IN THE ARIZONA SUPREME COURT

In the Matter of:	)	
	)	Supreme Court No. R-20-0009
	)	
PETITION TO ADOPT	)	
ARIZ. R. SUP. CT. 24	)	
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Comment of American Civil Liberties Union Foundation of Arizona (ACLU of Arizona) and Arizona Attorneys for Criminal Justice (AACJ) in Support of Petition to Adopt Ariz. R. Sup. Ct. 24

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Pursuant to Rule 28(D), Rules of the Supreme Court, the American Civil Liberties Union Foundation of Arizona (ACLU of Arizona) and Arizona Attorneys for Criminal Justice (AACJ) respectfully submit this Comment in support of the Petition to Adopt Ariz. R. Sup. Ct. 24 related to jury selection.

I. The Proposed Rule Change is Necessary to Effectuate the Constitutional Guarantee of Racially Bias-Free Jury Selection

Almost two decades ago, this Court warned of the need to strengthen protections against racially discriminatory jury selection "lest *Batson*'s guarantee of equal protection become nothing more than empty words."[1] Since that time, however, courts in Arizona have failed to do so.[2] The proposed amendment to Rule 24 is a necessary first step toward accomplishing this goal in Arizona. This proposed rule provides detailed guidance to parties and courts by outlining the procedures for conducting a *Batson* inquiry while accounting for implicit bias that impacts even the most well-intentioned attorneys.[3] As modified, Rule 24 may help alleviate some of

[1] *State v. Cruz*, 175 Ariz. 395, 400 (1993) (adopting an "independent verification" requirement for any "wholly subjective" reason for a peremptory strike).
[2] *E.g.*, *State v. Gentry*, 247 Ariz. 381, ¶¶ 11-13 (App. 2019) (holding prosecutor's peremptory strike of "only remaining African-American juror did not violate *Batson*" and rejecting call to strengthen Arizona's *Batson* procedures), *review denied* January 7, 2020; *State v. Ybarra*, 2019 WL 2233299, ¶ 26 (mem., May 22, 2019) (holding prosecutor's peremptory strike of only African-American juror did not violate *Batson*), *review denied* March 3, 2020.
[3] *See* Stephanie Russell-Kraft, "Lawyers Are Uniquely Challenging Audience for Anti-Bias Training," BLOOMBERG LAW (May 13, 2019), *available at:* https://news.bloomberglaw.com/us-law-week/lawyers-are-uniquely-challenging-audience-for-anti-bias-training.

the racial disparities in Arizona's criminal legal system and will begin to fulfill *Batson*'s promise of eliminating the discriminatory use of peremptory challenges. Moreover, amendments to court rules such as this are contemplated under *Batson* and similar amendments have proven successful in other states.[4]

a. Racial Disparities Continue to Plague Arizona's Criminal Legal System

Arizona courts are tasked with providing "justice for all."[5] Yet Arizona's criminal legal system is plagued by racial disparities. Arizona has the highest rate of imprisoned Latinos and the sixth highest rate of imprisoned Black persons in the nation.[6] Such racial disparities wreak havoc on communities of color.[7] From increased harassment by police[8] to arrest rates,[9] from pre-trial detention rates[10] to

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[4] *See* Wash. Gen. R. 37 (2018).

[5] Supreme Court of Arizona, Justice for All: Report and Recommendations of the Task Force on Fair Justice for All: Court-Ordered Fines, Penalties, Fees, and Pretrial Release Policies, p. 13 (2016).

[6] The Sentencing Project, *The Color of Race and Justice: Racial and Ethnic Disparity in State Prisons* (Jun. 14, 2016), *available at:* https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.

[7] *See e.g.* Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 6-7, 13, 16-19 (The New Press) (2010); Chris Hayes, A Colony in a Nation 23, 32-39 (W. W. Norton and Co.) (2017).

[8] *See* Philip Bump, *The Facts About Stop-and-Frisk in New York City*, Wash. Post, Sep. 26, 2016, *available at*: https://www.washingtonpost.com/news/the-fix/wp/2016/09/21/it-looks-like-rudy-giuliani-convinced-donald-trump-that-stop-and-frisk-actually-works/?utm_term=.298d46a6863f.

[9] Christopher Hartney & Linh Vuong, *Created Equal: Racial and Ethnic Disparities in the US Criminal Justice System*, National Council on Crime and Delinquency, 2009, at 3, *available at*: http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf.

[10] Pretrial Justice Institute, "Race and Bail," *available at*: http://projects.pretrial.org/racialjustice/.

sentencing outcomes,[11] the statistics on racial disparities confirm that justice is not equal for all.

In Arizona, sentencing disparities are particularly troublesome. Overall, communities of color in Arizona experience imprisonment at higher rates than white people.[12] In 2017, Latinos made up 31% of Arizona's population, but 37% of those imprisoned.[13] Black people made up 5% of the state's population, but comprised 13% of the prison population.[14] White people, on the other hand, made up 55% of the overall state population but only 40% of the prison population.[15] In addition to the "stark differences" in who is sent to prison, there are also racial and ethnic disparities in how much time people spend in prison.[16] After controlling for gender, offense type, and the number of prior felonies, Black people receive the longest average prison sentences in Arizona.[17] Such disparities have wide-ranging effects that "touch the entire community."[18]

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[11] *See* The Sentencing Project, *supra* note 3; Brandon L. Garrett, End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice 1147-49,192 (Harvard University Press) (2017) (discussing racial disparities in capital sentencing and execution rates).

[12] FWD.us, *Arizona's Imprisonment Crisis: Part 2, The Cost to Communities*, Nov. 2018 at 10-16, *available at*: https://36shgf3jsufe2xojr925ehv6-wpengine.netdna-ssl.com/wp-content/uploads/2018/11/PART-2-The-cost-to-communities-1.pdf.

[13] *Id.* at 10.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 13-14.

[17] *Id.* at 13.

[18] *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

Although the problems of racial disparities and racial discrimination in the criminal legal system do not begin nor end with proper jury selection, juries provide a functional and symbolic bulwark against the misuse of government power. Indeed, "[i]t is the jury that is a criminal defendant's fundamental protection of life and liberty against race or color prejudice."[19] For these reasons, it is urgent that Arizona strengthens the process of effectuating the constitutional guarantee of racially bias-free jury selection by amending Rule 24.

b. *Batson* Provides an Inadequate Framework for Ensuring Racially Bias-Free Jury Selection

The United States Supreme Court held in *Batson* that the Equal Protection Clause of the Fourteenth Amendment is violated when the government exercises peremptory strikes in a discriminatory manner.[20] In evaluating whether a prosecutor struck a juror for discriminatory reasons, a reviewing court engages in a three-step process:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.[21]

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[19] *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880).
[20] 476 U.S. at 85-68.
[21] *Snyder v. Louisiana*, 552 U.S. 472, 476-77 (2008) (citing *Miller-El v. Dretke*, 545 U.S. 231, 277 (2005)).

Unfortunately, the procedures established in *Batson* have failed to protect against racial discrimination in jury selection. Numerous studies have shown that *Batson*'s "guarantee of equal protection [has] become nothing more than empty words."[22] One study examined "all opinions and orders between January 1, 2000, and December 31, 2009, in which a federal court evaluated a race-based *Batson* challenge in either a civil or criminal case …," which equated to 269 decisions. [23] The study concluded that reviewing federal courts granted new trials in only 6.69% of cases reviewed and rejected *Batson* claims entirely in 85.1% of cases.[24]

This is not surprising, given the "charade that has become the *Batson* process" in the criminal context, which allows prosecutors to

> provide the trial court with a series of pat race-neutral reasons for exercise of peremptory challenges. Since reviewing courts examine only the record, we wonder if the reasons can be given without a smile. Surely, new prosecutors are given a manual, probably entitled, "Handy Race-Neutral Explanations" or "20 Time-Tested Race-Neutral Explanations." It might include: too old, too young, divorced, "long, unkempt hair," free-lance writer, religion, social worker, renter, lack of maturity, improper demeanor, unemployed, improper attire, juror lived alone, misspelled place of employment, living with girlfriend, unemployed spouse, spouse employed as school teacher, employment as part-time barber, friendship with city council member, failure to remove hat, lack of community ties, children

[22] *Cruz*, 175 Ariz. at 400.
[23] Jeffery Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1975, 1092 (2011).
[24] *Id.*

> same "age bracket" as defendant, deceased father, and prospective juror's aunt receiving psychiatric care.[25]

The "race-neutral" justifications courts have accepted at *Batson*'s second step are as numerous as they are laughable. Such justifications need not be "persuasive, or even plausible,"[26] and can include inappropriate dress, physical appearance, age, body language, attitude, lack of family contact, and living in an area consisting predominantly of apartment complexes.[27]

Arizona courts have failed to reject the use of peremptory strikes for similar reasons. The Arizona Supreme Court has rejected *Batson* challenges in cases where a prosecutor struck Black jurors for looking "stern" and "angry," failing to make eye contact with prosecutors, and being "sympathetic" to drug users.[28] The court has also accepted having family members with prior felony convictions and having a "blended" family as acceptable race-neutral justifications for a peremptory strike.[29] Finally, Arizona courts have found "antipathy toward police alone may constitute a valid reason to strike jurors when the State's case relies on police testimony."[30]

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[25] *People v. Randall*, 283 Ill.App.3d 1019, 1025-26 (1996).
[26] *State v. Lucas*, 199 Ariz. 366, ¶ 7 (App. 2001) (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995).
[27] *Randall*, 283 Ill.App.3d at 1025; Kyle C. Barry, *Prosecutors' 'O.J. Simpson question' and the case against peremptory strikes*, The Daily Appeal (Mar. 5, 2020), https://mailchi.mp/theappeal/daily-appeal-347787?e=f12f515f5c.
[28] *State v. Gay*, 214 Ariz. 214, 220-21, ¶ 18-19 (App. 2007).
[29] *Gentry*, 247 Ariz. 381, ¶11-12.
[30] *State v. Roque*, 213 Ariz. 193, ¶ 15 (2006), *overruled on other grounds by State v. Escalante-Orozco*, 214 Ariz. 254, ¶ 13-15 (2017).

Many of these excuses have historically been tied to the life experiences of jurors of color. If such pat excuses can extinguish an allegation of racial discrimination in jury selection, *Batson* is surely not working as it was intended. By adopting the proposed amendment to Rule 24, this Court will be taking a much-needed step towards ending the "charade" that has become the *Batson* process by helping ensure that race-based peremptory challenges become a thing of the past.

c. *Batson* Allows States to Adopt Procedures to Better Effectuate the Constitutional Guarantee of Racially Bias-Free Jury Selection

The Supreme Court has left it to state courts to create their own procedures "to be followed upon a defendant's timely objection to a prosecutor's challenge."[31] Indeed, the Supreme Court made "no attempt to instruct" state or federal courts about how they should implement the Court's ultimate holding in *Batson*.[32] Thus, courts have taken this opportunity to devise a variety of approaches to better combat racially biased jury selection.[33]

Washington is one state that has taken a necessary step to better combat racial discrimination in jury selection. In 2018, Washington adopted General Rule 37, which is virtually identical to the proposed amendment to Rule 24. Like this

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[31] *Batson*, 476 U.S. at 99.
[32] *Id*.
[33] *Cruz*, 175 Ariz. at 397-98 (acknowledging that "many state and federal cases since *Batson* have extended its application"); *State v. Urrea*, 244 Ariz. 443, ¶¶ 11-16 (acknowledging that "the trial court plays a 'pivotal role' in the *Batson* process" and noting the variety of approaches state courts have taken in the *Batson* context).

proposed rule change, Washington's adoption of General Rule 37 was aimed at eliminating both implicit and intentional racial bias in jury selection and was adopted after extensive review and study through the Washington Supreme Court's Minority Justice Symposium.[34] As in Washington, the adoption of this rule change in Arizona is necessary to protect the right of the criminally accused to a fair and impartial jury selection process.[35]

Importantly, the adoption of this rule change will also protect the rights of jurors to serve, as "[p]eople excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion."[36] Moreover, adoption of this rule change will build public confidence in the fairness of our courts and our system of justice. As the Supreme Court has repeatedly observed, "[r]ace discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system, and prevents the idea of democratic government from becoming a reality."[37] For these reasons, Arizona should join Washington in adopting this necessary rule change.

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[34] Proceedings of the Washington Supreme Court's Minority Justice Symposium are available here: https://www.tvw.org/watch/?eventID=2017051090.
[35] *See State v. Superior Court (Gardner)*, 157 Ariz. 541, 545-46 (1988) (finding the constitutional guarantee of trial by jury supports courts in applying "the *Batson* principle … to situations going beyond *Batson*'s specific facts….").
[36] *Carter v. Jury Commission*, 396 U.S. 320, 329 (1970).
[37] *Rose v. Mitchell*, 443 U.S. 545, 556 (1979).

II. Conclusion

Additional, more robust protections are needed to prevent race-based discrimination in jury selection in Arizona. The proposed adoption of Rule 24 is a first step in realizing the constitutional guarantee to racially bias-free jury selection and should be adopted.

Respectfully submitted, this 6th day of April 2010.

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