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IN THE SUPREME COURT
OF ARIZONA

IN THE MATTER OF:	SUPREME COURT NO. R-21-0008
PETITION TO AMEND THE RULES OF THE SUPREME COURT OF ARIZONA TO ADOPT RULE 24-JURY SELECTION	**COMMENT OF THE COMMISSION ON MINORITIES IN THE JUDICIARY IN *SUPPORT* OF PETITION NO. R-21-0008**

Pursuant to Rule 28(e) of the Rules of the Supreme Court of Arizona, the Commission on Minorities in the Judiciary respectfully submits this comment in support of Petition No. R-21-0008 filed by the "*Batson* Working Group" to adopt a new Arizona Supreme Court Rule 24 concerning jury selection.

RESPECTFULLY SUBMITTED this 3rd day of May 2021.

By /s/

Honorable Frankie Y. Jones
Chair, Commission on Minorities in the Judiciary

I. STATEMENT OF INTEREST

The Commission on Minorites in the Judiciary ("COM") is a standing committee of the Arizona Judicial Council tasked with developing and implementing policies designed to promote diversity, equality, and justice in the judicial department and in the legal community in Arizona. One of the principal goals of COM is to improve justice, eliminate bias from court operations, promote equal access to the courts, and inspire a high level of trust and public confidence.

II. COM SUPPORTS ADOPTING R-21-0008 AS WRITTEN

COM supports the adoption of Petition No. R-21-0008 (the "Petition") as written because no juror should ever be denied the opportunity to serve based on explicit or implicit bias. The Petition offers a practical and workable solution to the issues of *Batson v. Kentucky* and its progeny to eliminate discrimination from jury selection.

a. The promise of *Batson v. Kentucky* is broken.

The current *Batson* scheme essentially requires a finding of purposeful discrimination on the part of a prosecutor. *Batson v. Kentucky*, 476 U.S. 79, 98 (1986). A court must decide that there is no "neutral" explanation for striking a juror other than an intent to unlawfully discriminate. Judges may be quite reluctant to accuse an attorney of purposeful discrimination—especially where there may be regular appearances before that judge. As a Third Circuit panel once put it:

> No judge wants to be in the position of suggesting that a fellow professional—whom the judge may have known for years—is exercising peremptory challenges based on forbidden racial considerations.

Coombs v. Diguglielmo, 616 F.3d 255, 264 (3d Cir. 2010).

Similarly, attorneys may refrain from using *Batson* challenges in the first place so as not to offend opposing counsel, against whom they might frequently cross proverbial swords in litigation.[1] Thus, courts have denied *Batson* challenges for such imperfect reasons as a juror's demeanor, failure to make eye contact, unemployment, or appearing to be "inattentive." *See e.g., U.S. v Sherrills*, 929 F2d 393 (8th Cir. 1990); *Simon v Epps*, 2007 WL 4292498 (USDC, ND Miss. 2007).

Far more importantly, however, the current *Batson* procedures ignore the significant impact of implicit, or non-intentional, biases in jury selection. This Commission recognizes implicit bias as a long-standing reality in our criminal justice system—and in jury selection[2] and jury behavior,[3] in particular.

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[1] Sloan, Anne, *What To Do About Batson?: Using A Court Rule To Address Implicit Bias In Jury Selection*, 108 CALIF. L. REV. 233, 241 (2020).

[2] *See, e.g.*, Sloan, Anne, *What To Do About Batson?": Using A Court Rule To Address Implicit Bias In Jury Selection*, 108 CALIF. L. REV. 233 (2020); Bennett, Hon. Mark W., *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, 149 (2010); Page, Antony, *Batson's Blind Spot: Unconscious Stereotyping & the Peremptory Challenge*, 85 B.U. L. REV. 155, 160 (2005)

[3] *See* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L.J. 345, 355-56 (2007); Levinson, Justin and Young, Danielle, *Different Shades of Bias: Skin Tone, Implicit Racial Bias and*

Like most parts of society, lawyers and judges are not immune from unrecognized biases.[4] As one judge has written:

> The Batson challenge process, at the end of the jury selection, may create further implicit bias in jury selection by "sanitizing" or providing "cover" for the biased selections that it is purportedly designed to detect and eliminate, thus failing to prohibit explicitly and implicitly biased peremptory strikes.[5]

But diversity is a well-documented remedy for stagnation; for example, it is well-known that symphony orchestras became much more diverse and inclusive when they implemented blind tryouts behind a curtain. Nobody accused them of intentional discrimination. But the before and after show the effects of implicit bias. The *Batson* scheme needs to address implicit biases as well.

b. <u>The change proposed in the Petition is a workable solution that can help us finally realize the promise of *Batson*</u>.

The Washington Supreme Court recently acknowledged the longstanding effects of implicit bias in jury selection, shifting the focus of bias inquiries for trial courts under its jurisdiction:

> [W]e hold that the question at the third step of the *Batson* framework is *not* whether the proponent of the peremptory strike is acting out of purposeful

Judgments of Ambiguous Evidence, 112 W. VA. LAW REV. 307, 337–38 (2010); Kang, Jerry et al, *Implicit Bias in the Courtroom,* 59 UCLA LAW REV. 1124, 1156–57 (2009).

[4] Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195 (2009).

[5] Bennett, Hon. Mark J., *Id.* at note 1

> discrimination. Instead, the relevant question is whether "an objective observer could view race or ethnicity as *a factor* in the use of the peremptory challenge." If so, then the peremptory strike shall be denied.

State v. Jefferson, 429 P3rd 467, 480 (2018). COM supports the Petition's proposed rule because it emphasizes *inclusion* of all groups in jury participation, rather than the current scheme, which operates only to *exclude* (absent purposeful discrimination, of course).

The experience of the Washington courts validates this conclusion. Prior to adoption in Washington, a similar reform measure was criticized by judges as impractical. But since Washington General Rule 37 was adopted in 2018, the Washington courts have embraced the rule. The Washington Supreme Court expanded the scope of the procedural rule by adopting the "objective observer test" in its 14th Amendment *Batson* analyses. *State v. Jefferson*, 192 Wash. 2d 225, 249, 429 P.3d 467, 480 (2018).

Following the United States Supreme Court decision in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), the Washington Supreme Court also incorporated the objective observer test for implicit bias into its jury misconduct analysis. Recognizing that "implicit racial bias can affect the fairness of a trial as much as, if not more than, 'blatant' racial bias," the Washington Supreme Court reiterated that courts "***should not 'throw up our hands in despair at what appears to be an intractable problem***. Instead, ***we should recognize the challenge presented by***

unconscious stereotyping . . . and rise to meet it.'" *State v. Berhe*, 193 Wash. 2d 647, 663–64, 444 P.3d 1172, 1180–81 (2019) (emphasis added).

III. CONCLUSION

The proposed order sends a clear message to our constituents, to the people of Arizona, that our state-wide judiciary is committed to confronting systemic inequities by "altering courtroom practices" to redress, rather than ignore, these systemic pitfalls.[6] And the science tells us that such practices, coupled with "testing and training," in addition to deliberate "auditing [of] judicial decisions," *will* lead to a reduction in unconscious biases both in jury selection *and among the judges making these decisions*.[7]

The time to act is now. The proposed rule has been studied. It works in Washington and California, and it will work here. By altering the *Batson* framework to default toward inclusion of jurors who have historically been excluded under the specter of discriminatory animus, the proposed rule will strengthen the procedural fairness of jury selection. Improved procedural fairness promotes confidence in the

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[6] Jeffrey J. Rachlinski et. al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1226 (2009)

[7] *Id.* ("To minimize the risk that unconscious or implicit bias will lead to biased decisions in court, the criminal justice system could take several steps. These include exposing judges to stereotype-incongruent models, providing testing and training, auditing judicial decisions, and altering courtroom practices. Taking these steps would both facilitate the reduction of unconscious biases and encourage judges to use their abilities to compensate for those biases.").

judiciary and bolsters the court's legitimacy in the eyes of litigants and the public. COM encourages the Supreme Court of Arizona to err on side of tradition *and* reform, by keeping peremptory strikes *and* ensuring that qualified jurors are never again excluded because of bias.

Therefore, the Commission on Minorities in the Judiciary hereby fully supports and urges the approval of this Petition.