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August 1, 2005

Corbin Davis
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2003-04
Proposed Amendment of Rule 6.412 of the Michigan Court Rules

Dear Clerk Davis:

At its July 29, 2005 meeting, the Board of Commissioners of the State Bar of Michigan considered the above proposed amendment published for comment. After careful consideration, the Board adopted a position of opposition to the proposal. Review of the proposal resulted in the determination that case law speaks adequately to the issue of discrimination during voir dire. The Board took careful note of the recommendation of the Standing Committee on Justice Initiatives (please see enclosed).

We appreciate the opportunity to offer this position for the Court's consideration. Please contact me with any further questions.

Sincerely,

John T. Berry

John T. Berry
Executive Director

cc: Lynn Richardson, Administrative Counsel, Michigan Supreme Court
Nancy J. Diehl, President
Janet Welch, General Counsel

Report on Public Policy Position

Name of Committee:
Standing Committee on Justice Initiatives

Contact Person:
Judge Cynthia D. Stephens, Candace Crowley

Email:
judgecyn@yahoo.com, ccrowley@mail.michbar.org

Proposed Court Rule or Administrative Order Number:
2003-04 - Proposed Amendment of Rule 6.412 of the Michigan Court Rules
The April 12, 2005, proposed amendment of MCR 6.412(F) is new language that states that discrimination on the basis of race, color, religion, national origin, or sex during the selection process of a jury is prohibited even in cases where the purpose would be to achieve balanced representation. Former subrule (F) is relettered as (G).

Date position was finalized:
June 23, 2005

Process used to take ideological position:
Telephone discussion and vote

Number of members in the decision-making body:
Sixteen

Number who voted in favor and opposed to the position:
Favor: Ten
Opposed: None

Position:
Recommend a position of opposition

The text of the court rule that is the subject of this report:
http://courts.michigan.gov/supremecourt/Resources/Administrative/2003-04-041205.pdf

Introduction

The Michigan Supreme Court has proposed an amendment of Rule 6.412 of the Michigan Court Rules regarding jury selection. The amendment adds language regarding discrimination in the selection process on the basis of race, color, religion, national origin, or sex. This proposal involves a court rule, which directly affects the functioning of the courts. Court rules are generally considered Keller permissible areas for comment.

Summary of Position

Existing law provides a strong rationale for the proposition that challenges to jury composition should be addressed on a case-by-case basis. When properly applied, the burden-shifting framework described in *Batson v Kentucky*, 476 US 79 (1986), addresses real or perceived bias in the jury selection process. The pattern and practice of abuses in this area, described most recently by the US Supreme Court in *Miller-El v Dretke*, 545 U.S. (# 03-9659, released 6/13/05, while highlighting some of Batson's flaws, still show why it is important to examine jury selection issues on a case-by-case basis. Proposed MCR 6.412 does nothing to further Batson's purposes, which are to eradicate discrimination from our civic institutions and prevent undermining public confidence in the fairness of our system of justice.

This is an area that is better suited for a judge's application of existing law to the circumstances of the particular instance. It is an area also guided, in part, by ABA Principles for Juries and Jury Trials. If the judge's interpretation of law is erroneous or the judge's application of the law is an abuse of discretion, appellate remedies are capable of the necessary oversight.

This position is based on the following.

Analysis

Case law background

A long line of United States Supreme Court cases address this issue, from *Strauder v West Virginia*, 100 US 303 (1880), 25 L.Ed. 664, *Swain v Alabama*, 380 US 203 (1986), 85 S. Ct. 824, 13 L.Ed. 2d 759, *Batson v Kentucky*, 476 US 79 (1986), 106 S. Ct. 1712, 90 L.Ed. 2d 69, to *Johnson v California*, 545 U.S (# 04-6964, released 6/13/05) and *Miller-El v Dretke*, 545 U.S. (# 03-9659, released 6/13/05).

Strauder held that a state denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded. While a defendant has no right to a jury composed in whole or in part of persons of his own race, the Equal Protection Clause guarantees the defendant that the state will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors. In addition, selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.

In *Swain v Alabama*, the court held that a defendant alleging lack of a fair cross section must demonstrate systematic exclusion of a group of jurors from the venire. The Swain method of demonstrating that exclusion required a defendant to prove that a prosecutor "in case after case, whatever the circumstances, whatever the crime and whoever the defendant... is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries." That method was overturned in *Batson v Kentucky*, 476 US 79 (1986)

The *Batson* court held the same equal protection principles are applied to determine whether there is discrimination in selecting the venire also govern the state's use of peremptory challenges to strike individual jurors from the petit jury. A defendant might establish a prima facie case of purposeful discrimination solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. The defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. The defendant may also rely on the facts that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that such facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the petit jury on account of their race. Once the defendant makes a prima facie showing, the burden shifts to the state to come forward with a neutral explanation for challenging black jurors. The prosecutor may not rebut a prima facie showing by stating that he challenged the

jurors on the assumption that they would be partial to the defendant because of their shared race or by affirming his good faith in individual selections.

More recently, *Johnson v California* provided a succinct rationale for the proposition that *Batson* challenges should be addressed on a case-by-case basis, and that *Batson's* burden-shifting framework (when properly applied) addresses real or perceived bias in the jury selection process. Additionally, the pattern and practice of abuses described in the recent *Miller-El case*, while highlighting some of *Batson's* flaws, still shows why it is important to examine jury selection issues on a case-by-case basis. MCR 6.412 does nothing to further *Batson's* purposes (as discussed by the Supreme Court in *Johnson*), which are to eradicate discrimination from our civic institutions and prevent undermining public confidence in the fairness of our system of justice. Johnson, citing *Batson*, 476 U.S. at 87.

ABA Principles

It is also noted that the American Bar Association passed a new set of Principles for Juries and Jury Trials at the midyear meeting in Salt Lake City, February 14, 2005. Principle 10 provides that "Courts should use open, fair, and flexible procedures to select a representative pool of prospective jurors." Standard 10B deals with a relevant selection procedure. "Any selection method may be used, manual or automated, that provides each eligible and available person with an equal probability of selection, except when a court orders an adjustment for underrepresented populations." Also note Principle 11, "Courts should ensure that the process used to empanel jurors effectively serves the goal of assembling a fair and impartial jury." Standard 11F deals with the Batson challenges.

"F. No party should be permitted to use peremptory challenges to dismiss a juror for constitutionally impermissible reasons.

1. It should be presumed that each party is utilizing peremptory challenges validly, without basing those challenges on constitutionally impermissible reasons.

2. A party objecting to the challenge of a juror on the grounds that the challenge has been exercised on a constitutionally impermissible basis, establishes a prima facie case of purposeful discrimination by showing that the challenge was exercised against a member of a constitutionally cognizable group; and by demonstrating that this fact, and any other relevant circumstances, raise an inference that the party challenged the juror because of the juror's membership in that group.

3. When a prima facie case of discrimination is established, the burden shifts to the party making the challenge to show a nondiscriminatory basis for the challenge.

4. The court should evaluate the credibility of the reasons proffered by the party as a basis for the challenge. If the court finds that the reasons stated are not pretextual and otherwise constitutionally permissible and are supported by the record, the court should permit the challenge. If the court finds that the reasons for the challenge are pretextual, or otherwise constitutionally impermissible, the court should deny the challenge and, after consultation with counsel, determine whether further remedy is appropriate. The court should state on the record the reasons, including whatever factual findings are appropriate, for sustaining or overruling the challenge.

5. When circumstances suggest that a peremptory challenge was used in a constitutionally impermissible manner, the court on its own initiative, if necessary, shall advise the parties on the record of its belief that the challenge is impermissible, and its reasons for so concluding and shall require the party exercising the challenge to make a showing under F. 3. above."

Other positions

The Michigan Judges' Association passed a resolution on May 24, 2005, at its Executive Board meeting, to oppose the proposed Amendment because the change was unnecessary. Comments from two lawyers in opposition to the proposal are also posted on the Court's website.

Conclusion

The Standing Committee on Justice Initiatives believes what the court is trying to do in the proposed rule may be laudable, but redundant to controlling case law regarding the parties' use of peremptory strikes. Insofar as it prohibits "courts" from attempting to assemble representative, balanced or proportionate juries during voir dire - something it seems only fair and just to do within constitutional limits - it is inconsistent not only with the access and fairness concepts espoused by our initiatives, but is at odds with principles assuring inclusion of all qualified groups in jury service as required by our Constitution and the laws enacted under it; conformity "with our basic concepts of a democratic society and a representative government," *Johnson*, 545 US, at 9-10; and "creating public confidence in the fairness of our system of justice."
Batson,476 US at 87.

It is important to examine jury selection issues on a case-by-case basis. MCR 6.412 does nothing to further *Batson's* purposes (as discussed by the Supreme Court in *Johnson*), which are to eradicate discrimination from our civic institutions and prevent undermining public confidence in the fairness of our system of justice. *Johnson*, citing *Batson*, 476 U.S. at 87.

This is an area that is better suited for a judge's application of existing law to the circumstances of the particular instance. If the judge's interpretation of law is erroneous or the judge's application of the law is an abuse of discretion, appellate remedies are capable of the necessary oversight.

For these reasons, the SCJI recommends opposition to the proposed court rule.

June 23, 2005