota, which provides mileage reimbursement to and from the courthouse, and on-site childcare for jurors. In urban areas, rather than a mileage reimbursement, providing public transportation to and from the courthouse or parking is critical. These are often cited as hardships particularly in Hudson County, by individuals when called to jury duty and we should heed those concerns.

To address concerns of implicit bias, we must increase education on this issue. Law schools, bar associations, as well as the Court, should be educating jurors on what implicit bias is and how it can potentially impact a jury proceeding. As part of this Court's ongoing review of the jury selection process, we suggest:

- 1) Direct implicit bias information for prospective jurors via an online course or a presentation as they wait in the jury room
- 2) Adding a requirement for a CLE credit on implicit bias for all lawyers

3) Training for judges and court staff on implicit bias

Finally, there is currently a high degree of variation across the State's Courts on how judges dismiss a juror and we believe that more uniformity is needed to ensure fairness in the jury selection process. Establishing guidelines and protocols for judges would be helpful to both the defense and the State.

By removing these barriers, we can further our objective of ensuring our juries in New Jersey reflect the diverse communities they represent.