

October 28, 2021

Hon. Glenn A. Grant, J.A.D.  
Acting Administrative Director of the Courts  
Hughes Justice Complex  
P.O. Box 037  
Trenton, New Jersey 08625-0037

Re: Comments on the Jury Selection Process (Pre-Judicial Conference)

Dear Judge Grant,

I am writing to offer comments in anticipation of the upcoming Judicial Conference on the Jury Selection Process.

I have been a member of the Berkeley Law faculty since 2001. I am the founding director of our Death Penalty Clinic, which I currently co-direct.

I have been engaged in the litigation and analysis of jury selection issues for close to three decades. A copy of my CV is available on my Berkeley Law [faculty page](#). It does not, however, reflect my contributions to litigation in criminal and capital jury selection matters, including amicus curiae briefs in support of the appellant or petitioner in cases such as *Williams v. California*, 571 U.S. 1197 (2014); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); and *People v. Lenix*, 44 Cal. 4th 602, 187 P.3d 946 (Cal. 2008).

I am a co-author of the 2020 report *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* (“*Whitewashing the Jury Box*”).<sup>1</sup> The report was the first empirical investigation into peremptory challenges in our state and included the first analysis of how prosecutors are trained to exercise their strikes. *Whitewashing the Jury Box* reaffirmed what the overwhelming number of studies on peremptory challenges have shown. First, prosecutors historically and currently use their strikes to disproportionately exclude Black prospective jurors.<sup>2</sup> Second, no such evidence exists regarding

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<sup>1</sup> Elisabeth Semel, Dagen Downard, Anne Weis, Danielle Craig & Chelsea Hanlock, [Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors](#), Berkeley L. Death Penalty Clinic (2020).

<sup>2</sup> *Id.* at 82-84 nn.1-2 (collecting and discussing studies); *id.* at 13-23 (reporting empirical findings); [Report of the Connecticut Supreme Court's Jury Selection Task Force to Chief Justice Richard A. Robinson](#) (“*Connecticut Task Force Report*”) 28-30 & n.21 (2020) (collecting and discussing studies); see also Anna Offit, *Race Conscious Jury Selection*, 82 Ohio St. L.J. 201,

criminal defense attorneys' exercise of strikes.<sup>3</sup> Third, *Batson* is an ineffectual mechanism for eliminating racially discriminatory peremptory challenges.<sup>4</sup> I also participated in drafting Assembly Bill 3070 (AB 3070),<sup>5</sup> which works a wholesale revision of the *Batson*<sup>6</sup> inquiry, and was involved in the legislative process that culminated in the bill's passage.<sup>7</sup> I note that Attachment D to the *Guide to the New Jersey Judicial Conference on Jury Selection* ("*New Jersey Conference Guide*") references AB 3070 and quotes from the California Legislature's findings.<sup>8</sup> The attachment, however, does not include the text of AB 3070 and makes no mention of our report.<sup>9</sup>

Recently, the New Jersey Supreme Court incorporated "implicit or unconscious bias" into the third step of its *Gilmore* analysis, though prospectively only. *State v. Andujar*, 247 N.J. 245, 284, 314-15, 254 A.3d 606 (N.J. 2021); see *State v. Gilmore*, 103 N.J. 508, 511 A.2d 1150 (N.J. 1986). The Court's call for a "thoughtful, comprehensive discussion" of "the nature of discrimination in the jury selection process" is commendable. *Andujar*, 247 N.J. at 317-18.

I am mindful that the New Jersey Judiciary invited "proposals to improve all aspects of jury selection, including [several] key areas," one of which is a reconsideration of the number of statutorily-allowed peremptory challenges.<sup>10</sup> I write specifically to oppose any proposal that New Jersey eliminate or significantly reduce peremptory challenges at this juncture. Although, it is

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238 (2021) ("Judges and prosecutors disproportionately excuse Black jurors, while defense attorneys disproportionately excuse White jurors."); *id.* at 239-42 (collecting and discussing studies); *id.* at 223-37 (presenting the results of a qualitative field study based on interviews with Assistant U.S. Attorneys); Shaun L. Gabbidon, Leslie K. Kowal, Kareem L. Jordan, Jennifer L. Roberts & Nancy Vincenzi, *Race-Based Peremptory Challenges: An Empirical Analysis of Litigation from the U.S. Court of Appeals, 2002-2006*, 33 Am J. Crim. Just. 59, 62-64 (2008) (analyzing 184 federal criminal trials and finding that prosecutors exercised peremptory challenges against Black prospective jurors in close to 90% of the cases, and that reviewing courts found *Batson* violations in only 12.3% of cases).

<sup>3</sup> See *supra* note 2.

<sup>4</sup> See *supra* note 2.

<sup>5</sup> A.B. 3070, also known as the "Ending Discrimination in Jury Selection Act," was authored by Dr. Shirley Weber, then a member of the California Assembly and currently California's Secretary of State.

<sup>6</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986). Eight years before *Batson*, the California Supreme Court held that the exercise of a peremptory challenge based on "group bias" violates the state Constitution's fair cross-section guarantee. *People v. Wheeler*, 22 Cal. 3d. 258, 583 P.2d 748, 761 (Cal. 1978).

<sup>7</sup> [A.B. 3070](#), 2019-2020 Leg., Reg. Sess. (approved by Governor, Sept. 30, 2020, ch. 318) (codified at Cal. Civ. Proc. Code § 231.7).

<sup>8</sup> See [Guide to the New Jersey Judicial Conference on Jury Selection](#), Attachment D, at D 6-7.

<sup>9</sup> See *id.* Attachment J, at J 1-16.

<sup>10</sup> *Id.* at 22.

not one of Professor Rose’s recommendations,<sup>11</sup> the Arizona Supreme Court recently took this step,<sup>12</sup> and Attachment D to the *New Jersey Conference Guide* prominently features the views of judges who endorse the elimination of peremptory challenges.<sup>13</sup>

After considerable study, reports in Connecticut and Washington and *Whitewashing the Jury Box* recommended a dramatic revision of the *Batson* framework; they did not recommend the reduction or elimination of peremptories.<sup>14</sup> As you know, in 2018, the Washington Supreme Court adopted General Rule 37 (GR 37), becoming the first state to dismantle the *Batson* jury selection regime.<sup>15</sup> AB 3070 is modeled on GR 37.<sup>16</sup>

Initial information indicates that GR 37 “has served a critical role in judicial education in eliminating racial bias,”<sup>17</sup> and suggests that attorneys and judges are adhering to GR 37, which has led to a decline in prosecutors’ use of peremptory challenges to disproportionately strike Black jurors as well as a decrease in their reliance on reasons that are “presumptively invalid” under the rule.<sup>18</sup> Although still few, appellate opinions reflect the application of the new standard.<sup>19</sup>

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<sup>11</sup> Mary R. Rose, [Final Report on New Jersey's Empirical Study of Jury Selection Practices and Jury Representativeness](#), 17, 20, 79-81 (June 2021) (recommending that (1) New Jersey explore ways to reduce the number of jurors who appear for duty but are “not used”; (2) positing that reducing the number of peremptory challenges may be a “mechanism” to achieve this goal; (3) acknowledging that judges’ “willingness to be generous” in granting for-cause challenges likely “facilitates” attorneys’ use of fewer peremptory challenges; and (4) recommending that should New Jersey reduce the number of peremptory challenges, “judges should not likewise pull back on granting challenges for cause”) (emphasis omitted).

<sup>12</sup> [Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47\(e\) of the Rules of Civil Procedure](#) (filed August 30, 2021).

<sup>13</sup> See, e.g., *New Jersey Conference Guide*, *supra* note 8, at D 2-11, but see *id.* at 10-19 (placing the reduction of peremptory challenges front and center).

<sup>14</sup> *Connecticut Task Force Report*, *supra* note 2, at PDF pages 2-5 (unpaginated documents preceding the formal report) (describing the year-long inquiry and detailing the composition and charge of each of the four subcommittees); *id.* at 16-18 (setting forth a new General Rule on Jury Selection); *id.* at 30-33 (explaining the recommendation not to limit or eliminate peremptory challenges); [Proposed New GR 37—Jury Selection Workgroup Final Report](#) (“Washington Work Group Final Report”) 10-13 (2018) (presenting the Proposed New Rule—GR 37); *Whitewashing the Jury Box*, *supra* note 1, at ix-xii (providing recommendations).

<sup>15</sup> Wash. Ct. R. General Applicability, [General R. 37](#).

<sup>16</sup> *Whitewashing the Jury Box*, *supra* note 1, at 71.

<sup>17</sup> Letter from Chief Justice Steven González and Justice Mary Yu, Washington Supreme Court, to Lila Silverstein, Washington Appellate Project (May 20, 2020) (on file with the office of former Assembly member Dr. Shirley Weber and with the author).

<sup>18</sup> See GR 37(h).

<sup>19</sup> See e.g., *State v. Listoe*, 15 Wash. App. 2d 308, 475 P.3d 534, 541 (Wash. Ct. App. 2020) (finding error under GR 37 and holding that an “objective observer aware of implicit bias could view race or ethnicity as a factor” in the prosecution’s strike of “the only Black member of the

I reviewed the *Final Report on New Jersey's Empirical Study of Jury Selection Practices and Jury Representativeness* ("New Jersey Final Report") (2021) by Professor Mary Rose. The report answers three questions posed by the New Jersey Supreme Court about jury representativeness with regard to race, ethnicity and gender, examining the composition of jury pools and the successive stages of the jury selection process to identify those most likely to produce unrepresentativeness, i.e., "patterns of attrition" that "correlate with a person's race, ethnicity or gender."<sup>20</sup> I note, in particular, Professor Rose's finding that "the processes that determine who appears at the courthouse constitute a systemic source of minority-group attrition because concerning levels [of] underrepresentation appeared in nearly all areas studied."<sup>21</sup> She recommends that "New Jersey's next intensive study of jury representativeness should be aimed at understanding why the source(s) of jury pools consistently and substantially underrepresent African Americans."<sup>22</sup>

In its directive to Professor Rose, "the Court also expressed a particular interest in whether the existing system of peremptory challenges, and their use in trials, substantially altered the likelihood that members of various racial or ethnic groups were seated on juries."<sup>23</sup> She found that seated juries are largely representative *when compared to the venires from which they were selected*.<sup>24</sup> Professor Rose documented patterns of attrition, but did not examine individual peremptory and for-cause challenges. Her findings do not tell us whether racial or ethnic bias influenced the exercise of individual challenges or trial court rulings. Nor do they tell us whether discrimination is at play in appellate review of peremptory and/or for-cause challenges. It appears from the referral questions that Professor Rose was not asked to tackle these issues, and it is not clear whether her data set is adequate to address them.<sup>25</sup> Professor Rose acknowledged,

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venire"); *State v. Omar*, 12 Wash. App. 2d 747, 460 P.3d. 225, 229 (Wash. Ct. App. 2020) (applying GR 37 to affirm the prosecution's objection to the defense strike of an Asian juror where defense counsel's reasons "were vague and unsubstantiated" and "might mask conscious or unconscious bias" such that "an objective observer could view race as a factor in the challenge").

<sup>20</sup> *New Jersey Final Report*, *supra* note 11, at 22-23; *id.* at 65 ("For the majority of African Americans, and in the majority of trials examined, attrition came through . . . mechanisms [other than peremptories]."); *id.* at 85 ([A]ctively dismissing people who raise concerns about bias does not negatively affect diversity in criminal or civil cases.").

<sup>21</sup> *Id.* at iii; *id.* at 40, 43 (observing that "African Americans are underrepresented in the jury pools to some degree in each one of the 14 counties studied" and that underrepresentation is "at concerning levels in fully 10 of the 14 areas studied") (emphasis omitted); *id.* at 91 ("[T]he best correlate of a diverse jury is a diverse venire.").

<sup>22</sup> *Id.* at 46.

<sup>23</sup> *Id.* at 23.

<sup>24</sup> *E.g.*, *id.* at 69 (concluding that "peremptory challenges are rarely the primary way that minority groups experience attrition from juries") (emphasis omitted); *id.* at 86 (concluding that "active use of for-cause challenges does not harm jury diversity in criminal cases, and particularly in civil cases").

<sup>25</sup> For example, criminal trials comprised only 27% of the total number of trials studied (26 criminal trials in contrast to 69 civil trials). *Id.* at 33. Professor Rose's unit of measure was the

“The data do NOT support the conclusion that attorneys ignore race when using peremptory challenges . . . [E]ven though attorney behavior did not stand out as the key systematic explanation for levels of representation on juries, evidence for some amount of racial patterning of strikes did emerge.”<sup>26</sup>

In the face of overwhelming evidence across time and geography that prosecutors exercise their peremptory challenges to disproportionately remove Black prospective jurors,<sup>27</sup> it would be a mistake for the New Jersey Supreme Court to conclude that the state does not have a “*Batson* problem.”<sup>28</sup> There is a through line from the historical and present-day discriminatory treatment of Black and Brown people to prosecutors’ discriminatory peremptory challenges and the judiciary’s endorsement of the reasons for these strikes. We describe this trajectory in *Whitewashing the Jury Box*.<sup>29</sup> The starting point of our present-day analysis was Justice

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particular trial as opposed to the individual juror. *See, e.g., Id.* at 49 (Tbl. VI.1), 51 (Tbl. VI.2), 53 (Tbl. VI.3). The adequacy of the sample size also may be different when the referral question is different as, for example, when the referral question asks whether race discrimination influenced the exercise of individual peremptory or for-cause challenges or judicial decisions on those challenges.

<sup>26</sup> *Id.* at viii-ix.

<sup>27</sup> *See supra* note 2.

<sup>28</sup> There appears to be a contradiction between Dr. Rose’s finding that, in New Jersey, “peremptory challenges are rarely the primary way that minority groups experience attrition from juries” and the guide’s assertion that the exercise of peremptory challenges “intensifi[es]” the underrepresentation in jury venires. *Compare New Jersey Final Report, supra* note 11, at 69 with *New Jersey Conference Guide, supra* note 8, at 19. Also, the guide quotes from Black jurors’ descriptions of the profound harms that they suffered because of their exclusion by peremptory strikes. *See New Jersey Conference Guide, supra* note 8, at 19 (highlighting the testimony of young Black woman before the Washington Supreme Court); *id.* Attachment L, at L 4-6 (providing examples from the Equal Justice Initiative’s 2010 report, [Illegal Racial Discrimination in Jury Selection: A Continuing Legacy](#) (“Illegal Racial Discrimination”), which examined peremptory challenges in eight southern states). The guide fails to mention that these were almost exclusively the accounts of jurors who were removed by prosecution strikes and that neither EJI nor the Washington Jury Selection Work Group recommended the elimination of peremptory challenges. *See Illegal Racial Discrimination, supra*, at 44-50 (presenting recommendations); *Washington Work Group Final Report, supra* note 14, at 3 (concluding that “[e]liminating peremptory challenges is not the preferred way to address juror discrimination”). This year, the Equal Justice Initiative released [Race and the Jury: Illegal Discrimination in Jury Selection](#). Again, EJI did not recommend the elimination of peremptories. Rather, it proposed reforms along the lines of GR 37 and AB 3070. *See* <https://eji.org/report/race-and-the-jury/what-needs-to-happen/#examples-from-across-the-country>.

<sup>29</sup> *See Whitewashing the Jury Box, supra* note 1, at 29-65 (describing how implicit bias taints peremptory challenges, prosecutors’ continued resistance to *Batson*—including an analysis of California prosecution training materials—and the California Supreme Court’s resistance to *Batson*).

Marshall's prediction that the *Batson* framework would fail to eradicate race-based peremptory challenges and his explanation of why its protections would prove to be "illusory."<sup>30</sup>

Among his concerns, Justice Marshall "described the ease with which prosecutors would be able to 'assert facially [race] neutral reasons,' especially when they rely on a prospective juror's demeanor, thus 'creating a difficult burden' for the judge who must assess the credibility of those reasons."<sup>31</sup> *Whitewashing the Jury Box* found that "[p]rosecutors' reasons for striking jurors correlate with racial stereotypes."<sup>32</sup> Our study of 683 California appellate court *Batson* opinions over a 12-year period showed that prosecutors relied on demeanor as a basis for their strikes in over 40% of the cases, jurors' views that the criminal legal system or law enforcement is racially- or class-biased in over 34% of the cases, and jurors' prior contact with law enforcement or the criminal legal system in more than 21% of the cases.<sup>33</sup>

Judicial norming of racial proxies and stereotypes as "race-neutral" is among the most insidious and effective ways in which *Batson* has been crippled; this is particularly so when implicit bias is at work.<sup>34</sup> In the *Batson* context (though not only there), tolerance of racial bias is something of a feedback loop: prosecutors' explanations for peremptory challenges of Black jurors that are racial proxies, judicial approval of those explanations, and the training of prosecutors to employ these judicially-sanctioned "race-neutral" reasons, with the result that the list of acceptable reasons appears almost infinite.<sup>35</sup> Recently, California Supreme Court Justice Goodwin Liu, a critic of the majority's *Batson* jurisprudence and advocate for a "course correction,"<sup>36</sup> wrote:

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<sup>30</sup> See *id.* at 8 (discussing and quoting Justice Marshall's concurring opinion in *Batson*, 476 U.S. at 105-06) (Marshall, J., concurring).

<sup>31</sup> *Id.* at 8 (quoting *Batson*, 476 U.S. at 105-06) (Marshall, J., concurring).

<sup>32</sup> *Id.* at 15.

<sup>33</sup> *Id.* at 15 and Fig. 3.

<sup>34</sup> See, e.g., *Illegal Racial Discrimination*, *supra* note 28, at 16-18 (discussing prosecutors' reliance on and courts' tolerance of reasons that "do[] not explicitly mention race" but are "stereotype-based" reasons); Mark W. 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. & Pol'y Rev. 149, 156-58 (2010) (discussing studies on implicit bias and judicial decision-making); *Whitewashing the Jury Box*, *supra* note 1, at 52-65 (describing five ways in which the California Supreme Court's *Batson* decisions over the past three decades have turned a blind eye to discrimination against Black prospective jurors).

<sup>35</sup> *Whitewashing the Jury Box*, *supra* note 1, at 49-51 (examining California prosecutors' jury selection training materials, which include dozens of judicially approved race-neutral justifications. E.g., *id.* at 50 ("The *Inquisitive Prosecutor's Guide* list 77 race-neutral reasons for striking a juror.") The district attorney training materials referenced in *Whitewashing the Jury Box* are available on the Berkeley Law Death Penalty Clinic's [website](#)).

<sup>36</sup> See, e.g., *People v. Rhoades*, 8 Cal. 5th 393, 453 P.3d 89, 139 (2019) (Liu, J., dissenting); see *Whitewashing the Jury Box*, *supra* note 1, at 53-65 (highlighting some of Justice Liu's concurring and dissenting opinions in *Batson* cases).

To many people, excluding qualified Black jurors based on their negative experiences with law enforcement or the justice system must seem like adding insult to injury. It has been more than 30 years since this court has found racial discrimination in the peremptory strike of a Black juror. Over the decades, California courts have repeatedly upheld the exclusion of Black jurors for these reasons. It is time to reassess whether the law should permit the real-life experiences of our Black citizens to be devalued in this way. At stake is nothing less than “public confidence in the fairness of our system of justice.”<sup>37</sup>

Absent changes that bring unconscious, judicially-sanctioned but discriminatory practices into consciousness and prohibit them, behavior will not change.<sup>38</sup> This acknowledgement is key to the structural reformulation of *Batson* that GR 37, AB 3070, and the *Connecticut Task Force Report*'s recommendations aim to accomplish.<sup>39</sup> The historical, precedential, and empirical record suggest that eliminating peremptory challenges without—as GR 37 and AB 3070 do—explicitly identifying reasons historically associated with race discrimination and erecting legal barriers against their use will lead to greater tolerance of explicit, implicit, and institutional bias in the exercise of cause challenges. These structural guardrails are imperative to seating juries that are representative *and cross-sectional*.<sup>40</sup>

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<sup>37</sup> *People v. Triplett*, 48 Cal. App. 5th 655, 267 Cal. Rptr. 675, 692-93 (Cal. Ct. App. 2020) (Liu, J., dissenting from the denial of review) (quoting *Batson*, 476 U.S. at 87) (citations omitted). “Decades of social science research confirms that African Americans and Whites differ in their views of the criminal legal system, with more Blacks consistently expressing the view that the system is racially discriminatory. The reasons for the divide in perception are embedded in the historic and present-day differences . . . between how the two groups experience the criminal legal system.” *Whitewashing the Jury Box*, *supra* note 1, at 40; *id.* at 38-40 (discussing the empirical evidence that the criminal legal system, from police stops to executions, disproportionately targets and punishes Black people); *id.* at 37-43 (summarizing the data on how Black and white people view criminal justice issues); *see also* Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 *Yale L. & Pol’y Rev.* 387, 394 (2016) (observing the racial disparities in the treatment of Black and white people throughout the criminal legal system “harm the individuals that they directly affect and come at a great price for the nation—a diminished view of the justice system and a racial divide between the way that Whites and people of color view our criminal justice system”).

<sup>38</sup> *See Whitewashing the Jury Box*, *supra* note 1, at 34 (discussing studies finding that instructions against bias were ineffective in decreasing biased decision-making).

<sup>39</sup> *See, e.g.*, A.B. 3070, Sec. 1(a) (In particular, the Legislature finds that requiring proof of intentional bias renders the procedure ineffective and that many of the reasons routinely advanced to justify the exclusion of jurors from protected groups are in fact associated with stereotypes about those groups or otherwise based on unlawful discrimination. Therefore, this legislation designates several justifications as presumptively invalid and provides a remedy for both conscious and unconscious bias in the use of peremptory challenges.”).

<sup>40</sup> “Bringing together a diverse group of jurors with different life experiences and insights not only preserves ‘the right to trial by a jury drawn from a representative cross-section of the community’ but also helps to achieve impartiality.” *Andujar*, 247 N.J. at 296-97 (quoting

Professor Rose concludes, “Judges in New Jersey use cause challenges with remarkable frequency.”<sup>41</sup> They account for the removal of “over half of all venire persons” in criminal cases and “for just under 40% of the exists from [civil] jury service.”<sup>42</sup> As noted above, Professor Rose “effectively found no relationship between a juror’s racial or ethnic background and the likelihood that that person would be dismissed through a challenge for cause.”<sup>43</sup> She also posits that “in all likelihood, judges’ willingness to be generous in excusing people for cause facilitates” attorneys’ infrequent use of all their peremptory challenges.<sup>44</sup> Her data do not tell us, however, whether cause challenges are an unexamined source of discrimination, in effect, a shadow peremptory challenge system. This is especially so because Professor Rose’s analysis did not investigate individual for-cause challenges, that is, the grounds on which the challenges were made and granted and on which they were affirmed on appeal. There is compelling evidence that for-cause challenges are as intertwined with race discrimination as peremptory strikes.<sup>45</sup>

Leaving the decision of who serves on juries solely in the hands of judges will not significantly reduce discriminatory jury selection, much less eliminate it. The bench remains overwhelmingly white.<sup>46</sup> *Batson*’s failure illustrates what the social science evidence establishes: judges are no more impervious than attorneys to conscious and unconscious racial bias.<sup>47</sup> While the status quo reflects the accuracy of Justice Marshall’s foresight, it also demonstrates a failure of judicial will.<sup>48</sup> The New Jersey Judiciary should act to ensure that criminal defendants, who

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*Gilmore*, 103 N.J. at 524-25); see also *Wheeler*, 538 P.2d, at 755, 761 (acknowledging the diversity of groups to which jurors “in our heterogenous society” belong; agreeing that it is “unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups”; and concluding that “overall impartiality” is achieved by “the representation of a variety of such groups on the jury”).

<sup>41</sup> *New Jersey Final Report*, *supra* note 11, at 85 (emphasis omitted).

<sup>42</sup> *Id.* at 85-86.

<sup>43</sup> *Id.* at 82 (emphasis omitted).

<sup>44</sup> *Id.* at 80.

<sup>45</sup> See generally, Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 Mich. L. Rev. 785 (2020);

<sup>46</sup> Janna Adelstein & Alice Bannon, [State Supreme Court Diversity -- 2021 Update](#), Brennan Ctr. for Justice (April 2021) (finding that “across all state high courts, just 17 percent of justices are Black, Latino, Asian American or Native American,” although “people of color make up almost 40 percent of the U.S. population”); New Jersey Supreme Court Committee on Minority Concerns, [2017-2019 Report](#), 33 (Tbl.1) (reporting that, as of 2019, there were no Black or Asian American justices and there was one Latinx justice on the New Jersey Supreme Court; Black members comprised 8.8% of the Appellate Division and Latinx members comprised 5.9%, with no Asian-American members; 8.9% of the Superior Court, Trial Division judges were Black, 6.8% were Latinx, and 1.3% were Asian American).

<sup>47</sup> See Bennett, *supra* note 34.

<sup>48</sup> See, e.g., *People v. Chism*, 58 Cal. 4th 1266, 324 P.3d 183, 245 (Cal. 2014) (Liu, J., concurring and dissenting) (observing that the California Supreme Court’s *Batson* jurisprudence . . . leaves



are predominantly men and women of color, can participate meaningfully in the selection of their juries and that the explicit and implicit barriers to jury service for men and women of color are removed.

Thank you for the opportunity to provide these comments. I would be pleased to answer any questions.

Sincerely,



Elisabeth Semel

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one to wonder whether any circumstance, short of an outright admission by the prosecutor will ever suffice to prove a violation”) (citation omitted); *State v. Saintcalle*, 178 Wash. 2d 34, 309 P.3d 326, 335 (Wash. 2013) (en banc), *abrogated on other grounds by City of Seattle v. Erickson*, 188 Wash. 2d 721, 398 P.3d 1124 (Wash. 2017) (“In over 40 cases since *Batson*, Washington appellate courts have *never* reversed a conviction based on a trial court’s erroneous denial of a *Batson* challenge.”); *Whitewashing the Jury Box*, *supra* note 1, at 23-24 (showing that over a 30-year period, the California Supreme Court found *Batson* error in 2.1% of the cases and that the state courts of appeal found error in 2.6% of the cases); *id.* at 52-65 (analyzing the California Supreme Court’s resistance to vigorous enforcement of *Batson*); *see also*, Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina’s Remarkable Appellate Batson Record*, 94 N.C. L. Rev. 1957, 1962-63 (2016) (examining published opinions and revealing that it had been 30 years since the North Carolina Supreme Court found a *Batson* violation); Jeffrey Bellin & Junichi P. Semitus, *Widening Batson’s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1075, 1092 (2011) (reviewing 269 federal civil and criminal *Batson* decisions over a nine-year period, and finding that relief in the form of a new trial was granted in fewer than seven percent of the cases); *Illegal Racial Discrimination*, *supra* note 28, at 22 (observing that though it had decided the *Batson* claims of more than 100 defendants, Tennessee appellate courts “have never reversed a criminal conviction because of racial discrimination during jury selection”).