Del Ciampo, Joseph

From: Del Ciampo, Joseph
Sent: Wednesday, September 29, 2021 3:50 PM
To: Rules Committee
Subject: FW: Referral from the Superior Court Rules Committee, RC ID # 2021-015

From: Abrams, James <James.Abrams@jud.ct.gov>
Sent: Wednesday, September 29, 2021 11:08 AM
To: Del Ciampo, Joseph <Joseph.DelCiampo@jud.ct.gov>
Subject: RE: Referral from the Superior Court Rules Committee, RC ID # 2021-015

As a member of the Jury Selection Task Force, I support the rule change.

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Hon. James Abrams
Judge, Superior Court
Connecticut Judicial Branch
email: james.abrams@jud.ct.gov
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From: Del Ciampo, Joseph
Sent: Wednesday, September 22, 2021 10:26 AM
To: Abrams, James <James.Abrams@jud.ct.gov>; Gold, David <David.Gold@jud.ct.gov>; asavvaides@woclleydon.com; 'jmaloney@cttriallawyers.org' <jmaloney@cttriallawyers.org>; eric.niederer@wilsonelser.com; ctdefenselawyers@gmail.com; Aalyia (for Scott Esdaile) <aalyia.ctnaacp@gmail>; Attorney Timothy Fisher <timothy.fisher@uconn.edu>; Atty Aigne Goldsby <aigne.goldsby@gmail.com>; Atty Anna Van Cleave <anna.vancleave@yale.edu>; Atty Charleen Merced Agosto <charleen.merced@gmail.com>; Atty Charles DeLuca <cdeluca@ryandelucalaw.com>; Atty Chase Rogers <ctrogers@daypitney.com>; Atty Claire Howard <choward@mppjustice.com>; Atty Erik Lohr <erik.lohr@ct.gov>; Atty Glenn Coffin <gcoffin@grsm.com>; Atty Harry Weller <harrwell@gmail.com>; Atty James Healy <jhealy@cowderymurphy.com>; Atty Joette Katz <jkatz@goodwin.com>; Atty Matt Blumenthal <matt.blumenthal@cga.ct.gov>; Atty Paul Williams <pdwilliams@daypitney.com>; Atty Preston Tisdale <PTisdale@koskoff.com>; Atty Richard Colangelo <richard.colangelo@ct.gov>; Ericson, Tais <Tais.Ericson@jud.ct.gov>; Hannah Kogan <Hannah.Kogan@uconn.edu>; Harris, Esther <Esther.Harris@jud.ct.gov>; Jalon White <White.Jalon@gmail.com>; Jason Knight <jason.knight@cga.ct.gov>; Gold, David <David.Gold@jud.ct.gov>; Lavine, Douglas <Douglas.Lavine@connapp.jud.ct.gov>; Abrams, James <James.Abrams@jud.ct.gov>; Judge Joan Alexander <Joan.Alexander@connapp.jud.ct.gov>; Williams, Omar <Omar.Williams@jud.ct.gov>; Professor Neal Feigenson <Neal.Feigenson@quinnipiac.edu>; Rapillo, Christine (Public Defenders) <Christine.Rapillo@jud.ct.gov>; Scot Esdaile <scotex@gmail.com>; Taylor Withrow <Taylor.Withrow@yale.edu>; Tobechukwu L. Umeugo <Tobechukwu.Umeugo@quinnipiac.edu>
Cc: Petruzzelli, Lori <Lori.Petruzzelli@jud.ct.gov>; Marin, Carolina <Carolina.Romanauskas@jud.ct.gov>
Subject: Referral from the Superior Court Rules Committee, RC ID # 2021-015

Good Afternoon,

At its meeting on September 13, 2021, the Rules Committee of the Superior Court considered a proposal submitted by Chief Justice Robinson for a new rule eliminating peremptory challenges based on race or ethnicity, as recommended by the Jury Selection Task Force. A copy of the proposal is attached (RC ID # 2021-015). Video of the meeting is available at https://youtu.be/JVOJbTevnfw.

After discussion, the Rules Committee tabled this proposal until its November 15, 2021 meeting, and referred it for review and comment to Judge Abrams, Chief Administrative Judge, Civil Matters, Judge Gold, Chief Administrative Judge, Criminal Matters, the Jury Selection Task Force, the Connecticut Bar Association, the Connecticut Trial Lawyers Association, and the Connecticut Defense Lawyers Association.

Please send all comments on the proposal to RulesCommittee@jud.ct.gov as soon as possible before the November 15th meeting.

Thank you.

Joseph J. Del Ciampo
Director of Legal Services
Connecticut Judicial Branch
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Hartford, Connecticut 06106

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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

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[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

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[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

Del Ciampo, Joseph

From: Katz, Joette <JKatz@goodwin.com>
Sent: Wednesday, September 22, 2021 12:29 PM
To: Rules Committee
Cc: Gold, David; Lavine, Douglas
Subject: Jury Selection Task Force Recommendations

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

As one of the active members of the *Batson* Working Group, as well as a drafter of the statement in Support of the Inclusion of (b) Appellate Review, I wholeheartedly indorse these proposals (along with the other recommendations set forth in this Final Report) and offer only corrections to scrivener type errors that got missed along the way.

pp. 18-22:
II. Report of the Batson Working Group
1. Paragraph 2: Batson should be *Batson*;
2. Paragraph 3: State v. Holloway should be *State* v. *Holloway*,;
3. Paragraph 3: Batson should be *Batson* (2x);
4. Paragraph 4: Batson/Holloway should be *Batson/Holloway*;
5. Paragraph 4: State v. Holmes, should be *State* v. *Holmes*,;
6. Paragraph 4: Batson's should be *Batson's* (2x)
7. Paragraph 8: Batson should be *Batson;*
8. Paragraph 8: Holmes should be *Holmes*;
9. Paragraph 10: Batson should be *Batson*

Thank you for your patience.
Best,
Joette

CONNECTICUT
TRIAL LAWYERS
ASSOCIATION

November 11, 2021

Rules Committee of the Superior Court
RulesCommittee@jud.ct.gov
State of Connecticut Judicial Branch
100 Washington Street, Third Floor
Hartford, CT 06106

Re: Rule Proposed by Jury Selection Task Force and Justice Robinson

Dear Members of the Rules Committee:

Thank you for the invitation to comment on the rule proposed by the Jury Selection Task Force and Justice Robinson.

The proposed rule change presents an opportunity to continue the repairs to our jury system envisioned in *State v. Holmes*, 334 Conn. 202 (2019), and developed by the Jury Selection Task Force. The Connecticut Trial Lawyers association strongly supports both the *Holmes* vision and its implementation through this proposed rule change. Ending the wrongful exclusion of persons of color from jury service is crucial to the wellbeing of our judicial system.

Sincerely,

Anastasios T. Savvaides
President, CTLA

Alinor C. Sterling
Co-Chair, CTLA Rules Committee

Marco A. Allocca
Co-Chair, CTLA Rules Committee

CDLA

The Voice of Connecticut's Civil Defense Trial Lawyers

Dear Rules Committee,

Thank you for your invitation and this opportunity to discuss the positions of the Connecticut Defense Lawyers Association (CDLA) as a professional association of civil defense attorneys throughout Connecticut. The CDLA sets forth its following positions and recommendations to the Rules Committee proposals 2021-014a/b and 2021-015 as follows:

2021-014a/b

The CDLA has no concerns or objections to the proposal by The Honorable Cesar Noble to add additional interrogatories and requests for production to Forms 203 and 206, except the bracketed language (in bold for your convenience) be added to prevent any confusion or objections as to relevancy and scope in time, and for consistency through the discovery demands, as follows:

Premises Liability Standard Form Discovery Interrogatories

X. State whether a contract existed for snow and ice remediation for the [**date and**] location on which the plaintiff claims to have been injured.

Y. State whether you received or prepared any invoices or records related to snow and/or ice remediation for the location on which the plaintiff claims to have been injured for the 30 days prior to the date on which the plaintiff claims to have been injured.

Request for Production

£. A copy of any contract identified in response to Interrogatory #X.

€. A copy of any documents identified in response to Interrogatory # Y.

2021-015

Thank you for the opportunity to weigh in on the Final Report of the Task Force which contains recommendations for jury reform in Connecticut, and particularly a general rule on jury selection in an effort to prophylactically remove conscious and unconscious bias consistent with issues discussed in *State v. Holmes*, 334 Conn. 2020 (2019).

Our system guarantees all individuals fair access to the judicial system, including judgment by their peers. Jury selection is a critical judicial process to ensure fairness, access to the

courts and trust in the judicial system in general, whether a spectator, party, witness, juror or society at-large. The CDLA is committed to diversity and inclusion in all aspects of the practice of law, including the selection of prospective jurors. Part of the CDLA's commitment as an organization is to be proactively introspective, self-aware, identify and root out all biases, both conscious and unconscious biases, in ourselves and all members of this noble and critical profession and the judicial branch as an organ of the State of Connecticut.

The genesis of the Task Force was based in the *sua sponte* recommendation of the Connecticut Supreme Court in *State v. Holmes, supra*. Notably, the decision in *Holmes* stemmed from a criminal case and the Supreme Court's decision questioning present-day relations between police and many minority and minority communities. This decision and related discussion did not speak to the practice of civil law in Connecticut, but its decision and proposed general rule on jury selection would affect criminal and civil matters alike in application. In this context, and as members of the legal community at-large, the CDLA wishes to briefly provide some observations for consideration by the Rules Committee.

We note that the recommendation for an expeditious adoption of the rules change is "intended to significantly improve the quality of justice *in our state* by eliminating the unfair exclusion of potential jurors through the use of peremptory challenges based on race or ethnicity." [Emphasis added.] However, the Report of the Jury Selection Task Force indicates that it would like to *start* collecting data on jury selection to determine when and how bias may impact the fair and full access to the courts by prospective jurors and parties to have their cases decided by a jury of their peers without undue or unlawful exclusion. 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. We agree data collection is necessary to determine if there is an issue, like this important issue, which needs to be fixed, the scope of that issue and how best to accomplish that noble goal through the analysis of data. We also note that the Task Force adopted the research on implicit bias from the *Holmes* decision, but it does not appear to have assessed the sources or independently determine what, if any, research is applicable to the jury selection process by the members of the Connecticut Bar. The CDLA would be most interested in any data applicable to our jury selection process; and, if an issue is found, then address it quickly and appropriately based on the analysis of the applicable data. A general rule, like the one proposed, of such critical importance should address a data-driven and defined issue applicable to the administration of justice in this State, rather than perceptions which may risk overreach or create collateral issues.

A concern we have in the current proposed General Rule subsection (e) is the presumption that the trial judge is put in the position of an "objective observer" which is defined to include that he or she "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." [Emphasis added.] That language combined with the additional language in subsection (g) which states that "[b]ecause historically the following reasons for peremptory challenges *have been associated with improper*

discrimination in jury selection ***in Connecticut*** or maybe influenced by implicit or explicit bias …" [emphasis added], and the contemporary creation and sought application of the proposed General Rule, it may be viewed as stating members admitted to the Bar in Connecticut have to the present improperly and systemically excluded prospective jurors on the basis of racial or ethnic identification. A statement in the proposed General Rule that there has been purposeful discrimination and implicit biases which has influenced attorneys' decisions without any evidence of the same is a serious and negative commentary on the members of the Connecticut Bar who practice and conduct themselves in a professional and unbiased manner. Again, we are not aware of any data that has been collected that supports this latter statement as it applies to Connecticut, but we would be very interested in the collection of such data and creation of a general rule on jury selection as indicated by the findings from such data.

For these reasons, we would recommend the Rules Committee first obtain and collect its data on jury selection so that it can analyze it and then make an informed and data-based decision before moving forward with the implementation of the proposed rule changes in the absence of such data.

Once again, we appreciate the opportunity to provide some commentary and are available to discuss this extremely important and vital issue.

Respectfully submitted,

/s/ Eric W.F. Niederer, Esq.
Eric W. F. Niederer, President
Connecticut Defense Lawyers Association

As approved by the CDLA Board