Public Comment of Douglas S. Lavine, Judge Trial Referee, Before
The Rules Committee, on the Proposed Jury Selection Rule.

I fully support the recommendations of the Jury Selection Task Force, with one exception relating to the standard of review. I would like to make a few comments on the issue which is now under consideration by the Rules Committee relating to the proposal that a new rule be adopted. The views I express are my own. I would, of course, disqualify myself from any case addressing this issue.

At the end of the day, the issue before the Rules Committee really comes down to one single critical question: How can a court system claim to be fair and just when that system permits a person to be excluded from jury service because they truthfully state that they have doubts about a criminal justice system which they feel does not treat everyone equally? Doesn't our judicial system have a legal and moral duty – rooted in our state and federal constitutions— to treat every prospective juror fairly, and every criminal defendant fairly, by guaranteeing a jury of his or her peers? Will the Rules Committee approve a relatively modest, much needed change in our jury selection system to eliminate an obvious blemish?

I would like to address two arguments that have been made by opponents of the proposed rule.

First, it has been argued that further study is needed. Sometimes, of course, this is a valid argument and further research or study is required to analyze properly or evaluate an issue. But not in this circumstance. The Connecticut Civil Defense Lawyers Association (CDLA) has submitted a statement asserting: "There is no indication we know of in Connecticut where data has been collected or relied upon which evidences implicit bias based on race or ethnicity during the jury selection process, especially in the *civil* jury selection process, by the lawyers in our state." Of course there isn't such data; that is the very nature of implicit bias. It is not out in the open; in fact, it is subtle and difficult to detect and indeed, often invisible to the naked eye. We all—every one of us—have biases of which we are not aware. The Jury Selection Task Force understood that data was not available, but concluded that: "Scholarly research and logic suggest that peremptory challenges provide an opportunity for implicit bias to impact jury selection. Many studies have found that peremptory challenges are used to exclude Black venirepersons more frequently than white venirepersons." *Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson*, at page 28. The report, at page 29, acknowledged that: "There is little empirical evidence about the degree to which peremptory challenges alone introduce implicit bias into the jury selection process" because the topic "by its very nature defies data driven analysis." The question is not whether peremptory challenges are being used to strike Black jurors for questionable reasons in large numbers. The question is whether our system can tolerate even one Black juror being deprived of jury service because he or she expresses valid, widely-held concerns about the criminal justice system based on their own life experience. This is *not* a numbers issue; it is a *fairness* issue.

Opponents have raised a constitutional argument. I submit that the Rules Committee would be making a very, very serious mistake were it to stray beyond its proper function and

offer what is in essence an "advisory opinion" on this issue. The Rules Committee is not a court of law. Common sense dictates that unless a proposed rule is palpably and unmistakably unlawful or absurd –"No persons with red hair shall serve on a jury" or "No left-handed persons shall sit on a jury" – the Rules Committee should scrupulously avoid expressing its view on the constitutionality of any proposed rule. Deciding complex constitutional arguments is not its job. Doing so would not only exceed its proper role, but would open the door for all sorts of mischievous challenges to future proposed rules.

As to the substance of the rule, Harry Weller and Peter Zarella assert with certitude that the proposed rule "is unconstitutional" because it violate Article First, Section 19.

I hesitate to respond in any way to their flat assertion because, as stated above, it is my view that this is not something with which the Rules Committee should concern itself. But in brief response, their argument boils down to this: absolutely no limitation or condition whatever can be placed on the right to challenge jurors peremptorily, no matter the basis.

It seems to me that the proposed rule does not run afoul of Article First, Section 19, by permitting our courts to disallow peremptory challenges that are inextricably linked, in one way or another, to racially inappropriate stereotypes that have persisted from the past into the present and kept Blacks off of juries for decades. I would like to associate myself with the remarks submitted by Dan Krisch. Viewed from one perspective, the proposed rule is merely an extension of *Batson,* which itself imposes limitations on the racially impermissible use of peremptories. Whether or not Zarella's and Weller's constitutional argument is persuasive should be determined by a court of law in due course. But my individual opinion is of no consequence, and neither is that of Zarella or Weller.

Concerns about the proper role of peremptory challenges are nothing new, *see* M. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions,* 4 Harv. L. & Policy Rev. 149, 161 (2010); Bellin & Semitsu, *Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney,* 96 Cornell L. Rev. 1075 (2011). The Arizona Supreme Court recently decided to ban the use of peremptories starting on January 1; other states, including California, Iowa, Massachusetts, Mississippi, New York, and Oregon are studying the problem. The arguments that this is not a problem in Connecticut, and that it will solve itself in the fullness of time, are unpersuasive. It is myopic to think that deeply-rooted problems which exist all around the country and have for generations, indeed, centuries, do not exist here. Given a renewed focus on racial justice, the propriety of their use is surely a topic of great concern here in Connecticut, and the time to address it is now.

Respectfully submitted,

Douglas S. Lavine
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