

Honorable Charles W. Gurtler, Jr., Presiding Judge
Superior Court in Mohave County
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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of:

PETITION TO AMEND RULES 18.4)
AND 18.5 OF THE ARIZONA RULES) Supreme Court Number
OF CRIMINAL PROCEDURE AND) R-21-0020
RULE 47(e) OF THE ARIZONA RULES)
OF CIVIL PROCEDURE) Comment of the
) Committee on Superior Court
_____)

The Committee on Superior Court (“COSC”) has authorized the Honorable Charles W. Gurtler, Jr., chair, to file this comment in support of Petition R-21-0020 on its behalf. COSC conducted a special meeting on April 2, 2021, to address various rule petitions. By a vote of eleven in support, four opposed, and three abstaining, a majority of COSC members support adoption of Petition R-21-0020 because eliminating peremptory jury strikes will help eliminate discrimination in jury selection and will make juries more representative of the communities in which they sit.

At its April 2 meeting, COSC discussed both Petition R-21-0020 and Petition R-21-0008, which also addresses jury selection. While a majority voted to support Petition R-21-0020, this comment reflects both the majority view and the view of those who oppose Petition R-21-0020. The committee voted unanimously (with four abstentions) to oppose Petition R-21-0008 as an unworkable solution. (COSC has filed a separate comment on Petition R-21-0008.)

Juries serve many functions. They find facts, make judgments about people's conduct, and engage in group decision-making. They also serve as a kind of surrogate for the larger community. When a jury renders a verdict, it is not just eight or twelve people declaring guilt, innocence, or liability. It is the justice system.

Public trust and confidence in that system require that juries fairly represent the communities from which they come. The drawback of the peremptory strike is not just its potential for intentional discrimination, or even the potential for unconscious bias to affect which jurors are stricken. It is that peremptory strikes can and often do result in juries that do not fairly reflect their communities. Eliminating the peremptory strike would be a significant step toward making juries more representative and the jury selection process more fair.

Petition R-21-0020 and competing Petition R-21-0008 present strong evidence of how peremptory strikes have been misused and have resulted in juries

that are not representative. If the makeup of juries tends to skew one way, it creates an understandable perception that they are not juries of one's peers, but rather juries of one group sitting in judgment on another. Of course, no jury will be perfectly representative. But differences resulting from the randomness of jury summonses are not the same as disparities resulting from the lawyers' tactical decisions.

Eliminating peremptory strikes also dispenses with the guesswork required when trial judges must scrutinize lawyers' motives or the effect of race or ethnicity on the exercise of strikes. With no peremptory strikes, judges need not decide whether lawyers have discriminatory intent or their rationale is legitimate or pretextual. They need not decide whether—as the rule proposed in Petition R-21-0008 would require—one could view a juror's race, ethnicity, or other status as a “conscious or unconscious factor” in a strike. And the Supreme Court need not decide which groups or personal characteristics are impermissible bases for exercising strikes or which seemingly neutral bases tend to reflect unconscious bias or have a discriminatory effect. Eliminating peremptory strikes takes all these considerations out of the equation.

The peremptory strike does have value in jury selection, and eliminating it will come at a cost. Lawyers will lose a tool they have come to rely upon for jury selection. And courts will likely see an increase in litigation over strikes for cause.

But the majority of COSC members believe the importance of ensuring that juries fairly reflect their communities outweighs these concerns.

In dissent, four committee members voted that the committee should not support Petition R-21-0020. The dissent contends that with its decision in *Batson*, the United States Supreme Court gave our trial courts a mechanism to prevent improper use of peremptory challenges on the basis of race. The dissent concludes that a procedure approved by the United States Supreme Court and which has been in use for 30+ years should not be negated by a process that involves a rule change as opposed to full judicial review of an adequate record.

The dissent notes that the record of appellate rulings on *Batson* in Arizona, rather than being interpreted as proof that the process is ineffective as suggested in the petition, can and should be interpreted as an indicator that Arizona trial judges are applying the rule properly and effectively. The dissent contends that the procedure proposed in the petition would take from all defendants, including minority defendants, the only tool they have to protect themselves from panel members who have hidden biases or agendas and recognize that they will not be struck for cause as long as they use the magic words that they can be fair and unbiased.

The dissent contends that the petition's suggestion that appellate litigation would be reduced by banning peremptory strikes is a flawed argument because

Batson challenges are rare, while for-cause challenges occur in almost every trial on multiple occasions and will be even more common if the use of the peremptory strike system is abandoned. Along those lines, the dissent also suggests that the petition's claim that fewer jurors will have to be summoned ignores the fact that there will likely be many more jury panel members being challenged and being excused for cause, resulting in an on going need for replacement jurors.

For the reasons stated above, COSC respectfully asks the Court to adopt Petition R-21-0020.

Submitted this _____ day of April, 2021.

/s/
Honorable Charles W. Gurtler, Jr.,
Presiding Judge
Superior Court in Mohave County