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RECOMMENDATIONS TO GOVERNOR HUGH L. CAREY REGARDING PROPOSALS FOR JURY SELECTION REFORM

From the Executive Advisory Commission
on the Administration of Justice
Arthur L. Liman, Chairman

November 15, 1982

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JUDICIAL VOIR DIRE

For more than a decade, proponents of New York court reform have focused on the protracted and time-consuming procedure of jury selection known as voir dire, or the pretrial examination to select trial jurors. This process allows attorneys to question potential jurors and to exclude them from the jury by challenging them -- either peremptorily, without a stated reason, or for cause, on specific grounds set forth in the Criminal Procedure Law. Conducted by the judge, or counsel, or both, voir dire is designed to guarantee every defendant an impartial jury.

In New York State, the law requires that attorneys must be permitted to question prospective jurors. In the federal courts, and in a number of states as well, the court conducts the voir dire, with attorney participation at the court's discretion. The attorney-conducted process has drawn criticism because it takes considerably longer than judge-conducted voir dire and its impact on the pace of justice in our courts has been a continuing cause for controversy. Currently there are four bills before the Legislature, sponsored by the Office of Court Administration (OCA), by Governor Carey, by Mayor Koch, and by Bronx County District Attorney Merola, proposing that New York State change its system of voir dire from an attorney-conducted procedure to the federal system.

Proponents of New York's present system argue that attorneys are more suited to discover bias than judges, because of their familiarity with a case, and because as adversaries they are likely to probe deeper. These same advocates claim that the federal system is necessarily superficial and undermines the effective use of challenges by attorneys. They justify the greater length of the attorney-conducted voir dire on the grounds that unrestricted adversarial questioning ensures an impartial jury.

Protagonists for the federal system, on the other hand, maintain that a court-conducted voir dire elicits bias adequately and consistently upholds constitutional standards of fairness for defendants. Moreover, they claim that attorneys abuse voir dire, using it to condition jurors by subtle lobbying, or to engage in personality contests with opposing counsel, or to question jurors beyond the proper limits of privacy. They emphasize the expediency of the federal system, which is significantly shorter than the attorney-conducted voir dire. On average, federal voir dire is completed in two-and-a-half hours.

In considering this controversy, the Commission undertook a survey of eleven counties, to determine how much of their trial time was taken by voir dire. Although the size of the survey was modest, its conclusions are consistent with observations by previous students of the system. In

August, September and October of 1981, court clerks in the five boroughs of New York City, as well as in Erie, Nassau, Niagara, Onondaga, Sullivan and Westchester counties completed survey forms (see appendix A). The results, compiled with the cooperation of OCA and the Division of Criminal Justice Services (DCJS), on the basis of 462 responses, indicated that an average voir dire takes 12.7 hours out of a total of 35 hours, or 40% of trial time. Moreover, in at least 20% of the cases, voir dire time actually exceeded the length of the trial itself.

These figures are higher than those of a previous study by professors at John Jay College which was limited to New York City. Their results showed that voir dire consumed a third of trial time, or 8-1/2 hours per trial.

Compared to the average 2-1/2 hours used for a federal voir dire, 12.7 hours have dramatic implications when they are applied to approximately 3,500 felony jury trials that occurred in 1981 in New York State. Using the survey findings, we estimate that by adopting the federal system, New York could create trial time savings equivalent to the work product of 26 additional judges.

To arrive at this estimate, we made certain assumptions; we assumed that the sample was representative, and that in New York the average length of a court-conducted voir dire would not exceed the federal average of two-and-a half hours. We assumed that in spite of the customary delay

in getting all the participants ready for trial, trial parts would be in use 95% of the time - and given the level of cases awaiting trial, with more effective case management, we believe this should be the case. We further assumed that a judge would spend at least six court hours during a judicial day (there are conflicting estimates from OCA, of 7-1/2 hours, and from a 1976 study of the Economic Development Council (EDC), of 3-1/2 hours); that there are 220 days in a judicial year (an OCA figure which includes vacations and sick-time). We assumed that the annual cost of a felony trial part is $500,000 (according to an OCA estimate); and finally we assumed that there are 3,500 felony voir dires each year (according to the DCJS Quarterly Report, January, 1982).

If New York changed to the federal system, and the average time of a voir dire were reduced from 12.7 hours to 2-1/2 hours, it would mean that each of the 3,500 annual felony trials would be shortened by more than 10 hours. Incorporating the assumptions listed above, that figure translates into approximately 35,700 hours, or 5,967 six-hour days of judicial time. Divided by the 220 days in a judicial work-year, and assuming the 95% use of courtrooms, this number represents 25.7 hypothetical judges and their support staffs, constituting 25.7 felony trial parts, which would

require $12.85 million for the State to fund.*

Our results also suggest that benefits would be greatest in the busiest counties in New York City, where they are most needed, and where voir dire takes the longest. (See appendix B) Moreover, these economies would allow the shifting of judicial resources to the civil courts where backlogs are beginning to increase again.

These figures present strong argument for change. But because the process of jury selection pertains to one of our basic constitutional rights - the guarantee for every criminal defendant to a jury trial by impartial peers, changes should not be made if they arise solely from administrative imperatives. Proponents of the status quo may argue that reform can come from within the system if judges would make a greater use of the authority, given them by the Court of Appeals in People v. Boulware, to control the scope and duration of the voir dire. We have no doubt that most judges, including those who presided over the cases in our survey, where the average voir dire took 12.7 hours, feel

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* The estimated number of additional trials that could be tried is elusive. For example, if it were assumed that adoption of the federal method would result in a 30% time savings, the courts could hear 30% more trials than they did in 1981 - or 1050 more trials. If, however, it were assumed that on a statewide basis, those judges sitting in criminal trial parts average from 17-23 cases a year - the range we have been given - the 26 hypothetical new judges could preside over 442 to 520 more trials.

they exercised that authority. But judges have difficulty in changing the mores in a system where attorneys have had so much freedom. We recognize, for instance, that voir dire is often used for other purposes: to delay the trial, while attorneys find time to locate or prepare a witness, or to pre-condition a juror to look with favor upon their interpretation of the facts. All these factors, old evolved habits in the attorney-conducted jury selection process, contribute to delay without accomplishing the primary function of voir dire, to pick a fair and impartial jury.

Therefore, without denying the importance of defendants' rights, we cannot responsibly ignore the findings in our survey - namely, that our court system, which is reeling under the pressures of rising indictments, jail backlogs, and inadequate resources, currently allocates 40% of its trial time to the examination of jurors before it even begins a trial. In our inundated system - where some defendants wait more than a year to be tried, and where both prosecutors and defense attorneys alike engage in extensive plea bargaining, in part, because the volume of cases will not permit a trial for everyone - we think that our courts can no longer allow such a massive allocation of time to the voir dire.

We therefore endorse the proposals already before the Legislature, that New York State change to judge-conducted voir dire. In so doing, we acknowledge the concern that the federal system, if it is administered with rigidity, is too restrictive. We urge that flexibility be maintained in the questioning process, and that supplementation by counsel be permitted at the court's discretion. For those who argue that permitting any questioning by attorneys will inevitably produce some delays, we point out that judicial discretion would be subject to review by the appellate courts, by court administrators, by peer pressure, by media, and by the public. If flexibility were observed, we are confident that the change to judge-conducted voir dire would expedite the process of jury selection without sacrificing defendants' rights.

"STRUCK JURY" SYSTEM

Traditionally juries in New York have been selected by filling the jury box with 12 prospective jurors. As prospective jurors were removed, others were called at random from the panel in the courtroom. Attorneys had no way of knowing who would be called to replace the juror they had just challenged. Their decision concerning the relative bias of the challenged juror, compared to the potential bias of the new juror, was -- in the words of one litigator -- "a crapshoot."

Recently, the Legislature ratified a custom already in practice in many courtrooms. Judges, instead of calling 12 jurors at a time for separate rounds of examination, now can seat and examine at one time as many prospective jurors as deemed necessary. By reducing the number of examination rounds required, this reform is intended to shorten the voir dire.

We urge the adoption, by the Legislature, of an additional reform known as the "struck jury" system. This method of exercising challenges allows the attorneys to know in advance the order in which the jurors will be considered and more importantly, it allows them to compare all prospective jurors before making their selections.

Although there are a variety of ways in which a struck jury system can be implemented, the basic procedure is as follows: a panel of jurors is brought to the courtroom; their number is equal to the number of potential jurors and alternates to be selected, plus the total number of peremptory challenges available to both sides, plus the total anticipated challenges for cause. This entire panel is then numbered in order as their names are drawn by lot. The court delivers its preliminary remarks to the entire panel and conducts the voir dire. As we have suggested above, the court, in its discretion, may

allow supplemental questioning by the attorneys. Upon the completion of the questioning, challenges for cause are made. The attorneys can then exercise their peremptory challenges by the alternate striking of jurors' names from a list of the panel. After both sides have either passed or exercised their challenges, the unstruck jurors are called in order, by number, until a jury is empanelled.

The advantages of the "struck jury" are twofold: it requires only one presentation of introductory remarks by the court and one round of examination of potential jurors. And most importantly, it allows the attorneys to compare all prospective jurors before making their choices. If New York adopted the "struck jury" system, thus providing attorneys with a more equitable and predictable method of exercising their challenges, they would have less need for a large number of peremptory challenges.

PEREMPTORY CHALLENGES

Compared to other states, the number of peremptory challenges allowed in felony cases in New York State is high, and their exercise adds considerably to the time taken by *voir dire*. In the most recent Legislative session Mayor Koch and OCA submitted proposed bills reducing the number of challenges.

Because of the pending legislation on the reduction of peremptory challenges and its relevancy to the lengthened *voir dire* process, the Commission included questions on the use of peremptory challenges in the *voir dire* survey. In approximately 400 responses, we found that in the present system neither side regularly used their allotted quota of challenges. (See appendix C) Defense attorneys used their maximum number of challenges in only 22% of the cases, which was twice as often as prosecutors.

We realize that the survey results may be affected by a litigator's desire to save some challenges as an exercise in caution. Nevertheless, considering the survey data, and considering that New York is liberal in the number of challenges it allows, and reiterating our previous conclusion that we can no longer afford the time spent on the jury selection process, we recommend that there be a reduction in the number of peremptory challenges in each of the felony categories. We recommend that challenges be reduced from 20 to 17 in Class A felonies; that they be reduced from 15 to 12 in Class B and C felonies; and from 10 to 8 in Class D and E felonies.

To ensure flexibility after reducing challenges, we recommend also that trial judges retain the authority to add challenges in special circumstances; in multi-

party cases, for instance, or in cases of unusual notoriety where there may have been extensive pretrial publicity. In these cases, the judge should be permitted to increase the number of challenges on application.

NEW YORK STATE COMMISSION ON JURY SERVICE

The preceding recommendations concerning the jury selection process are intended to economize on both time and money spent in a jury trial. However, there are many other aspects of jury service in New York State which require study and reform. We mentioned some in our preliminary report that need examination:

-- procedures used to establish eligibility lists;
-- laws exempting citizens from jury service. Do they justifiably limit the representativeness of juries;
-- utilization of telephone notice and one-day one-trial experiments;
-- compensation for jury duty, both as to amount and inequities;
-- physical facilities for jury service;
-- sequestration of jurors, which is mandatory only in New York State;
-- penalties for ignoring jury summonses.

We believe that it is essential to undertake an ongoing assessment of these and other jury matters. We wonder, for example, if the controversy over the method of voir dire could have persisted for so long had there been an institution charged with the responsibility of assessing voir dire practices. A jury management policy that is responsive to juror needs is long overdue.

We recommend the creation of a permanent statewide commission on jury service. This commission should consist of administrative and trial judges, representatives from the civil and criminal Bar, jury commissioners from counties representing diverse populations and trial volumes, and citizens who can represent the essential, if often neglected actor in the jury trial -- the juror.

We note that a project exists in New York State, instituted by the Chief Judge, to improve jury administration in the counties of New York, Queens, Nassau, and Delaware. It involves the collaborative expertise of the State's Unified Court System, The National Center for State Courts, and County Jury Commissioners. We trust that it will demonstrate the benefits of modern jury management to those counties and will provide the example upon which to base a permanent statewide Commission.

Such a Commission would be responsible for reviewing jury service procedures throughout the State and for developing statistical surveys to test their efficiency and fairness. It would study reforms adopted in other States and pilot projects in selected counties and consider the feasibility of expanded or statewide applications. It would serve as a sounding board for innovators, a central policy board for petitioners and an ombudsman for those with grievances. It would advise the Chief Judge, recommending administrative change where appropriate. It would propose statutory changes and lobby with the Legislature for statewide reform.

The right to a trial by jury is a measure of the freedom in our society which we jealously guard; yet jury duty is perceived as an ordeal. Too often New Yorkers go to great lengths to avoid it; they are unnecessarily inconvenienced and their time is wasted.

In our view, without the adoption of innovative jury management practices, the extravagent squandering of juror energy and good will is inevitable; and without the revision of present jury selection procedures, the needless consumption of court time will continue.

THE EXECUTIVE ADVISORY COMMISSION ON THE ADMINISTRATION OF JUSTICE JURY SELECTION QUESTIONNAIRE

County _____ Ind. No. _____ Top Charge _____
Person Preparing Form & Title _____
Date and Time Panel Arrived _____
Size of Original Panel _____
Date & Time of Additional Panel _____
Size of Additional Panel _____

Log of Actual Voir Dire - Including Selection of Alternates
(Please Add Additional Lines if Needed)

_____

1st Date _____

Time Began _____ Time Ended _____
Time Resumed _____ Time Ended _____
Time Resumed _____ Time Ended _____
Time Resumed _____ Time Ended _____

2nd Date _____

Time Began _____ Time Ended _____
Time Resumed _____ Time Ended _____
Time Resumed _____ Time Ended _____
Time Resumed _____ Time Ended _____

3rd Date _____

Time Began _____ Time Ended _____
Time Resumed _____ Time Ended _____
Time Resumed _____ Time Ended _____
Time Resumed _____ Time Ended _____

Total Panel Members Excused by Court _____
Total Panel Members Challenged for Cause
By People _____ By Defense _____
Total Panel Members Peremptorily Challenged
By People _____ By Defense _____
Number of Alternate Jurors Selected _____
If a plea occurs during jury selection, please submit form to show status at time of plea.

Log of Actual Trial Time, i.e., People's Opening Statement Through Charge
(If Trial Exceeds Four Days, Please Add Additional Sheets)

_____

1st Date _____

Time Began _____ Time Ended _____

Time Resumed _____ Time Ended _____

Time Resumed _____ Time Ended _____

Time Resumed _____ Time Ended _____

2nd Date _____

Time Began _____ Time Ended _____

Time Resumed _____ Time Ended _____

Time Resumed _____ Time Ended _____

Time Resumed _____ Time Ended _____

3rd Date _____

Time Began _____ Time Ended _____

Time Resumed _____ Time Ended _____

Time Resumed _____ Time Ended _____

Time Resumed _____ Time Ended _____

4th Date _____

Time Began _____ Time Ended _____

Time Resumed _____ Time Ended _____

Time Resumed _____ Time Ended _____

Time Resumed _____ Time Ended _____

Trial result _____

If trial ends in any manner other than by verdict, please submit this form for the period of trial which occurred.

Total Number of Trials for 1981 and County Averages in Hours for Three Term Survey

County	Total Trials-1981 (Through Completion of Proof)	Survey Average Voir Dire Time	Survey Average Trial Time (Opening Statement Through Charge)
Bronx	545	14.6	23.3
Kings	605	12.0	28.1
New York	710	14.2	19.6
Queens	453	13.4	20.9
Richmond	31	8.8	46.0
Erie	142	8.6	18.1
Nassau	143	10.1	17.4
Niagara	37	8.8	16.0
Onondaga	65	9.4	12.4
Sullivan	3	17.3	27.3
Westchester	140	14.3	21.7

Values rounded to nearest tenth, .05 is dropped.

Appendix C

Peremptories

Charge	Maximum Allowed	Average Defense Exercised	Average Prosecutor Exercised
A	20	15.6	14.1
B	15	11.2	10.0
C	15	10.4	9.7
D	10	8.0	7.0
E	10	8.0	7.2

While defense attorneys used their maximum number of challenges in 22% of all cases (n = 405), prosecutors used their maximum number of challenges in 11% of all cases (n = 408).

END