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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: **PETITION TO AMEND RULE 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 STATE BAR OF ARIZONA**

Judges Peter B. Swann and Paul J. McMurdie of the Arizona Court of Appeals propose amendments to the Rules of Criminal and Civil Procedure to eliminate all peremptory jury strikes in civil and criminal trials. Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar of Arizona hereby submits its comment in opposition.

A. <u>Discussion/Analysis</u>

1. Peremptory Strikes are Needed to Secure Fair and Impartial Juries.

Petitioners assert that trial attorneys use peremptory challenges to "structure a jury favorable to his or her cause." (Petition at 3). The State Bar, however, submits that attorneys use peremptory strikes to structure a jury whose members will have

an open mind and be the most impartial. As Justice O'Connor noted in *J.E.B. v. Alabama*, far from being a tool to secure a favorable jury, the peremptory challenge is the device by which parties try to secure fair, impartial, and unbiased juries:

> The principal value of the peremptory is that it helps produce fair and impartial juries. [Citation omitted.] 'Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of eliminat[ing] extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury.'[1]

As Justice O'Connor recognized, if there are particular jurors whose attitudes or experiences favor one side – but whose opinions do not rise to the level of a for-cause challenge – the opposing side will recognize this and utilize its peremptory strikes. Attorneys almost always know their case better than the judge. Accordingly, they are in the best position to determine which jurors may harbor biases that will impair their ability to listen fairly to the evidence and the theory of the case, and "experienced lawyers will often correctly intuit which jurors are likely to be the least sympathetic. . . ."[2] Thus, peremptory strikes provide balance in jury selection.

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[1] *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 147 (1994) (O'Connor, J., concurring, quoting, *Holland v. Illinois*, 493 U.S. 474, 484 (1990)).

[2] *Id.* at 148 (O'Connor, J., concurring).

2. Peremptory Strikes Serve Many Valuable Functions.

The Petition overlooks the valuable functions peremptory strikes serve: 1) the elimination of panelists who are unaware of or unwilling to reveal personal biases or predispositions; 2) removal of prospective jurors whose attitudes or experiences predispose them to be hostile to some or all aspects of the case; 3) removal of prospective jurors whose attitudes or experiences predispose them to favor the opposing side; 4) allowing the accused in criminal cases, and the litigants in civil cases, to have a say in the composition of the jury absent a successful challenge for cause; and 5) Peremptory challenges afford judges significant latitude to accept prospective jurors' questionable assertions of impartiality.

a) Implicit or Unconscious Bias

Of the benefits listed above, the most important is the ability to use peremptory strikes against prospective jurors who state that they can be fair and impartial even when they have made statements or reveal prior experiences that indicate otherwise. Elimination of the peremptory challenge ignores the reality that prospective jurors, like all of us, may be aware of our own inoffensive biases, but are probably not aware of implicit or unconscious biases. Psychological research in recent decades has shown that no matter how much we try, our personal biases are difficult to self-identify. People mistakenly hold the belief that they are not biased

or underestimate their biases. This is known as the "illusion of objectivity."[3]

Unconscious preconceptions may well color attitudes when sitting as a juror. One study demonstrated that jurors have difficulty identifying their biases and rarely know the extent of their biases because their beliefs, preconceptions, and values arise from how they were raised.[4] Because many prospective jurors do not realize their unconscious biases, they readily say that they can be fair and impartial even when they cannot. Nearly three decades ago, the United States Supreme Court recognized that "[i]t may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs . . . would prevent him or her from doing so."[5] Peremptory strikes help to address this reality.

b) The Procedure Utilized by Trial Courts During *Voir Dire* is Insufficient to Discover Implicit Biases.

During *voir dire*, trial judges usually only recognize explicit bias, a bias to which the juror admits. When a prospective juror identifies an experience or attitude that may affect their ability to be fair and impartial, the usual inquiry by the trial

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[3] D.A. Armor, *The Illusion of Objectivity: A Bias in the Perception of Freedom from Bias*, Dissertation Abstracts International: Section B: The Sciences and Engineering 59(9-B), 5163 (1999). Available through: https://psycnet.apa.org/record/1999-95006-117

[4] *See,* Robertson R., Yokum D., and Parker M. *The Inability of Jurors to Self-Diagnose Bias* 96 Den. L. Rev. 869 (2019).

[5] *Morgan v. Illinois*, 504 U.S. 719, 735-36, n.6 (1992).

judge is to ask whether the juror can "set it aside," or "still be fair" or whether the juror "can follow the law." Most jurors dutifully answer in the affirmative. The dynamics of judge-directed *voir dire* are not conducive to admitting to beliefs that are outside the norm. Prospective jurors in a public forum – the foreign and intimidating environment of a courtroom – and seated among strangers will feel pressure to provide socially acceptable answers to the authority figure doing the questioning. Moreover, whenever a prospective juror utters an opinion that is indicative of bias or possibly detrimental to one or both of the parties, the typical response of the questioner – judge or attorney – is to react with follow-up questions that telegraph to the entire panel that the response was unacceptable.

Compounding this problem is the fact that attorneys and judges traditionally ask yes or no questions about biases without giving jurors the opportunity to explain. Consequently, if a prospective juror identifies a negative experience or acknowledges a problematic predisposition, most judges will accept the juror's word and seat the juror who says they can set it aside, no matter how bad their experience or negative their perception.

In cases involving juror questionnaires, it is all too common for a juror to respond one way on a written questionnaire, only to provide a different answer to the same question during *voir dire*. Equally important to the selection process itself, and the goal of impartiality, are those jurors who answer a pointed question one way,

only to be subsequently coerced into agreement that they can "follow the law" despite the fact that it conflicts with their personal views. In the context of a death penalty case, the United States Supreme Court has recognized that questions of general fairness and whether a juror can "follow the law" are insufficient to "detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath."[6]

3. Abolition of Peremptory Strikes Will, as a Matter of Necessity, Lengthen Jury Selection.

Petitioners assert that elimination of peremptory strikes will streamline jury selection. The State Bar respectfully disagrees. Part of the guarantee of the right to an impartial jury in criminal cases is an adequate *voir dire* to identify unqualified jurors.[7] The United States Supreme Court has explicitly recognized how difficult it can be to reveal a juror's bias.[8] Without a *voir dire* that affords sufficient time to obtain quality information about a prospective juror's attitudes and experiences, trial

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[6] *Morgan v. Illinois*, 504 U.S. 719, 734-35 (1992).

[7] *Id.* at 729, citing *Dennis v. United States*, 339 U.S.162, 171-72 (1950). *See also Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion) (Without adequate *voir dire* the judge's responsibility to remove impartial jurors cannot be fulfilled.).

[8] *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) ("[M]any veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear.'").

counsel are left with scant information upon which to base a challenge for cause. To be meaningful – especially in the absence of peremptory challenges – *voir dire* must involve more than simple responses to broad questions that do not reveal disqualifying biases or even the existence of facts and circumstances that may form a basis for disqualification.

One jurist who favors eliminating peremptory challenges recognizes that one should expect more, not less, *voir dire* when strikes are limited to for-cause challenges. Justice Mary Yu of the Washington Supreme Court endorses elimination of peremptories but recognizes this means affording counsel "ample time for thoughtful questioning of prospective jurors."[9] A time-limited examination by a trial judge does not reveal preconceptions or unconscious bias, especially since prospective jurors are reluctant to provide candid answers about biases that could be considered socially unacceptable or disappointing to the judge.[10]

Criminal defendants who are convicted should be expected to appeal every denial of a challenge for cause because elimination of peremptory challenges will most likely pave the way for automatic reversal on appeal.[11] Consequently, trial

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[9] *City of Seattle v. Erickson*, 398 P.3d 1124, 1134 (Wash. 2017) (Yu, J., concurring).

[10] Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 Conn. L. Rev. 827, 844-45 (2012).

[11] *See*, Subsection 6, *ante*.

judges will need to take time to be extra cautious during *voir dire* and when denying a for-cause challenge.

Petitioners argue that the elimination of peremptory strikes should also be done out of "respect for the jurors themselves." (Petition at 5). However, in a world without peremptories, but with computers and vast social media outlets, lawyers should be expected to spend significantly more time investigating jurors' backgrounds, families, employment, and associations, seeking evidence to support a challenge for cause. After all, Criminal Rule 18.4(b) provides that a challenge for cause may be made at any time so long as it is diligently made.

4. The Peremptory Challenge in the United Kingdom, Canada, and the Unites States.

As the Petition recognizes, no state relies solely on challenges for cause to secure fair juries; every state as well as the federal courts provide a limited number of peremptory challenges to ensure impartiality. (Petition at 3). The elimination of peremptory strikes by Canada and the United Kingdom might seem to support the argument for elimination here, but a consideration of the differences between use of the peremptory strikes in those countries and the United States explains why this isn't so. When these countries utilized peremptory challenges, prospective jurors

could not be questioned about their beliefs or prejudices during *voir dire*.[12] Further, British and Canadian lawyers do not place the same emphasis on jury selection as in the United States.[13]

Interestingly, British prosecutors got around the elimination of peremptory challenges through the creation of what became known as the "standby," which permitted a prosecutor to remove a prospective juror from the panel "for cause," but only required a for-cause showing if the panel was not filled by the remaining prospective jurors. Only if a "standby" juror was recalled, did a for-cause showing need to be made. Most juries were filled without requiring any "standby" to return. Consequently, this operated as a peremptory strike.[14] Unlike a defendant's limited number of peremptory strikes, the prosecutor's use of the "standby" was unlimited.[15] The "standby" remained a tool of the prosecutor even after Parliament eliminated

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[12] Samuel J. Cohen, *The Regulation of Peremptory Challenges in the United States and England*, 6 B.U. Int'l L.J. 287, 306 (1988); Judith Heinz, *Peremptory Challenges in Criminal Cases: A Comparison of Regulation in the United States, England, and Canada*, 16 Loy. L.A. Int'l & Comp. Law Rev. 201 (1993), at pp. 205-06. Available at: https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1318&context=ilr

[13] Judith Heinz, *supra*, note 12, at 206, n. 30.

[14] *Id.* at 209.

[15] *Id.* at 218.

the accused's right to peremptory strikes. It is only through self-regulation that British prosecutors forego the use of the "standby" procedure.[16]

It is interesting to note that the reasons the British government provided for eliminating the defense peremptory challenge – 1) striking jurors merely based on their appearance and 2) multiple defendants pooling their peremptory challenges to jointly replace an entire jury – were not supported by a study commissioned by the government.[17] Nonetheless, because the government feared that guilty defendants were manipulating jury selection, the defense lost the right to peremptory strikes. One commentator concluded that "[t]he value of getting convictions at the hands of a jury appears to have driven England's abolition of the peremptory challenge."[18]

While Canada's elimination of the peremptory challenge arose from discriminatory practices, abolishment was not universally sought. For instance, the Canadian Association for Black Lawyers (CABL) opposed Canada's elimination of peremptory strikes. The CABL contended that limiting the determination of bias or discrimination to the trial judge "'does not give an accused person comfort that the trial judge's discretion will be exercised in a way that is mindful of racial bias,'

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[16] *Id.* at 222.
[17] *Id.* at 218-19.
[18] *Id.* at 242.

especially since the majority of judges are white."[19] The CABL further argued that "[p]eremptory challenges are required to protect the constitutional rights of Black accused persons."[20] But perhaps a more important reason for not following the lead of these countries is because juries in Canada and the United Kingdom have less power and discretion than American juries, especially when it comes to sentencing, which leads to a topic unaddressed in the Petition - death penalty cases.

5. Peremptory Challenges, Juror Sentencing, and the Death Penalty.

Neither the U.K. nor Canada impose the death penalty. Arizona does. In Arizona capital cases, the jury imposes a sentence of life or death. Thus, the ability to exercise peremptory challenges is critical in these cases because jurors decide not only guilt, but also eligibility to receive a death sentence and, if eligible, whether the defendant will be executed. Because of the finality of the death penalty, there is a "heightened need for reliability in all processes" in capital cases.[21]

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[19] Julia Schabas, *The Abolition of Peremptory Challenges in R v. Chouhan: A License for Discrimination or Safeguard for Representative Juries?* Available at: http://www.thecourt.ca/the-abolition-of-peremptory-challenges-in-r-v-chouhan-a-license-for-discrimination-or-safeguard-for-representative-juries/ (Also opposing elimination were the Federation of Asian Canadian Lawyers and the Canadian Muslim Lawyers Assn.)

[20] Justin Ling, *Why Are We Eliminating Peremptory Challenges?* Available at: https://www.nationalmagazine.ca/en-ca/articles/law/in-depth/2020/why-are-we-elminating-peremptory-challenges

[21] *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

Studies of capital jurors have found that over half of the jurors decide the penalty after they decide the defendant is guilty of the murder charge(s).[22] With this in mind, the process of "death qualifying" jurors has been attacked repeatedly as a tool by which a skilled prosecutor can create a jury predisposed to convict and to impose the ultimate penalty.[23] Even the United States Supreme Court has recognized that death-qualified juries are more likely to convict, or to be "conviction prone."[24]

Capital jurors must be able to consider and give effect to evidence of mitigation when deciding whether to impose death. Mitigating evidence is any evidence that may serve as a basis for a sentence less than death.[25] Capital jurors make an individual assessment to determine whether mitigation exists and whether it is sufficiently substantial to call for leniency, i.e., a sentence of life.[26]

Without recourse to exclusion of questionable jurors through peremptories, capital defendants may face "conviction prone" jurors and/or be forced to present

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[22] William J. Bowers, Marla Sandys, Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' predispositions, Guilt-Trial Experience, And Premature Decision Making*, 83 Corn. L. Rev. 1476, 1503-1504 (1998).

[23] Sequin & Horowitz, *The Effects of "Death Qualification" on Juror and Jury Decisioning: An Analysis from Three Perspectives*, 8 L. Psychology Rev. 49 (1984.

[24] *Lockhart v. McCree*, 476 U.S. 162, 168-70 notes 4-5 (1986).

[25] *Tennard v. Dretke*, 542 U.S. 274, 285 (2004).

[26] A.R.S. 13-752(C)(E).

their mitigation evidence to a juror who is predisposed to not consider some or all of it. There is insufficient space in this comment to address all the complexities of jury sentencing in capital cases and the importance of peremptory challenges to capital defendants. Because the vote of a single juror can literally make the difference between life and death, peremptory challenges are a critical tool needed by capital defendants to secure fair and impartial juries.

6. Unintended Consequences – Automatic Reversal.

The potential path to automatic reversal is illustrated by two cases. The first is *Ross v. Oklahoma*,[27] where the trial judge erroneously rejected a defense challenge for cause, forcing the defense to remove the prospective juror with a peremptory strike. The *Ross* Court affirmed the conviction and death sentence holding that there was no constitutional violation because one of the purposes of peremptory strikes under Oklahoma law was to correct faulty judicial rulings.[28] *Ross* was followed by *United States v. Martinez-Salazar*,[29] where, again, a defense challenge for cause was erroneously denied and the defendant removed the juror using a peremptory strike. The difference between *Ross* and *Martinez-Salazar* was that in the latter case the law

[27] 487 U.S. 81 (1988).

[28] *Id.* at pp. 90-91.

[29] 528 U.S. 304 (2000).

did not require the peremptory be used to correct the erroneous ruling. To the *Martinez-Salazar* Court this distinction made no difference. By voluntarily striking the juror on his own, the defendant had remedied the constitutional error.[30]

Ross and *Martinez-Salazar* made it clear that peremptory challenges provide a safety valve to maintaining impartial juries when a court erroneously denies a for-cause challenge. If peremptories are eliminated, then erroneous denials of for-cause challenges may again set the stage for an automatic reversal on appeal – in both civil and criminal cases – which was the law in Arizona prior to *Martinez-Salazar*.[31]

7. Reduction of Peremptory Strikes During COVID-19.

Petitioners posit that the reduction in the number of peremptory strikes imposed during the COVID-19 pandemic demonstrates that abolishment is unproblematic. However, no empirical data supports this assertion. Juror lack of impartiality, like any other form of juror misconduct, is for the most part impossible to discern during a trial. It isn't until post-conviction proceedings that juror bias is most often discovered, assuming it's discovered at all.

That a national pandemic required fewer people in a courtroom during a trial does not equal a conclusion that the trial was inherently fair or the sitting jurors

[30] *Id.* at 307.

[31] *See, State v. Huerta*, 175 Ariz. 262 (1993).

impartial. As Petitioners observe in another context, the reduction in peremptory strikes due to COVID "tells us nothing about the overall fairness of the system" concerning those trials occurring at the time. (Petition, at 7, ¶2). Consequently, this argument does not support Petitioners' request.

8. The *Batson* Dilemma.

Petitioners place considerable reliance on the failure of *Batson v. Kentucky* to root out race-based peremptory challenges. (Petition at pp. 9-13). Their stated goal is to "put a stop to intentional and unintentional bias in jury selection. . . ." (*Id.* at 2). The State Bar does not dispute that peremptory challenges have been used to discriminate against protected classes of prospective jurors. This does not mean, however, that peremptory challenges must be eliminated. To the contrary, the process should be improved to better ensure the proper use of peremptory strikes. In this regard, the petitioners reference another pending petition, R-21-0008, which also seeks to solve the problem of discriminatory use of peremptory challenges. Indeed, Petitioners "embrace and incorporate the scholarship" of R-21-0008. (Petition at 3, n.1).

In essence, R-21-0008 seeks to solve the same problem at bar but through adoption of a rule modeled in part after Washington General Rule 37, which altered the Batson framework by instituting an "objective observer" standard to determine if a peremptory strike is grounded in discrimination. Petition R-21-0008 alters the

Washington standard to a reasonable person test, i.e., a party may challenge an opponent's peremptory strike of a potential juror if a reasonable person might see the strike as being connected to discrimination against the prospective juror's membership in a protected class. Other jurisdictions have followed[32] or are studying[33] the Washington approach. Alternatives to abrogation of peremptory strikes are available.

9. Potential Confusion as to the Standard of Proof in Criminal Cases.

Rule 18.4(b) of the Rules of Criminal Procedure is directed at challenges for cause and currently states that " . . . the court must excuse a prospective juror or jurors from service in the case if there is a *reasonable ground to believe* that the juror or jurors cannot render a fair and impartial verdict." (Emphasis added). A second provision of the rule, 18.5(f), also addresses proving challenges for cause in criminal cases. The Petition proposes to modify Rule 18.5(f) to read: "The party challenging a juror for cause has the burden to establish *by a preponderance of the evidence* that the juror cannot render a fair and impartial verdict." (Emphasis added.)

[32] *See, e.g.,* California Assembly Bill 3070, 2019-2020, Reg. Sess., ch. 318, 2020 Cal. Stat. Available at: https://legiscan.com/CA/text/AB3070/2019

[33] *See,* Supreme Court of Connecticut Jury Selection Task Force. Information available at: https://www.jud.ct.gov/Committees/jury_taskforce/default.htm

The State Bar submits that the language proposed in amended Rule 18.5(f) is arguably inconsistent with the standard currently found in Rule 18.4(b). At the very least, the potential for confusion exists if Rule 18.5(f) is modified as the Petition requests.

B. <u>Conclusion</u>.

Human beings are not automatons. We all possess opinions and attitudes, some of which we are not consciously aware, otherwise known as implicit biases. Simply because "a trial lawyer's instinctive assessment of a juror's predisposition cannot meet the high standards of a challenge for cause does not mean that the lawyer's instinct is erroneous."[34] Moreover, limiting the use of the peremptory challenge "increase[s] the possibility that biased jurors will be allowed onto the jury" due to the lack of an articulable for-cause basis for a strike.[35]

Elimination of peremptory strikes could well result in a jury selection process that helped conceal juror bias, resulting in fewer fair and impartial juries. Addressing the current harms resulting from peremptories should not also work to eliminate the benefits outlined in this Comment. Instead of eliminating peremptory challenges, the State Bar submits it would be wiser to ensure this important

[34] *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. at 148, O'Connor, J., concurring.

[35] *Id.*

procedure is used properly to secure a fair and impartial jury.

For the foregoing reasons, the State Bar of Arizona respectfully requests that the Court reject the proposed amendments to Rules 18.4 and 18.5 of the Arizona Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure.

RESPECTFULLY SUBMITTED this 30th day of April 2021.

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Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this 30th day of April 2021.

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