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IN THE SUPREME COURT

STATE OF ARIZONA

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-21-0008
COMMENT OPPOSING THE
PETITION IN PART

Pursuant to Rule 28(e), Rules of the Supreme Court, Andrew Jacobs and Marsha Cotton¹ respectfully submit their Comment for the Court’s consideration opposing in part the 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 (the “Petition”).

Introduction and Overview

We agree with and support the stated purpose of Chief Judge Swann and Judge McMurdie’s proposed rule changes – the elimination of discriminatory bias in jury

¹ The views expressed in this Comment are those of the Commenters and are not necessarily those of their law firm.

selection. To that degree, we support the Petition. However, we believe that Petition R-21-0008 (the “*Batson* Working Group Petition”) is preferable, for reasons stated in the *Batson* Working Group Petition and the host of excellent comments supporting its adoption.

But if this Court chooses to adopt the Petition as its preferred solution to the discriminatory use of peremptory challenges, it should do so as modified, to avoid two needless and self-defeating pitfalls in its design: (1) allowing the prosecution and defense to strike jurors by stipulation will recreate current peremptory practice wherever the county’s prosecutors and defenders choose to do so, whether case-by-case or throughout a county; and (2) the shift to a “preponderance of the evidence” standard to evaluate strikes will engender confusion in the law, creating the very increase in appeals the Petition promises to avoid. Notably, the Petition fails to explain or justify these injurious add-ons to its otherwise thoughtful and well-reasoned proposal. No other Comment to this point has called these defects out, so we felt it desirable to raise them for the Court’s consideration.

I. The Petition’s Purported Abolition of Peremptory Strikes – While Restoring Them Wherever the Lawyers Stipulate to Strikes – Undoes the Petition’s Reform, and Would Create a Hodgepodge of Courtrooms and Jurisdictions in Which Peremptories Are Banned Or Persist.

The Petition’s design does not deliver on its lofty promise to be the alternative that eliminates racial and other discrimination. It argues that it stronger than the *Batson* Working Group’s proposal and will “end definitively one of the most obvious

sources of racial injustice in the courts.” (Petition, at 2) While making these strong claims, the Petition contains an exception that eats the rule it promotes. In proposed Ariz. R. Crim. P. 18.5(g), the Petition’s Appendix provides, simply, “The parties may stipulate to the removal of a juror.” (Petition, Appendix A, at 2).

Leaving the power to strike jurors to any pair of agreeing opposing counsel will simply recreate the current practice. This became clear in the *Batson* Working Group, as some prosecution lawyers – but also some defense lawyers – argued that their side needed peremptories to achieve a fair jury. The comments on the Petition prove this point, too. Chief Deputy Attorney of Mohave County James Schoppmann commented against abolishing peremptories from a prosecution perspective, partly because of perceived concerns about fairness in relation to law enforcement. *See* J. Schoppman, Comment on R-21-0020 (Feb. 23, 2021). At the same time, the National Lawyers Guild opposed their abolition from a defense perspective because of its perception of the need to retain them for criminal defendants. *See* V. Aronow, Comment on R-21-0020 (April 30, 2021), at 4-6. Because trial attorneys on both sides already believe that peremptory strikes are a necessary part of having a fair and impartial trial, allowing the parties the choice to stipulate to peremptory strikes is really no abolition at all. If the Maricopa County Attorney and the Maricopa County Public Defenders’ offices both believed the current practice desirable, they could stipulate case-by-case, or could reach a standing informal agreement in all cases, to

the removal of X number of jurors, each side to remove 1, 2, or 3 of their preference. The rule absolutely permits this easily foreseeable outcome.²

This would thus make the abolition of peremptories one of many instances in American law when the exception destroys the rule. *See Jeffrey v. Rapid Am. Corp.*, 448 Mich. 178, 190, 529 N.W.2d 644, 651 (1995) (holding the general rule that a corporation merely purchasing the assets of another corporation does not automatically assume the liabilities of the purchased corporation is “swallowed” by the “express contractual agreement” exception because in virtually all merger agreements an assumption of liabilities clause is present); Wayne A. Logan, An Exception Swallows A Rule: Police Authority to Search Incident To Arrest, 19 Yale L. & Pol’y Rev. 381, 381-82 (2001) (arguing that the “search incident to arrest” exception to the Fourth Amendment’s prohibition against warrantless search and seizure “swallows the rule” because warrantless arrests “are very much the norm—not the exception—in American policing”).

² This Court is well familiar with status quo bias in thinking as a barrier to effective reform. *See Adam S. Zimmerman, Funding Irrationality*, 59 Duke L.J. 1105, 1134-36 (2010) (citing William Samuelson & Richard Zeckhauser, Status Quo Bias in Decision Making, 1 J. Risk & Uncertainty 7, 19 (1988)) (discussing status quo bias: “the tendency to value the status quo over other options, even when those options increase individual welfare.”). In 1992, Arizona lawyers feared the implementation of Rule 26.1, before coming to view it as a jewel of Arizona’s civil practice. In 2018, Arizona lawyers feared the implementation of Rule 26.2, before becoming accustomed to the efficiencies it promotes. That lawyers have always had peremptories does not mean that they promote the good, or that the alternative world might not prove fairer and preferable. It just assures resistance to reforming them.

The Petition takes the position that our current system effects discrimination and exclusion from juries through misuse of peremptories – the willing, almost unreviewable choices of opposing sets of lawyers as to who may sit in the jury box. And the Committee on the Superior Court even voted to support the Petition *because* it (and the *Batson* Working Group Petition) “present strong evidence of how peremptory strikes have been misused and have resulted in juries that are not representative.” *See* Comment, Committee on Superior Court, Hon. C. Gurtler, Chair (Apr. 12, 2021), at 2-3. The Petition and that Comment are right about that.

Thus, it makes no sense whatsoever as a matter of design to toss the keys back to the same institutional actors whose choices embed discrimination in our juries and invite them – once again – to decide between prosecution and defense alone, *unreviewably*, to remove jurors, whether singly or in groups. The Arizona Supreme Court has evidenced a strong interest in making sure that juries are representative, and that they are not composed through discrimination. If this Court elects to abolish peremptories, it needs to really abolish peremptories. That would be bold and praiseworthy, even though we suggest enacting the *Batson* Working Group proposal as a better alternative. But to enact a kind of Potemkin village abolition of peremptories – except not when lawyers cooperate to resurrect them – would be the appearance of reform without its reality, and would be not be meaningful action toward solving the problem.

II. The Petition’s Proposed Preponderance of the Evidence Standard For Removing Jurors For Cause Will Engender Confusion and a Great Deal of Appellate Litigation.

Curiously, the Petition proposes a significant and unwarranted modification of Arizona law without discussion or justification. Exhibit A to the Petition would inject into Ariz. R. Crim. P. 18.5(f), Challenge for Cause, the sentence, “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.” This language is doubly flawed and can only create confusion.

First, this language is flawed by the structural and conceptual oddity of conjoining a summary judgment-like notion – that there is no possibility that a juror can be fair – with a preponderance standard. Thus, the trial judge is put to analyzing whether it is slightly more likely than not that it is impossible that someone can be fair. This is internally contradictory in concept, and is in any event vastly more difficult than just having the trial judge ask the simpler question, “can the juror not render a fair and impartial verdict?”

Second, and worse, the preponderance burden would effect a significant revision in Arizona law without necessity or justification. Currently, Arizona appellate courts review a trial court’s voir dire ruling for an abuse of discretion. *State v. Glassel*, 211 Ariz. 33, 45 (2005). Under an abuse of discretion review, a trial court’s decision will not be reversed or vacated unless the judge: (1) commits an

error of law in reaching a discretionary conclusion; (2) reaches a conclusion without considering the evidence; or (3) makes a finding lacking any evidentiary support. *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 50 (Ariz. Ct. App. 2007) (internal citation omitted); see also *State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, 30 (Ariz. Ct. App. 2003) (“An abuse of discretion exists when the record, viewed in the light most favorable to upholding the trial court’s decision, is devoid of competent evidence to support the decision.”).

Preponderance of the evidence standards necessarily lead to meaningfully different appellate review. An appellate court reviews a decision based on the preponderance of the evidence standard to ensure that the decision was supported by “substantial evidence.” *Montana v. Luff*, 250 Ariz. 401, 405-06 (Ariz. Ct. App. 2020) (citing *In re Estate of Pouser*, 193 Ariz. 574, 579 (1999)). Under this standard of review, an appellate court must look at all the evidence present in the record to determine if substantial evidence favors the party upon whom the burden rests. *Id.*

The Petition’s preponderance standard would doubtless engender both confusion in the law, and a host of additional appellate litigation. To perform the required “substantial evidence” review of whether a trial court correctly determined by the preponderance of the evidence that a juror should have been dismissed, the appellate court would have to decide if the trial court correctly concluded that the evidence in favor of dismissing a juror for cause had a more convincing force than

the evidence opposing such determination. *Id.*; see also *Double AA Builders, Ltd. v. Grand State Constr. LLC*, 210 Ariz. 503, 511 (Ariz. Ct. App. 2005). Thus, even if a reviewing court were to seek to apply the current abuse of discretion standard, it could no longer simply affirm a trial court’s decision after finding some “competent evidence” to support the decision, as with other reviews for abuses of discretion. *Burton*, 205 Ariz. at 30. Instead, the reviewing court will have to find a higher quantum of evidence present, something equating to “substantial evidence,” that favored the party with whom the burden rested. *Luff*, 250 Ariz. at 405-06.

This new preponderance of the evidence standard will upend a party’s efforts to choose a fair and impartial jury. For example, in the context of racial bias, a trial judge will have a harder time finding substantial evidence to support a for cause strike because racial bias is rarely proven with unmistakable clarity. See *State v. Anderson*, 210 Ariz. 327, 338 (2005); *State v. Moody*, 208 Ariz. 424, 450 (2004). This underscores the preferability of the *Batson* Working Group approach, because by flipping the burden to undo – or deter – peremptory strikes that might reasonably be seen as discriminatory, that Petition largely avoids complicated proofs of racial bias. The “preponderance of the evidence” standard, not justified in the Petition, would pull Arizona law right back to the thorny thicket of factually complex attributions, asking the reviewing court a difficult and convoluted question – did substantial evidence show that the trial court was barely correct in attributing to a

juror that they could not possibly be fair?

As with the Petition's proposal to accord to lawyers or opposing offices a right to stipulate to striking jurors, we believe that if this Court resolves to abolish peremptory challenges, it should do so without the unnecessary addition to Arizona Rule of Criminal Procedure 18.5(f), Challenge for Cause, the sentence, "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."

CONCLUSION

While we prefer and suggest the adoption of the *Batson* Working Group Petition, R-21-0008, the Petition of Judges Swann and McMurdie grapples thoughtfully and well with the problem of discrimination and makes a serious proposal to remedy it. If this Court sees that proposal as the best solution, it should excise from their draft two structural features that are neither justified in the Petition, nor justifiable, as they mar an otherwise laudable proposal.

Respectfully submitted this 3rd day of May, 2021.

/s/ Andrew M. Jacobs

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