

The judges in the Mohave County Superior Court submit, unanimously, this comment in opposition of Petition R-21-0008. The rules proposed are designed to remedy the alleged ineffective procedures resulting from the United States Supreme Court decision in *Batson v. Kentucky* (1986), which prohibits a party from exercising a peremptory strike in a racially discriminatory manner. The proposed new rule prohibits the exercise of a peremptory challenge based on a prospective juror's membership in any discriminatory protected group to include "sex, gender, religion, national origin, disability, age, and sexual orientation." The proposed rule requires the striking party to provide the reason why the party used the peremptory strike and, thereafter, the court must determine "whether any reasonable person could view race or other protected status as a motivation for exercising the strike." The court must evaluate the reason for the strike "in light of the totality of the circumstances." The proposed rule further allows the court to consider several specified circumstances, although not limited to, "whether a party failed to ask a juror about the stated reason for the challenge, whether the striking party asked more or different questions of the challenged juror than other jurors, and whether the stated reason would apply to similarly situated jurors who were not challenged." The proposed rule lists reasons that are "presumptively invalid" for striking a juror to include, "previous unfavorable experiences with police officers; having a close relationship with someone who has been stopped, arrested, or convicted of a crime; living in a high-crime neighborhood; having a child outside of marriage; receiving state benefits; and not being a native English speaker." The proposed rule further identifies conduct of a prospective juror that has "historically been associated with improper discrimination in jury selection" to include, "a prospective juror being sleepy or inattentive, staring or failing to make eye contact, exhibiting a problematic attitude, body language, and unintelligent or confused answers." The proposed rule requires a party who intends to make a challenge for one of these reasons to notify the court in order to allow the court to verify and corroborate the reason. The proposed rule requires the court to sustain an objection to a strike if a reasonable person could view the strike as emanating from status-based bias and the trial court must explain its ruling on the record.

Petition R-21-0008 is impracticable. Virtually all prospective jurors are members of the "protected group" which suggests all peremptory strikes will be motivated for inappropriate reasons. Each time a party exercises a peremptory strike the party will be required to specifically explain the reason for the strike. Every strike will be challenged. It is simply not pragmatic to conduct a hearing after each strike. Further, the proposed rule requires the court to evaluate, under the totality of the circumstances, whether any reasonable person could view race or a protected class as a motivation for exercising the strike. This a very subjective standard and requires the court to focus less on the actual reason for the strike and focus more on a "reasonableness" standard, perhaps ignoring a legitimate reason for a peremptory strike. Further, in practice, is not practicable for a party

to give the trial judge advance notice that the party intends to exercise a peremptory strike to allow the judge, simultaneously, to verify and corroborate the reason.

The Mohave County Superior Court further rejects the proposition that *Batson* is “widely recognized as a failure” in mitigating a party’s use of peremptory challenges to intentionally strike prospective jurors based on race. Arizona has set forth a very specific and workable protocol for the trial court to follow if a party objects to a peremptory strike based on *Batson*. *State v. Porter*, 248 Ariz. 392, 460 P.3d 1276 (App. 2020). In practice, this an easy, uncomplicated, method which effectively assures that a peremptory strike was not exercised in a racially discriminatory manner.

For the reasons stated, the Mohave County Superior Court unanimously opposes Petition R-21-0008.