Public Comment of Harry Weller, Sr. Ass't State's Atty (Ret) and Peter T. Zarella, Associate Justice of the Supreme Court (Ret) on the Proposed Jury Selection Rule

INTRODUCTION

The undersigned recognize the importance of increasing minority participation in the jury system and support any changes that are constitutional, effective, and workable. Indeed, one of the undersigned served on the Chief Justice's Task Force studying the issue in light of the case of *State v. Holmes*, 327 Conn. 984 (2017) and co-chaired a subcommittee that offered numerous far-reaching legislative changes designed to increase minority participation. Some of those statutory changes were enacted, and we look forward to seeing them succeed. Unfortunately, one proposal that could have the greatest impact on minority participation, increasing juror's compensation, mileage and family care reimbursement, was not enacted.

Nevertheless, even laudable goals such as increasing minority jury participation cannot be accomplished via unconstitutional means. The proposed rule violates Article First, § 19. Additionally, the Committee should eschew enacting a rule unless and until it is confident that the proposal addresses the root of the existing problem and, of equal import, that the rule proposed is constitutional and will provide a remedy to that problem. The proposed jury selection rule fails all of these tests.

I. The proposed rule violates Article First, § 19

Article First, § 19 reads in pertinent part: "the *parties* shall have the right to challenge jurors peremptorily, the number of such challenges to be established by law. (Emphasis added)." As the Committee well knows, a peremptory challenge permits a party to strike a prospective juror without providing a reason. The proposed rule,

however, alters that constitutional right by requiring a party, in some instances, to offer detailed explanations that satisfy newly created standards before a trial court "allows" that party to strike a juror. For the reasons set forth below, the proposed rule violates Article First, § 19.

To better understand why the proposed rule is unconstitutional we need to provide some context. Connecticut is the only state in the union that provides all litigants a constitutional right to peremptory challenges. In all other states and the federal court system, peremptory challenges are extended in one of three ways: by statute, court rule, or common law. Notably, the Connecticut constitution authorizes only the legislature to act in regard to peremptory challenges and that body can only set the number of challenges. Otherwise, the right itself cannot be impinged or eliminated except from an equal or higher source of authority. Put another way, absent a state constitutional amendment altering the express right to peremptory challenges, only a United Supreme Court ruling imposed via the Fourteenth amendment and the Supremacy Clause can impede this right in any manner. The Superior Court's rulemaking authority, therefore, is no match for the express constitutional right set forth in Article First, § 19.

As the Committee also knows, the United States Supreme Court has employed its superior constitutional position to curtail one specific reason a litigant might exercise a peremptory challenge. As referred to here, the *Batson* line of cases[1] hold that a

[1] *Swain v. Alabama*, 380 U.S. 202 (1965) (a pattern over time of striking jurors solely based on race proves unconstitutional use of peremptory challenges); *Batson v. Kentucky, 476 U.S. 79 (1986)* (a strike can be invalidated based on conduct in one trial), *Powers v. Ohio*, 499 U.S. 400 (1991) (a party does not have to belong to the race discriminated against to raise a *Batson* claim), *Edmonson v. Leesville Concrete Co*., *500 U.S. 614, 629* (1991) (*Batson* applies in civil cases).

litigant in both civil and criminal cases violates the federal equal protection clause by employing a peremptory challenge to *purposefully* strike a juror "solely because of their race."[2] United States Supreme Court precedent makes clear that the right of both the litigant and the prospective juror are at stake when someone is purposefully stricken because of their race.[3]

Normally, United States Supreme Court precedent provides a floor for a right it identifies and protects and allows the state supreme court or legislature to expand upon that right if the state constitution permits such expansion.[4] However, with respect to peremptory challenges in Connecticut, the situation is unique. The express right in the Connecticut Constitution, rather than the federal constitution, provides the floor for a party's right to exercise a peremptory challenge that, absent a constitutional amendment, can be raised, as it was in *Batson*, only by the United States Supreme Court. Said another way, any policing of peremptory challenges beyond those dictated by the United States Supreme Court runs head long into an express state constitutional clause that makes the right to peremptory challenges inviolate. The proposed rule expands *Batson* in several ways that make it harder to exercise and easier to disallow a peremptory challenge. Such an expansion conflicts with Article First, § 19 and has not been found to be required under the federal constitution.

First, the *Batson* line of cases prohibit exercising a challenge to "purposefully" discriminate during jury selection. By contrast, under the proposed rule, a trial court can

[2] *Batson v. Kentucky,* supra. at 79

[3] *Powers v. Ohio*, supra.

[4] See, e.g., *State v. Purcell*, 331 Conn. 318, 341 (2019).

disallow a peremptory “If the court determines that the use of the challenge against the prospective juror, as reasonably viewed by an objective observer, legitimately raises the *appearance* that the prospective juror's race or ethnicity was a factor in the challenge, (Emphasis added).” Indeed, section D expressly states, “The court need not find purposeful discrimination to disallow the peremptory challenge.” This greatly departs from *Batson* by replacing the requirement that a court find *purposeful* discrimination with a finding that there is simply the “appearance” thereof. Notably, a Connecticut litigant has the constitutional right to employ a peremptory regardless of how it “appears” so long as there is no purposeful discrimination. By expanding *Batson* in this manner, the proposed rule, by its own terms, violates Article First, § 19. This is justification enough for not adopting the proposed rule. Again, a superior court rule cannot trump an express constitutional right.

Second, and relatedly, the proposed rule alters *Batson*’s focus from the disreputable intent of the litigant, and refocuses on the speculative notions of “an objective observer.” Removing the litigant from the evaluation expands the *Batson* line because, under federal precedent, only the litigant’s malevolent purpose can justify disallowing a peremptory challenge.

Third, *Batson* precludes a litigant from considering race as the “sole” factor when exercising a peremptory. By contrast, the rule precludes a litigant from relying on race as “a” factor. It might well be desirable to eliminate race entirely from a litigant’s list of reasons for striking a juror, but the *Batson* line of cases does not go that far. Such an expanded restriction on peremptory challenges therefore can only be accomplished by either a state constitutional amendment or a ruling by the United States Supreme Court.

Fourth, the rule defines an "objective observer" as one who "(1) is aware that purposeful discrimination, and implicit, institutional, and unconscious biases, have historically resulted in the unfair exclusion of potential jurors on the basis of their race, or ethnicity." Under *Batson*, however, only purposeful discrimination invalidates a peremptory challenge, not implicit or unconscious bias. Of course, a trial court may infer purposefulness from the record as it develops, and can, but is not required to, find purposefulness in an institution's jury selection practice (e. g. a prosecutor's office that displays a pattern of discrimination), but those cannot substitute for a finding of purposefulness without expanding *Batson* and simultaneously encroaching on Article First, § 19.

Fifth, subsection (i), declares that some historically "race neutral" reasons are now "presumptively invalid." It then places the burden of proof on the litigant exercising the challenge to prove that race is not a factor. The process creates a much higher burden than what is required by *Batson* and thus transforms a peremptory challenge into a "for cause" challenge in violation of Article First, § 19. The proposed new standards codify a belief that certain historically race neutral reasons (e.g., distrust of police) disproportionally affect minority jurors. If, however, the litigant is not purposefully using a peremptory "solely" to discriminate, the fact that there is a disproportionate effect does not satisfy the *Batson* test. Put simply, a disproportionate result alone says little or nothing about the fairness of the process.[5] Moreover, a "race neutral" reason to exercise a peremptory has never been defined as a rule established to obtain

[5] See, e.g., *State v. Gibbs,* 254 Conn. 578 (2000) (Disproportionate results of summoning process was not result on any systematic or systemic bias).

proportional results on a petit jury, a result that is not even required under the federal constitution. Rather, it is a reason that does not target a specific juror's race. And importantly, even if proportionality on a petit juries is the proposed rule's objective, it would not operate in a vacuum. Rather, it would operate against every litigant's constitutional right to exercise peremptory challenges. Regardless of how laudable a policy the proposed rule champions, a superior court rule cannot add such a limitation on a litigant's express constitutional right to peremptory challenges set forth in Article First, § 19.

II. The Underlying Premise Needs Examination

Many aspects of the rule suggest that it is attempting to address the original complaint in *Batson*, that the state uses peremptory challenges to strike minority jurors. (e.g., distrust of police, a close relationship with people who have been stopped, arrested, or convicted of a crime). Nothing in the proposal indicates, however, that the subcommittee recommending this rule conducted any empirical study or anecdotal survey to determine whether purposeful discrimination during voir dire is problematic in *Connecticut*, and, if it is, whether the state is the prime source of *Batson* violations.

For example, one complaint about *Batson* is that it is a "toothless" tiger because courts are not overturning convictions. That observation is hardly informative. It may well be, as the United States Supreme Court noted in *Batson*, that the ruling has had a salutary effect on Connecticut prosecutors and lawyers such that, presently, they do not purposefully discriminate against prospective jurors, and Connecticut trial judges have

proven fully competent resolving *Batson* claims such that no prejudice inures to the detriment of a defendant or a prospective juror.[6]

Likewise, nothing is revealed by the complaint that *Batson* claims arise only against the state and not against defense lawyers. That is most likely a consequence of two factors. One, the state cannot appeal an acquittal, so even if it raises a *Batson* claim to object to a defendant's use of a peremptory at trial, the state has no remedy beyond the trial court. Second, it would take a brave trial court indeed to disallow a defendant's exercise of his constitutional right to peremptory challenge even if the ruling were based on *Batson*. The latter is especially poignant because wrongful denial of a defendant's peremptory challenge is per se reversible error.

The issue should be examined within the superior court to determine whether purposeful discrimination during voir dire, especially from the state, is a practice in Connecticut courts and, where it is, whether judges respond adequately under the constitutional *Batson* framework.

Conclusion

The proposed rule violates Article First, § 19 in each of the ways explained above. Judicial rulemaking simply lacks the authority to place any limits on the express state constitutional right to peremptory challenges afforded all Connecticut litigants.

Moreover, enacting an unconstitutional rule for what is, perhaps, a non-issue in Connecticut, is an unwise exercise of authority. The undersigned understands the desire to do something to make things fairer or to appear fairer. But any solution should

[6] Batson fn. 22.

address demonstrated problems as they are experienced in our courts. And then the problems should be addressed within the constitutional authority of the acting body.

We thank you for the opportunity to address the proposed rule.

Respectfully Submitted,

Harry Weller

Peter T. Zarella