

1 ELLEN SUE KATZ, AZ Bar. No. 012214  
2 BRENDA MUÑOZ FURNISH, AZ Bar. No. 027280  
3 WILLIAM E. MORRIS INSTITUTE FOR JUSTICE  
3707 North Seventh Street, Suite 300  
4 Phoenix, Arizona 85014-5095  
5 (602) 252-3432  
6 eskatz@qwestoffice.net  
7 bmfurnish@qwestoffice.net

8 IN THE SUPREME COURT

9 STATE OF ARIZONA

10 PETITION TO AMEND THE RULES OF  
11 THE SUPREME COURT OF ARIZONA  
12 TO ADOPT RULE 24 – JURY  
13 SELCTION

Supreme Court No. R-21-0008

**COMMENTS IN SUPPORT OF  
PETITION TO AMEND THE RULES  
OF THE SUPREME COURT OF  
ARIZONA TO ADOPT RULE 24 –  
JURY SELECTION**

14 Pursuant to Rule 28 of the Rules of the Supreme Court, Community Legal  
15 Services (“CLS”), DNA People’s Legal Services (“DNA”), Southern Arizona Legal Aid  
16 (“SALA”) and the William E. Morris Institute for Justice (“Institute”) submit these  
17 comments in support of the Petition to Amend the Rules of The Supreme Court of  
18 Arizona to Adopt Rule 24 – Jury Selection. The Petition filed, by the State Bar’s Civil  
19 and Criminal Practice and Procedure Committees’ Batson Working Group, requests that  
20 the Court adopt a new Supreme Court rule to supplement the existing model for  
21 evaluating peremptory challenges to prospective jurors as outlined by *Batson v.*  
22 *Kentucky*, 476 U.S. 79 (1986). Under *Batson*, peremptory challenges cannot be used to  
23 intentionally strike prospective jurors based on their race. As explained in the Petition,  
24 *Batson* is severely limited and has largely failed to impact jury diversity or to prevent  
25 race-based challenges. The proposed rule attempts to remedy these shortcomings through  
26 several reforms, including expanding *Batson* to preclude intentionally striking potential  
27 jurors based on ethnicity, sex, gender, religion, national origin, disability, age, and sexual  
28 orientation in addition to race (Proposed Rule 24(a)), and requiring courts to look at the

1 “totality of the circumstances” when evaluating the given reasons for a peremptory strike  
2 (Proposed Rule 24(f)).

3 CLS, DNA, SALA and the Institute fully support the Petition and state the  
4 following:

5 **I. Statement of Interest**

6 CLS, DNA and SALA are federally funded civil legal services programs for low-  
7 income Arizonans. The legal services programs provide free legal help on a variety of  
8 matters to persons with a diverse background. The legal services programs understand  
9 the need to have juries reflect this diversity to promote fair and equitable judicial  
10 outcomes.

11 The Institute is a non-profit program established to advocate and litigate on behalf  
12 of the interests of low-income and other vulnerable Arizonans. The Institute works  
13 closely with the three federally funded legal services programs, other legal advocacy  
14 programs and community groups on a variety of issues, including ensuring that all  
15 persons have equal access to the legal system and the courts.

16 **II. *Batson*’s Failure to Impact Jury Diversity Can Lead to Disproportionate  
17 Incarceration Rates of African American and Latinx Persons**

18 *Batson* lays out a three-part test for challenging peremptory strikes: (1) the party  
19 challenging a peremptory strike must first show a prima facie case of intentional  
20 discrimination; (2) the striking party must then provide a “race-neutral” basis for the  
21 strike; and (3) the judge must then determine if the challenging party has established  
22 “purposeful discrimination.” *Batson*, 476 U.S. at 96-98. The Petition correctly explains  
23 that *Batson* places an extremely high bar on the challenging party and that it “has failed  
24 to bring equality to jury service” and that “[p]eremptory challenges are still often an  
25 excuse for bias, with group status – whether race, gender, religion, or otherwise – used to  
26 predict how jurors will decide.” Petition at 1. This weakens the legal system’s integrity  
27 and causes persons to distrust the courts. *Id.* The Petition lays out *Batson*’s historic  
28 failures and explains that most courts do not find any wrongdoing when *Batson*

1 objections are made. *Id.* at 3-4. Arizona courts are no different in this respect. The  
2 Batson Working Group evaluated 160 Arizona appellate decisions since 1987 and  
3 discovered that our courts only found *Batson* error in 4.4 percent of cases. *Id.* at 3. This  
4 low rate of finding error means that African American and Latinx jurors are much more  
5 likely to be stricken from juries than White jurors. The Petition explains that in Arizona,  
6 over 60 percent of unsuccessful *Batson* challenges involved the removal of African  
7 American or Latinx jurors. *Id.* at 5, Appendices D and E.

8 The Petitioners explain that *Batson's* failure to make juries more diverse can  
9 impact case outcomes. Petition at 3. The Petitioners use the recent Supreme Court  
10 decision in *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), to emphasize this point.  
11 Petition at 3. In *Flowers*, the Court reversed an African American defendant's conviction  
12 based on the prosecution's use of peremptory strikes to eliminate most of the prospective  
13 African American jurors over the course of six trials. *Flowers*, 139 S. Ct. at 2250.  
14 Nationwide, African American and Latinx defendants are disproportionately convicted  
15 and incarcerated at higher rates than White defendants. The National Association for the  
16 Advancement of Colored People ("NAACP") reports that African American and Latinx  
17 persons make up approximately 56 percent of incarcerated persons, despite only making  
18 up 32 percent of the U.S. population. NAACP, Criminal Justice Fact Sheet, <https://www.naacp.org/criminal-justice-fact-sheet/> (last visited Apr. 25, 2021). In Arizona, African  
19 Americans only make up 5.1 percent of the population but make up 14.6 percent of the  
20 prison population. Jerod MacDonald-Evoy, *Data Show Arizona's Racial Inequalities in*  
21 *Education, Poverty, Prisons*, AZ Mirror (June 10, 2020), <https://www.azmirror.com/2020/06/10/data-show-arizonas-racial-inequities-in-education-poverty-prisons/>. Similarly, Latinx persons make up 31.6 percent of the Arizona's population and  
22 make up 38.8 percent of the prison population. *Id.*

23  
24  
25  
26 Other group classifications, such as gender and disability, are also subject to  
27 disproportionate incarceration rates. For example, 60 percent of incarcerated persons  
28 have a disability. ACLU, Disability Rights, <https://www.aclu.org/issues/disability->

1 rights#current (last visited Apr. 25, 2021). Further, the imprisonment rate for African  
2 American women is twice that of White women, which also is an example of  
3 intersectional bias. NAACP, Criminal Justice Fact Sheet.

4 As the Petition and the above statistics show, *Batson* has failed and is in desperate  
5 need of reform.

### 6 **III. The Proposed Rule Will Address *Batson*'s Shortcomings**

7 The proposed rule reforms *Batson* to address some of its documented failings.  
8 First, the proposed rule expands *Batson* to include not just race but other group  
9 classifications: sex, gender, religion, national origin, ethnicity, disability, age and sexual  
10 orientation (Proposed Rule 24 (a)). As demonstrated above, different classification  
11 groups, in addition to race, are convicted and imprisoned at disproportionate rates. Often,  
12 these defendants are members of more than one group, leading to intersectional bias or  
13 discrimination. Second, the proposed rule gets rid of *Batson*'s requirement of showing  
14 intentional bias. The proposed rule states that its purpose is "to eliminate the unfair  
15 exclusion of potential jurors...whether based on conscious or unconscious bias."  
16 Proposed Rule 24(a). The proposed rule lessens the burden on the objecting party, who  
17 will only have to refer to the rule when making its objection. Proposed Rule 24(c).  
18 Third, the proposed rule will help reduce the use of pretextual reasons for invalid  
19 peremptory strikes. It requires courts to sustain an objection to a peremptory challenge if  
20 any reasonable person could view any of the protected classes as a conscious or  
21 unconscious factor in the use of the challenge, even if other legitimate reasons are also  
22 given. Proposed Rule 24(e). Fourth, the proposed rule allows courts to look beyond the  
23 reasons given by the party making the peremptory challenge. The proposed rule allows  
24 courts to look at the totality of the circumstances and consider several factors such as the  
25 number and type of questions asked of potential jurors, and whether other jurors not  
26 subject to a strike gave similar answers to questions the challenging party asked of the  
27 jurors they are trying to strike. Proposed Rule 24(f). Finally, the proposed rule  
28 recognizes the history of discrimination against certain groups of persons and lists several

1 presumptively invalid reasons for a peremptory strike as indicative of bias: having past  
2 unfavorable experiences with law enforcement officers; having a close relationship with  
3 people who have been stopped, arrested, or convicted of a crime; living in a high-crime  
4 neighborhood; having a child outside of marriage; receiving state benefits; and not being  
5 a native English speaker. Proposed Rule 24(g).

6 Taken as a whole, the proposed rule will correct *Batson*'s failing and make juries  
7 more diverse and representative of our community.

#### 8 **IV. The Proposed Rule is Needed and Courts Can Use It Effectively**

9 The judges in the Mohave County Superior Court submitted comments in  
10 opposition to the proposed rule. The judges state the rule is "impracticable" because  
11 "[v]irtually all prospective jurors are members of the 'protected group'" and "[e]very  
12 strike will be challenged." The judges also oppose the proposed rule's requirement for  
13 the court to sustain an objection if, considering the totality of the circumstances, a  
14 reasonable person could view any of the rule's protected classes as a conscious or  
15 unconscious factor in the use of the challenge, even if other valid reasons are also given.  
16 The judges state that this standard will require courts to ignore the true reason for the  
17 strike. Further, the judges disagree with the Petitioners and state that the *Batson* test is  
18 "an easy, uncomplicated, method which effectively assures that a peremptory strike was  
19 not exercised in a racially discriminatory matter."

20 CLS, DNA, SALA, and the Institute disagree with the judges' objections to the  
21 proposed rule. The classes identified and protected by the proposed rule cover particular  
22 sectors of the population who have historically been subject to discrimination in jury  
23 selection and in many other situations. Indeed, federal law recognizes those same groups  
24 as protected classes in several laws. *See e.g.*, Title VI of the Civil Rights Act of 1964, 42  
25 U.S.C. §§ 2000d et seq. (programs receiving federal financial assistance); Title VII of the  
26 Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (term, condition, or privilege of  
27 employment); Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601, et seq. (Fair  
28 Housing Act). As federal law recognizes, the groups protected by these laws are not

1 virtually everyone. Also, the proposed rule does not require courts to ignore the true  
2 reason for a peremptory strike. Rather, it requires courts to consider the totality of the  
3 circumstances surrounding the strike to eliminate the use of pretextual reasons. The  
4 courts are free to use their judicial discretion in sustaining an objection to a peremptory  
5 strike. Finally, *Batson* has failed in its original intentions. As the Petitioners explain,  
6 *Batson* has not made juries more diverse and the Petition proposes a jury selection  
7 method that will ensure a more fair and equitable legal system.

8 **V. Conclusion**

9 CLS, DNA, SALA, and the Institute request that the Court approve the Petition  
10 filed by the State Bar’s Civil and Criminal Practice and Procedure Committees’ Batson  
11 Working Group. The Petition seeks to adopt a new Supreme Court Rule 24 to  
12 supplement the existing model for evaluating peremptory challenges to prospective jurors  
13 as outlined by *Batson v. Kentucky*, 476 U.S. 79 (1986). The creation of new Rule 24 will  
14 help address past discriminatory practices and make juries more diverse and  
15 representative of our community. For these reasons, CLS, DNA, SALA and the Institute  
16 request the Court approve the Petition.

17 Respectfully submitted this 29<sup>th</sup> day of April 2021.

18 COMMUNITY LEGAL SERVICES  
19 DNA PEOPLE’S LEGAL SERVICES  
20 SOUTHERN ARIZONA LEGAL AID  
21 WILLIAM E. MORRIS INSTITUTE FOR JUSTICE

22  
23 By /s/ Ellen Sue Katz  
24 Ellen Sue Katz  
25 Brenda Muñoz Furnish  
26 3707 North Seventh Street, Suite 300  
27 Phoenix, Arizona 85014-5095  
28

1 Original electronically filed with the  
2 Clerk of the Supreme Court of Arizona  
3 this 29<sup>th</sup> day of April 2021.

4 By: /s/ Ellen Sue Katz

5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28