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**IN THE ARIZONA SUPREME COURT**

In the Matter of:

Petition to Amend 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 Number  
R-21-0020

**COMMENT IN SUPPORT OF  
R-21-0020**

Justice Thurgood Marshall heralded *Batson*, as “a historic step toward eliminating the shameful practice of racial discrimination in the selection of juries.” *Batson v. Kentucky*, 476 U.S. 79, 102 (J. Marshall, concurring).

But Justice Marshall warned that *Batson* would “not end the racial discrimination that peremptories inject into the jury-selection process,” which could only be accomplished “by eliminating peremptory challenges entirely.” *Id.* at 102-03. This was because any attorney could “easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons.” *Id.* at 106.

Justice Marshall's concerns have proved prescient. A party that seeks to discriminate has little trouble doing so. This is true whether the case is civil or criminal, and whether the striking attorney represents the plaintiff or defense.

As such, R-21-0020 is a simple yet elegant solution to a real problem. Justice Marshall and the proposal are correct: the only way to end the discriminatory use of peremptory challenges is to eliminate peremptory challenges.

I therefore part from many of my fellow criminal defense attorneys and support R-21-0020. It is the correct approach to the invidious problem of discrimination in the exercise of peremptory challenges.

### **Discussion**

Discrimination is a real problem that finds its way into the jury selection process, particularly through the exercise of peremptory challenges. In confronting this problem, different approaches have been taken. While I support the efforts to improve *Batson* offered in R-21-0008, the better approach is the simpler one offered by R-21-0020. The

only way to end the discriminatory use of peremptory challenges is to eliminate peremptory challenges.

**1. Peremptory strikes have long been a tool for discrimination.**

As a starting point, there is near-uniform agreement that peremptory strikes have long been a tool for discrimination. Professor Mimi Samuel observed that “many attorneys still use peremptory strikes to remove prospective jurors based on characteristics such as race, gender, religion, and national origin. In fact, a 2005 survey revealed that every lawyer interviewed considered race and gender when picking a jury.” Mimi Samuel, *Focus on Batson: Let the Cameras Roll*, 74 *Brooklyn L. Rev.* 95, 95 (2008). Professors Jeffrey Bellin and Junichi Semitsu opined that the U.S. Supreme “Court has allowed discrimination to flourish by failing to place significant limits on race-based jury selection’s primary enabler—the peremptory challenge.” Jeffrey Bellin & Junichi Semitsu, *Widening Batson’s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 *Cornell L. Rev.* 1075, 1077 (2011). And Judge Mark Bennett suggested that “the *Batson* challenge process” was a well-

intentioned method, but “actually perpetuate[s] legal fictions that allow implicit bias to flourish.” Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: the Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol’y Rev. 149, 150 (2010). Again, peremptory strikes are the primary culprit because they allow “the implicit and explicit biases of attorneys to impact jury composition and may provide a false veneer of racial neutrality to jury trials.” *Id.*

Discrimination in jury service is not new. “So far as we are aware ... the first African-Americans ever to serve on a jury in America were two who sat in Worcester, Massachusetts, in 1860.” Albert Alschuler & Andrew Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 884 (1994); accord Douglas Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 Cornell L. Rev. 1, 31 (1990).

In the wake of the Civil War, several jurisdictions passed laws expressly preventing persons of color from serving on juries. Scott Howe, *Deselecting Biased Juries*, 2015 Utah L. Rev. 289, 296 (2015). Unfortunately, the Arizona Territory was among the jurisdictions that

passed laws preventing persons of color from serving on juries.

Arizona's first Territorial code—the Howell Code, passed one year before the end of the Civil War—authorized only white men to serve on juries. See [Howell Code](#) Chapter XXIV, § 6 (pg. 172) (allowing only white men to be electors); Chapter XLVII, § 4 (pg. 294) (requiring status as an elector to serve on a jury).

In *Strauder v. State of West Virginia*, the U.S. Supreme Court ruled that laws could not be passed that prevented Black citizens from serving on juries. [Strauder v. State of West Virginia, 100 U.S. 303, 310 \(1879\)](#).

When *Strauder* held jurisdictions could no longer discriminate at the front end, peremptory strikes became the tool to discriminate at the back end. As Judge Morris Hoffman explained, “when faced with the inevitability of desegregated veneers, [Southern states] turned to the peremptory challenge as the primary tool to keep blacks off juries.”

Judge Morris Hoffman, [Peremptory Challenges Should be Abolished: A Trial Judge's Perspective, 64 U. Chi. L. Rev. 809, 849 \(1997\)](#). Again, Arizona's history corroborates this development. Under the Howell

Code, which only permitted white men to serve on juries, peremptory strikes were permitted as follows:

- Cases where death or life could be imposed—Defendant got 10, the Territory got 5;
- All other offenses—Defendant got 5, Territory got 3.

[Howell Code](#), Chapter XI, § 316 (pg. 105). But in the wake of *Strauder*, the number of peremptory strikes increased:

- Cases where death or life could be imposed—Defendant got 14, the Territory got 7;
- All other felonies—Defendant got 10, Territory got 5;
- All other offenses—Defendant got 5, Territory got 3.

[Rev. Stat. Ariz. \(1887\)](#), Title IX, § 1631 (pg. 791).

The problem is that despite cases like *Batson*, the discriminatory use of peremptory strikes persists.

In criminal cases, this discrimination goes both ways. A study conducted in Mississippi and published just last year concluded Black venire members are 4.51 times as likely to be excluded by a prosecutor's peremptory strike, and White venire members are 4.21 times as likely to be excluded by a defense attorney's peremptory strike. [57 J. Research in Crime & Delinquency 1, 20 \(2020\)](#).

While civil cases appear to be less studied, the Petition and Comments support the notion that discrimination is attempted in civil cases as well. In the Petition, Judge Swann noted pressure he had received from a jury consultant to strike Hispanic jurors. And while the Comment from Mr. Casey indicates his belief that *Batson* works, it is noteworthy that he reports having personally observed *Batson*'s successful application in two civil cases. That means in the two civil cases Mr. Casey references, a party attempted to use their peremptory strikes to discriminate. Each attorney just happened to be the “unapologetically bigoted or painfully unimaginative attorney” Professors Bellin and Semitsu reference. *See* Bellin & Semitsu, *Widening Batson’s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1075. With these reports, there is no reason to believe peremptory strikes are not being used in a discriminatory fashion in civil cases.

Peremptory strikes have long been a tool for discrimination. And they continue to be a tool for discrimination despite the efforts of *Batson* and even more aggressive rules and rulings to prevent such use. R-21-

0020 is an elegant solution—if peremptory strikes are being used to discriminate, eliminate peremptory strikes.

**2. Eliminating peremptory strikes removes the primary tool for discrimination in a way that reform does not.**

Justice Marshall noted the solution when he said that “the racial discrimination that peremptories inject into the jury-selection process” could only “be accomplished only by eliminating peremptory challenges entirely.” [Batson](#), 476 U.S. at 102-03 (J. Marshall, concurring).

States, courts, and scholars have made recommendations or adopted reforms in an effort to accomplish the goal of ending racial discrimination while retaining peremptory strikes.

Washington adopted General Rule 37, which replaces the purposeful discrimination standard with an objective observer standard, lists presumptively invalid justifications, and requires prior notification of demeanor problems before they can be the basis for a strike. [Wash. Gen. R. 37\(e\), \(h\), \(i\)](#). This is the rule R-21-0008 was modeled after, and it is a step in the right direction.

The Massachusetts Supreme Judicial Court has developed its own path through case law. The Massachusetts Court retained a heftier

second-prong analysis even after the U.S. Supreme Court ruled it was unnecessary. *Com. v. Maldonado*, 788 N.E.2d 968, 973 fn.7 (Mass. 2003), *abrogated on different grounds as stated in Com. v. Robertson*, 105 N.E.3d 253, 265 fn.10 (Mass. 2018). Additionally, in Massachusetts “[c]hallenges based on subjective data such as a juror’s looks or gestures, or a party’s ‘gut’ feeling should rarely be accepted as adequate because such explanations can easily be used as pretexts for discrimination.” *Id.* at 973; *accord Com. v. Rosa-Roman*, 151 N.E.3d 863, 882 (Mass. 2020).

There are more extreme suggestions. For example, Professor Mimi Samuel argued voir dire should be video recorded and reviewed on appeal. Mimi Samuel, *Focus on Batson: Let the Cameras Roll*, 74 *Brook. L. Rev.* 95, 99 (2008).

All these solutions seek to fix *Batson* to retain peremptory strikes.

But a growing number of judges have joined Justice Marshall’s call to simply abolish peremptory challenges. Judge Mark Bennett has called for the abolition of peremptory strikes. *Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection*, 4 *Harv. L. & Pol’y Rev.*

at 166-67. So too has Judge Morris Hoffman. [Hoffman, \*Peremptory Challenges Should be Abolished\*, 64 U. Chi. L. Rev. at 809-10.](#)

And a host of Arizona judges have now joined in the call to abolish peremptory strikes. The Committee on Superior Court—a committee composed of Superior Court judges from across the state—filed a comment in support of abolishing peremptory strikes. So too has the Yavapai County Superior Court bench.<sup>1</sup>

This judicial support joins academic calls to eliminate the peremptory strike. *E.g.* Anthony Page, [Batson's Blind Spot: Unconscious Stereotyping and the Peremptory Challenge](#), 85 B.U. L. Rev. 155, 245-46 (2005).

This growing support makes sense. Reforms and improvements to *Batson* over the years have not eliminated the discriminatory use of peremptory strikes. While these reforms may have reduced discrimination in some instances, discrimination continues. But the discrimination that occurs in the reformed systems is simply masked by more savvy justifications.

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<sup>1</sup> The Mohave County Superior Court has filed comments opposing both this proposal as well as R-21-0008. Instead, the Mohave County Superior Court wants to retain the same broken system, but simply reduce the number of peremptory strikes to two.

The question thus becomes simple: Should the goal of the Courts be to end discrimination in the jury selection process, or simply hide it?

If the goal is to just hide discrimination behind more intelligent justifications for strikes, then modification would accomplish that goal.

But if the goal is to end the discriminatory exercise of peremptory strikes, elimination is the only solution.

Considering *Batson*, Judge Bennett noted the decision “may provide a false veneer of racial neutrality to jury trials.” Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection*, 4 Harv. L. & Pol’y Rev. at 150. We can strengthen *Batson*’s second step like Massachusetts, record voir dire like Professor Samuels recommends, or tell the discriminating party precisely what they’re not allowed to say to justify their strike. But to the extent modifications may improve *Batson*, they simply work to strengthen the false veneer. Attorneys will still use peremptory strikes in a discriminatory manner; they will simply become even more savvy when doing so.

Discrimination during the jury-selection process is so invidious, the goal should be to put an end to it. Justice Marshall, Judges Bennett and Hoffman, and a growing chorus of judicial officers and legal

scholars are correct—the only way to end the discriminatory use of peremptory strikes is to eliminate peremptory strikes.

**3. Concerns raised regarding the elimination of peremptory strikes are overstated.**

Of the negative responses that have been submitted at the time of writing this comment, complaints can be grouped into four categories. Those categories are complaints about 1) the judiciary, 2) attorneys, 3) jurors, and 4) public confidence. But a deeper inspection of the complaints demonstrates that satisfactory resolution requires just minor alterations, if any at all. And some of the complaints support R-21-0020 when framed in the proper light.

**A. Complaints about the judiciary.**

First, several comments complain that the judiciary often makes mistakes when deciding challenges for cause and that peremptories are needed to rectify these incorrect rulings. This attitude is reflected in the comments of Brian Snyder, James Schoppmann, and William Sandweg.

Much of this incorporates a second complaint about judges, which is that judicial officers do not give sufficient time to conduct meaningful

voir dire. This belief is seen in the comments of Brian Snyder, Tim Casey, James Schoppmann, William Sandweg, and the Central Arizona National Lawyers' Guild.

The general notion is that judges do not provide enough time to conduct voir dire and that the result is that attorneys are left unable to develop a record that would support strikes for cause. For example, Mr. Shoppmann complains that jurors are often considered rehabilitated "by simply stating the magic words 'I can be fair and impartial,'" despite previous clear announcements they could not. Kip Anderson's comment for the Mohave County bench corroborates these concerns, albeit from a different perspective. The Mohave County bench posits that jury selection might take more time if peremptory strikes are eliminated. And the Mohave County bench shares concerns that jurors may be left on as long as they can "promise to keep an open mind."

But our Court of Appeals already addressed the base issue of trial judges simply accepting weak avowals to be fair. In *State v. Smith*, the Court of Appeals cautioned that "[t]hese issues are not to be resolved by 'magic words.' Nor do we suggest that, in order to avoid granting challenges for cause, trial judges should employ leading questions to

prod doubt-ridden jurors to weakly pledge to attempt to be fair.” *State v. Smith*, 182 Ariz. 113, 115 (App. 1995).

Where a juror does little more than weakly state “I can be fair and impartial” or “promise to keep an open mind,” trial courts have every right to—and indeed a responsibility to—reject that claim and grant a motion to strike for cause. This is inherently part of the trial court’s determination of whether a juror can render a fair and impartial verdict.

And time is certainly a factor.

To the extent trial courts are not providing a sufficient opportunity to conduct voir dire, that establishes a problem, but not the problem the critics believe.

Judge Bennett noted that “empirical research suggests that potential jurors respond more candidly and are less likely to give socially desirable answers to questions from lawyers than from judges.” Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection*, 4 Harv. L. & Pol’y Rev. at 160.

And when attorneys don’t have a sufficient opportunity to communicate with jurors, as Tim Casey and William Sandweg suggest,

attorneys are likely exercising peremptories based upon their own biases, rather than objective information. See Samuel Sommers & Michael Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 *Law & Hum. Behav.* 261, 263 (2007).

Judge-dominated and heavily time-restricted voir dire leads to less reliable juror answers and increased discrimination and stereotyping by attorneys. Trial courts should thus permit sufficient time for voir dire. See Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection*, 4 *Harv. L. & Pol'y Rev.* at 165-66.

But this shortcoming does not mean R-21-0020 should be rejected; it means minor modifications to procedural rules regarding jury selection should also be adopted. [Civil Rule 47\(c\)\(3\)\(A\)](#) could be easily modified to guarantee sufficient time:

Questioning by Court and Parties. The court must thoroughly question the jury panel to ensure that prospective jurors are qualified, fair, and impartial. The court must permit each of the parties [sufficient time](#) to ask the panel additional questions, but may impose reasonable limits on the questioning. Written questions also may be used as provided in Rule 47(b)(2).

So too could [Criminal Rule 18.5\(d\)](#):

Voir Dire Examination. In courts of record, voir dire examination must be conducted on the record. The court must conduct a thorough oral examination of the prospective jurors and control the voir dire examination. Upon request, the court must allow the parties sufficient ~~a reasonable~~ time, with other reasonable limitations, to conduct a further oral examination of the prospective jurors. However, the court may limit or terminate the parties' voir dire on grounds of abuse. Nothing in this rule precludes submitting written questionnaires to the prospective jurors or examining individual prospective jurors outside the presence of other prospective jurors.

But even without these modifications, this Court has already started developing jurisprudence regarding the adequacy of opportunities to conduct voir dire, at least in criminal cases. *E.g. State v. Johnson*, 247 Ariz. 166, ¶ 101 (2019).

The complaints regarding the judiciary are easily addressed with either small changes or better adherence to principles that have already been announced. They are not a reason to reject R-21-0020.

## **B. Complaints about attorneys.**

Through Kip Anderson, the Mohave County bench also raises a concern regarding attorneys: attorneys who want to discriminate will continue to do so through more aggressive voir dire questioning and motions to strike for cause.

There is no reason to believe voir dire questioning would become more aggressive without peremptory strikes. Attorneys already conduct voir dire with an eye toward creating a record to support cause strikes. While the elimination of peremptory strikes might make this stage of questioning more important, there is no reason to believe they would suddenly engage in a different style of questioning, especially when such an aggressive voir dire would risk alienating jurors.

Even if there was a desire for more aggressive questioning, trial judges are well-equipped to handle the issue. Nothing stops the trial judge from stepping in during voir dire to prevent an attorney from denigrating or attacking a panelist. And if voir dire were to turn to an improper topic, nothing prevents an objection and trial court ruling. In fact, the criminal rules already contemplate this: “the court may limit or terminate the parties’ voir dire on grounds of abuse.” [Ariz. R. Crim. P. 18.5\(d\)](#).

Our trial courts are also well-equipped to rule on motions to strike for cause, even if attorneys are more “aggressive” in their presentation or ask for more panelists to be struck for cause than in the status quo. And just as our courts can and should refuse to permit “doubt-ridden

jurors [who] weakly pledge to attempt to be fair” from serving, *Smith*, 182 Ariz. at 115, so too can courts consider coercive counsel questions designed to force acquiescence.

This actually demonstrates the important role our trial courts can play to prevent discrimination—conscious or unconscious—during the jury selection process when peremptories are removed. Courts can protect jurors from abusive voir dire and deny unfounded or misleading motions to strike for cause. What our trial courts have been ill-equipped to address is *Batson* and its progeny. Eliminating peremptory strikes resolves that problem.

### **C. Complaints about jurors.**

Several of the comments argue jurors are not aware of their biases. The comments submitted by Tim Casey, William Sandweg, and the National Lawyers’ Guild all express this concern.

This is likely true.

But it ignores the important impact of unconscious bias held by attorneys. Just as jurors have biases they are not fully aware of, so too do attorneys.

The core problem is that when attorneys act upon their implicit biases while exercising peremptory strikes, the result is discrimination. Sommers & Norton, *Race-Based Judgments, Race-Neutral Justifications*, 31 *Law & Hum. Behav.* at 263; Samuel, *Focus on Batson*, 74 *Brooklyn L. Rev.* at 95.

Certainly, jurors may harbor some unconscious biases they are not aware of. This is good reason to allow attorneys the time needed to explore those potential biases. See Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection*, 4 *Harv. L. & Pol’y Rev.* at 160, 165-66.

But two wrongs don’t make a right.

Just as jurors might have unconscious biases, an attorney’s perception of that juror is driven by their unconscious biases. Indeed, Kip Anderson’s comment for the Mohave County bench illustrates the very problem. Mr. Anderson argues “[c]haracteristics such as facial expressions, body language, tone of voice, dress and grooming” are all reasons attorneys exercise strikes. But demeanor-based justifications are the breeding ground for stereotyping, prejudice, and discrimination. As Raphael and Ungvarsky point out, “[a] juror’s demeanor is an

extremely frequent neutral explanation in our study. It is also the most subjective type of explanation and thus, the easiest and most likely pretext for striking black jurors.” Raphael & Ungvarsky, *Excuses, Excuses*, 27 U. Mich. J. L. Ref. at 237. And even if it is not the refuge for overt, intended racism, many demeanor-based justifications considered in Bellin and Semitsu’s study “played into racial stereotypes and might reflect subconscious bias.” Bellin & Semitsu, *Widening Batson’s Net*, 96 Cornell L. Rev. at 1077.

Complaints about jurors validate the need to ensure each party has sufficient time to conduct voir dire; they do not justify the perpetuation of a system that masks discrimination in the course of exercising peremptory strikes.

#### **D. Complaints about public confidence.**

Finally, some comments complain that public confidence will be undercut by eliminating peremptory strikes. Tim Casey and the National Lawyers Guild make this complaint, albeit in different ways. Tim Casey argues peremptory strikes themselves are needed to protect

the public's perception of fairness. The NLG, on the other hand, argues reform will do a better job at securing public trust.

As to Mr. Casey's perspective, the question is straightforward: What will the public find more trustworthy—a system that authorizes the discriminatory exclusion of jurors, or a system that prevents it? The ongoing exclusion of jurors based upon race, nationality, gender, and a host of other factors undermines the public's trust of our system right now.

The current system not only authorizes such discrimination, it cloaks that discrimination in a facade of neutrality. *See Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection*, 4 Harv. L. & Pol'y Rev. at 150.

The public is best served by, and would be most trusting in, a system that ensures jurors are both 1) fair and impartial and 2) not excluded based upon the conscious or unconscious discrimination of the actors within that system. Eliminating peremptory strikes promises both. Cause strikes ensure the seated jurors are fair and impartial, and eliminating peremptory strikes ensures they were not seated as a result of discrimination.

The NLG posits that reform sends a superior message of commitment to the eradication of discrimination.

But reform merely strengthens the veneer. Even if reform reduces discrimination by some measure—and R-21-0008 is an improvement over the status quo—elimination of peremptory strikes is the only way to fully prevent the discrimination caused by peremptory strikes.

Our judiciary better communicates its commitment to the eradication of prejudice and discrimination in the jury-selection process by eliminating peremptory strikes than reform of *Batson*. And further commitment to the fight against bias and discrimination can (and should) be communicated by adopting R-21-0016 in some form, which would require diversity and inclusion training as a component of the annual CLE requirement.

More to the point, *Batson* was not meant to be symbolic, it was meant to provide a solution. But that solution has not worked and cannot work. While reform may help move our expectations, the abolition of peremptory strikes is the only way to ensure peremptory strikes are not used in a discriminatory manner.

## Conclusion

The discriminatory use of peremptory strikes is a real problem that must be addressed. While reform may strengthen *Batson*, it will not prevent the discriminatory use of peremptory strikes. It will simply cause lawyers who are consciously or unconsciously discriminating to become more savvy in their discrimination, strengthening the false veneer of race-neutrality. The elimination of peremptory strikes is the only full solution to that problem.

RESPECTFULLY SUBMITTED this 3rd day of May, 2021.

By           /s/ Mikel Steinfeld            
MIKEL STEINFELD