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Via Electronic Mail
The Honorable Andrew J. McDonald, *Chair*
**Rules Committee of the Superior Court**
231 Capitol Avenue
Hartford, CT 06106
andrew.mcdonald@connapp.jud.ct.gov

**Re: 2021-15; Proposal for Peremptory Challenge Rule Based on Recommendation of Jury Selection Task Force**

Dear Justice McDonald:

I served on the Jury Selection Task Force and was a member of the Implicit Bias/*Batson* subcommittee. I submit these comments in response to the submission by Peter Zarella and Harry Weller.

Our subcommittee devoted a substantial amount of time, discussion, and research to the unique constitutional nature of peremptory challenges in Connecticut. See Report of Jury Selection Task Force, 26-34. We recommended against eliminating or reducing the number of peremptory challenges for some of the reasons in the Zarella/Weller submission. See *id.* at 30-33.

Nonetheless, the notion that "[t]he proposed rule violates Article First, § 19[,]" Zarella/Weller, 1, rests on three incorrect premises. First, the parties' "right to challenge jurors peremptorily[,]" Art. I, § 19, is not absolute: Like every other constitutional right, Art. I, § 19 is subject to judicial interpretation – and interpretation often breeds limitation. So, for example, the right to free speech has exceptions for obscenity and fighting words; the right to free exercise of religion bows to criminal laws of general applicability; the right to be free from unreasonable searches and seizures has exceptions for automobile stops and *Terry* searches; and so forth. There is no sound reason to exempt the right to peremptory challenges from reasonable limitations.

Moreover, the law often prescribes the lens through which courts must view constitutional rights (thereby limiting them). The equal protection clause does not mention levels of scrutiny – yet strict scrutiny for suspect classes and rational basis review for economic rights are blackletter principles. Likewise, the First Amendment

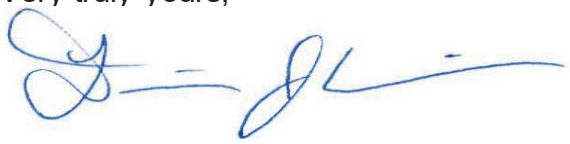
does not mention time, place, or manner – yet courts analyze those factors to distinguish permissible and impermissible limitations on the right to free speech. The adoption of an analytical framework for *Batson* challenges is no different.

Second, the sole focus of *Batson* is not "the litigant's malevolent purpose". Zarella/Weller, 4. To the contrary, "[b]y taking steps to eradicate racial discrimination from the jury selection process, *Batson* sought to protect the rights of defendants and jurors, *and to enhance public confidence in the fairness of the criminal justice system*." *Flowers v. Mississippi*, 139 S.Ct. 2228, 2242 (2019) (emphasis added). This is part and parcel of the constitutional right of jurors not to be excluded for discriminatory reasons. *J.E.B. v. Alabama*, 511 U.S. 127, 141–42 (1994).

Third, *Batson* has evolved to reflect our changing understanding of discrimination and to "guard[ ] against any backsliding." *Flowers*, 139 S.Ct. at 2243. Though *Batson* requires purposeful discrimination, proof that "the State was motivated in substantial part by discriminatory intent[,]" *id.* at 2244, suffices to establish it. In the thirty-five years since *Batson*, science has exposed the implicit and unconscious biases that often motivate our decisions without discrimination being our conscious "purpose". Allowing courts to consider implicit and unconscious biases as one factor helps "vigorously enforce[ ] and reinforce[ ] the decision". *Id.*

Thank you very much for consideration of these comments.

Very truly yours,



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CC: The Honorable Richard A. Robinson
The Honorable Chase T. Rogers (Ret.)
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(All via electronic mail)

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