

Central Arizona National Lawyers Guild
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IN THE ARIZONA SUPREME COURT

IN THE MATTER OF:

PETITION TO AMEND THE RULES
18.4 AND 18.5 OF THE ARIZONA
RULES OF CRIMINAL PROCEDURE
AND RULE 47(e) OF THE ARIZONA
RULES OF CIVIL PROCEDURE

SUPREME COURT NO. R-21-0020

COMMENT OF THE CENTRAL
ARIZONA NATIONAL LAWYERS
GUILD OPPOSING THE
ABOLITION OF PEREMPTORY
STRIKES

Pursuant to Rule 28(e) of the Rules of the Supreme Court of Arizona, the Central Arizona National Lawyers Guild (Central AZ NLG), respectfully submits this comment opposing R-21-0020. The abolition of preemptory strikes will undermine the legitimacy of Arizona's jury trials and it will do nothing to eliminate explicit and implicit bias from the jury selection process. This Court should reform their use, not abolish them.

I. STATEMENT OF INTEREST

The Central Arizona National Lawyers Guild is a local chapter of the National Lawyers Guild located in the greater Phoenix metropolitan area.

The National Lawyers Guild (NLG) is the nation's oldest and largest progressive bar association and was the first one in the US to be racially integrated. Our mission is to use law for the people, uniting lawyers, law students, legal workers, and jailhouse lawyers to function as an effective force in the service of the people by valuing human rights and the rights of ecosystems over property interests. This is achieved through the work of our members and the Guild's numerous organizational committees, caucuses and projects, reflecting a wide spectrum of intersectional issues. Guild members effectively network and hone their legal skills in order to help create change at the local, regional, national, and international levels.

The NLG is dedicated to the need for basic change in the structure of our political and economic system. Our aim is to bring together all those who recognize the importance of safeguarding and extending the rights of workers, women, LGBTQ people, farmers, people with disabilities, and people of color, upon whom the welfare of the entire nation depends; and those who seek actively to eliminate racism; who work to maintain and protect our civil rights and liberties in the face of persistent attacks upon them; and who look upon the law as an instrument for the protection of the people, rather than for their repression.

The proposal to abolish peremptory strikes, although well-intentioned, fails to directly address the harms caused by explicit and implicit bias during jury selection. If implemented, litigants in civil and criminal trials will be denied a meaningful opportunity to select the jurors who will hear their case. The proposal also fails to acknowledge the institutional history of the judiciary itself in preventing both explicit and implicit bias through all phases of litigation. Without an expanded requirement for a voir dire process that mandates that trial judges conduct the proceedings in a manner that enables the litigants to uncover bias, the abolition of peremptory strikes will lead to more unjust trials filled with jurors who harbor discriminatory animus toward the litigants.

II. THE ABOLITION OF PEREMPTORY STRIKES WILL UNDERMINE CONFIDENCE IN THE FAIRNESS OF JURY TRIALS --- REFORM WILL IMPROVE IT.

The abolition of peremptory strikes will undermine the confidence in Arizona's jury trials without adequately addressing the issue of explicit or implicit bias. Reform that acknowledges role implicit bias plays in our courts will burnish the legitimacy of the judiciary while protecting the rights of litigants.

A. The historical purpose of peremptory strikes is to promote the legitimacy of the jury trials by giving litigants a say in who will judge the facts.

The Petition acknowledges that “public confidence is the currency of the judicial system.” (Petition at 13). Yet it fails to acknowledge that the core purpose

of the peremptory strike is not “designed to *make* juries unbiased. Rather, the purpose of the peremptory challenge was to help ensure the legal system did not seem to be biased, as ‘to perform its high function in the best way ‘justice must satisfy the appearance of justice.’” Erik J. Girvan, Robert J. Cramer, Caroline Titcomb, Tess M.S. Neal, Stanley L. & Brodsky, The Propriety of Peremptory Challenges for Perceived Personality Traits, 37 Law & Psychol. Rev. 49, 54 (2013) (quoting Swain v. Alabama, 380 U.S. 202, 219 (1965) (quoting In re Murchison, 349 U.S. 133, 136 (1955)), overruled by Batson v. Kentucky, 476 U.S. 79 (1986)). “Social scientific research supports the notion that litigants who perceive the justice system as procedurally fair are more willing to support it, even when they lose a case” Id at fn 27 (citing Allan Lind & Tom R. Tyler, The Social Psychology of Procedural Justice, (1988)).

B. The state and criminal defendants are not on equal footing, and the abolition of peremptory strikes for criminal defendants exacerbates the unequal power held by the state in criminal trials.

The Petition acknowledges that, historically, criminal defendants were entitled to peremptory strikes whereas the prosecution was not. Petition at 5. The government has no peers. But a survey of the Arizona judiciary would likely establish a disproportionate number of former prosecutors on the bench. See, e.g., Sarah Fair George, There Are Too Many Prosecutors On The Bench. Take It From Me, A Prosecutor. THEAPPEAL.ORG (Jan. 08, 2021). Perhaps this is why the Petition

finds it to be “odd” that the government would “would have less access (or no access at all) to the device of peremptories.” Petition at 5.

The scholarship criticizing Batson’s failure to remedy discrimination during jury selection is focused on the prosecution’s improper use of discriminatory strikes. Collin P. Wedel, Twelve Angry (and Stereotyped) Jurors: How Courts Can Use Scientific Jury Selection to End Discriminatory Peremptory Challenges, 7 Stan. J. Civ. Rts. & Civ. Liberties 293, 309 (2011)

The studies cited by the Petition suggesting that criminal defendants act in a discriminatory manner by striking white jurors misses the mark while reflecting a crucial misunderstanding of the interplay between race and power. Many white jurors hold racist views that are difficult to discern. Justice O’Connor explained “It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence.” Georgia v. McCollum, 505 U.S. 42, 68 (1992 (O’Connor, J., dissenting) (citing Developments in the Law—Race and the Criminal Process, 101 Harv.L.Rev. 1472, 1559–1560 (1988); Colbert, Challenging the Challenge: Thirteenth Amendment as a Prohibition against the Racial Use of Peremptory Challenges, 76 Cornell L.Rev. 1, 110–112 (1990)).

Furthermore, given the over-representation of white jurors and the under-representation of people of color on jury panels, the Petition’s assertion that

abolishing peremptory challenges is a fair and even-handed approach ignores the institutional history of over-representation of white jurors in criminal cases. See Ashish S. Joshi and Christina T. Kline, Lack of Jury Diversity: A National Problem with Individual Consequences, American Bar Association (Sept. 01, 2015).

Abolishing peremptory strikes will do nothing to remedy this problem; indeed, it will deprive the accused in criminal cases, who are also disproportionately people of color because of discriminatory policing and prosecution policies, of the only tool available to them to participate in a system widely viewed as rigged against them from the start. *See, e.g.*, John Gramlich, From police to parole, black and white Americans differ widely in their views of criminal justice system. FACTANK: News in Numbers (May 21, 2019).

C. Jurors are not reliable self-reporters of bias, and judges are more concerned with efficiency than fairness during jury selection.

Other comments opposing the abolition of peremptory strikes note that the voir dire process is simply inadequate to root out juror bias. (*See* Comments of Brian Snyder, Tim Casey, James Schoppman, William H. Sandweg III, R-21-0020). These concerns are borne out by scholarship on juror bias. *See* Gary Moran & Brian L. Cutler, The Prejudicial Impact of Pretrial Publicity, 52 *Guild Prac.* 1, 15 (1995), Patterson, Arthur H. and Neuffer, Nancy L. Removing Juror Bias by Applying Psychology to Challenges for Cause, *Cornell Journal of Law and Public Policy*: Vol. 7: Iss. 1, Article 6 (1997); David C. Baldus et al., The Use of Peremptory Challenges

in Capital Murder Trials: A Legal and Empirical Analysis, 3 U.P.A. J. Const. L. 3 (2001) ; Mikah K. Thompson, Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom, 2018 Mich. St. L. Rev 1243,1277-1285 (2018)

D. The institutional history of the judiciary is replete with discriminatory animus toward people of color, the LGBTQ community, the disabled, and members of various religions. This proposal permits that history to continue.

The Petition asserts that the “primary tool by which [...] discrimination is practiced [in jury trials] is the peremptory strike.” Yet, the Petition does not address why the existing Batson regime fails to remedy this problem. Instead, the Petition embraces the scholarship reflected in the Batson Working Group’s separate petition seeking to reform the Batson process. The BWG petition, however, acknowledges that trial judges play a large role in perpetuating Batson’s failure based on their unwillingness to find that an attorney subjectively possessed a discriminatory intent, acted on the discriminatory intent, and then took measures to mask or conceal the discriminatory intent. *See* Petition, [R 21-008](#) at 5-6.

The abolition of peremptory strikes will only extend more power to trial judges who are unwilling or too uncomfortable to remedy discrimination in jury selection.

History tells us that this discomfort or disinclination to remedy discrimination may be rooted in the explicit or uncovered biases of the judiciary.

Consider the following statements of the United States Supreme Court:

A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude.

Plessy v. Ferguson, 163 U.S. 537, 543 (1896), overruled by Brown v. Bd. of Ed. of Topeka, Shawnee County, Kan., 347 U.S. 483 (1954)

.....

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Muller v. State of Oregon, 208 U.S. 412, 421 (1908)

.....

Although sedentary, industrious, and disposed to peace, they [Pueblo] are Indians in race, customs, and domestic government, always have lived in isolated communities, and are a simple, uniformed people, ill-prepared to cope with the intelligence and greed of other races.

United States v. Candelaria, 271 U.S. 432, 441–42 (1926)

.....

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it

could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.

Buck v. Bell, 274 U.S. 200, 2070 (1927)

.....

Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. . . Blackstone described “the infamous *crime against nature*” as an offense of “deeper malignity” than rape, a heinous act “the very mention of which is a disgrace to human nature,” and “a crime not fit to be named.”

Bowers v. Hardwick, 478 U.S. 186, 196 (1986 (Burger, C.J., concurring) (Internal citations omitted)), overruled by Lawrence v. Texas, 539 U.S. 558, (2003)

Plessy, Muller, Candelaria, Buck, and Bowers provide a disturbing snapshot depicting generations of *de jure* discrimination in the institutions of our courts. Efforts to reform the institutional legacy established by cases such as these require procedures which empower those who have dehumanized with tools aimed at achieving equity. Rather than abolish peremptoriness, this Court should reform their use so that the historical imbalance and unfairness can be corrected.

E. Reform, not abolition, will promote confidence in the judiciary and ensure the fairness of jury trials.

The abolition of peremptory strikes is too extreme an act aimed at avoiding squarely addressing discrimination in jury selection.

The proposal set forth by the Batson Working Group is sensible, tested, and workable. There is no risk of harm to litigants because the outcome of a successful objection under the Batson Working Group's proposed rule is the seating of a qualified juror. *See* Proposed Rule 24(c), Ariz.R.Sup.Ct. [R-21-0008](#). On the other hand, should peremptory strikes be abolished, the result of a trial judge's refusal to strike a juror for cause will be a retrial since such error may not be remedied by the use of a peremptory strike. *See State v. Hickman*, 205 Ariz. 192 (2003) (requiring use of peremptory strike to cure erroneous denial of motion to strike juror for cause).

Contrary to the Committee on Superior Court's speculative assertion that the BWG proposal is "unworkable," the record in Washington and the literature on implicit bias training establishes that judges can be trained to recognize implicit bias. *Compare* Hon. Charles W. Gurtler, JR. [Comment on R-21-008](#) *with* Pamela M. Casey et al., Addressing Implicit Bias in the Courts, 49 Ct. Rev.. 64 (2013); Pamela M. Casey et al., Helping Courts Address Implicit Bias: Resources for Education (2012); Jerry Kang et al., Implicit Bias in the Courtroom, 59 UCLA L. Rev. 1124 (2012).

By expressly acknowledging the historical shortcomings of the judiciary to root out bias in our courts and setting forth a test which embraces a collective inquiry into the unspoken but forceful discriminatory motivations of a litigant, reform, not abolition of peremptory strikes, will promote confidence in our justice systems. *See* Proposed Rule 24(a), Ariz.R.Sup.Ct. [R-21-0008](#)

III. CONCLUSION

Procedural fairness in jury selection is important. The use of peremptory strikes by litigants who have deep distrust of justice systems which were founded on the premise that they were not people, citizens, or otherwise worthy of participation in the judicial process ensures a sense procedural fairness that will be lost if peremptory strikes are abolished entirely.

The better approach is to take remedial action to ensure that qualified jurors are not discriminated against on conscious or unconscious grounds.

But if this Court wants to experiment with abolishing peremptory strikes, then it should consider abolishing their use by the prosecution in criminal cases only. The government has no peers, and the reason why Batson's failures resonate widely across our nation is because of discriminatory acts of prosecutors and the judiciary's refusal to remedy them.

Otherwise, this Court should retain the use of peremptory strikes but take remedial measures to strengthen their purpose in promoting legitimacy in jury trials

by ensuring that Batson's net is not so narrow that it only catches the unapologetically bigoted.

Respectfully submitted April 30, 2021.

CENTRAL ARIZONA NATIONAL LAWYERS GUILD

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