

1 Elizabeth Burton Ortiz, Bar No. 012838
2 Executive Director
3 Arizona Prosecuting Attorneys'
4 Advisory Council
5 3838 N. Central Avenue, Suite 850
6 Phoenix, AZ 85012
7 (602) 542-7222 / FAX (602) 274-4215
8 Elizabeth.Ortiz@apaacaz.com

9 **IN THE SUPREME COURT**
10 **STATE OF ARIZONA**

11 In the Matter of:

12 Supreme Court No. R-21-0008

13 **PETITION TO AMEND THE**
14 **RULES OF THE SUPREME**
15 **COURT OF ARIZONA TO ADOPT**
16 **RULE 24 - JURY SELECTION**

17 **COMMENT OF**
18 **THE ARIZONA PROSECUTING**
19 **ATTORNEYS' ADVISORY**
20 **COUNCIL**

21 The goal of this Workgroup is commendable. The Arizona Prosecuting
22 Attorneys' Advisory Council ("APAAC") shares the common goal of ensuring that
23 the criminal justice system is as free of bias as is humanly possible. Practices of the
24 past, particularly in certain states, that intentionally excluded minorities from jury
25 service were deplorable and should be disavowed. APAAC supports the idea of
examining and eliminating practices that unintentionally exclude any group from
jury service. We are committed to the goal of having juries reflect our community,
just as we are committed to achieving justice for defendants and victims.

1 Unfortunately, the proposal, as written, is an untenable and illogical solution to a
2 problem that may not currently exist and does not further the pursuit of justice.

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4 There is a presumption by the authors that there is a problem with jury
5 selection in Arizona, and particularly in Maricopa County. Moreover, there is a
6 further assumption that the problem rests solely with the lawyers making the strikes.
7 The authors cite to the very few cases that were found on appeal to have violated the
8 provisions of *Batson v. Kentucky*, 476 U.S. 79 (1986) and assume nefarious motives
9 of the prosecutors and courts involved in those few cases. They provide no detail
10 on the actual reasons why even those few cases were found to have violated *Batson*.
11 The low number of cases does not mean *Batson* is being ignored. It is likely Arizona
12 prosecutors and trial courts are selecting juries in an unbiased and fair manner and
13 that is what accounts for the low numbers. Perhaps even in those cases where *Batson*
14 violations were found, the error was purely technical. In short, there is nothing but
15 conjecture and limited anecdotal evidence presented that there is a real problem with
16 Arizona's jury selection in 2021.

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19 Of course, where bias exists, we must do everything we can to eliminate it.
20 However, without knowing if real bias exists in our system, the recommendations of
21 the Workgroup are futile. For any proposal to be meaningful, the existence, context,
22 nature, cause and extent of any bias must first be established. Assuming there is bias
23 in jury selection in Arizona, there are many places other than preemptory challenges
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1 where it may manifest. Perhaps it occurs when initial juror summons are sent out.
2 Perhaps it is when potential jurors are excused by a jury commissioner, or when
3 prescreening is done before potential jurors even get sent to a courtroom for possible
4 selection. Judges may excuse potential jurors from a certain group for hardship
5 reasons or even for cause more often members of another group. Of course,
6 preemptory challenges may be a source of bias as well. Any serious inquiry into this
7 issue should be driven by data, not emotion. Without knowing whether there is truly
8 a problem, what that problem is, when it occurs and what the surrounding
9 circumstances are, it is impossible to craft a meaningful solution. If a group is being
10 excluded disproportionately by use of hardship strikes, then changing rules for
11 preemptory strikes may be a good public relation move but will do absolutely
12 nothing to fix the underlying systemic issue. Indeed, if members of a certain group
13 are being excluded before the preemptory strikes happen, then the system gives the
14 preemptory strikes more weight. If the ultimate panel from which strikes are made
15 is more diverse then it becomes harder for either side to dilute it by use of strikes.

20 Not only are the recommendations of the Workgroup premature, they are also
21 unworkable. The presumptions being recommended would be difficult, if not
22 impossible, for a trial court to monitor. Imagine a group of prospective jurors that
23 is comprised of various races and genders—as is typically the case. The trial court
24 would need to make a record of the sex and race of each potential juror. If a juror is
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1 mixed race, the trial court would need to make a further record of what race the
2 potential juror identifies with. For that matter, the court would need to make such
3 an inquiry for every single juror, as outward appearance may not reflect the racial
4 makeup of a particular juror. The record would be empty of those facts without each
5 juror being questioned individually. Names themselves would not help, as, for
6 example, a potential juror may have an Hispanic surname due to marriage or
7 adoption. Gender is not the same as sex and therefore questions would need to be
8 asked of each juror about their gender identification and sexual preference as well.
9 The rule may result in mini-hearings about which race, gender and sexual preference
10 each potential juror identifies with, if any.

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14 The mandates of the proposed rule are not as simple as the Workgroup seems
15 to believe. Trial courts would be put in the impossible position of holding mini trials
16 during jury selections to determine whether a potential juror is in a protected class,
17 as well as whether the reasons given for a strike are supported. Unlike current U.S.
18 Supreme Court requirements, the proposed rule would require much more
19 questioning and information of the juror, as well as from the party exercising a strike.
20 While the proposal purports to be protecting defendants' and jurors' rights, such
21 intrusive questioning into the most personal details of a juror's life seems to
22 contradict that claim.
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