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ARIZONA SUPREME COURT

**PETITION TO AMEND RULES 18.4 AND
18.5 OF ARIZONA RULES OF CRIMINAL
PROCEDURE AND RULE 47(E) OF THE
ARIZONA RULES OF CIVIL PROCEDURE**

R-21-0020

MARICOPA COUNTY ATTORNEY'S
COMMENT IN OPPOSITION

The Petition in this matter seeks to eliminate preemptory strikes available to both sides during jury selection. Because we believe the elimination of strikes is unnecessary and will ultimately lead to trials that are less fair for all sides, the Maricopa County Attorney's Office submits this comment asking this Court to deny the Petition.

The Petition discusses the history of preemptory strikes and notes that no jurisdiction in this country has eliminated preemptory strikes. Although, as the Petition notes, preemptory strikes are not constitutionally required, "they are one means to achieve the constitutionally required end of an impartial jury." *United State v. Martinez-Salazar*, 528 U.S. 304, 307 (2000). The Supreme Court has "long

recognized the role of the peremptory challenge in reinforcing a defendant's right to a trial by an impartial jury." *Id.* at 311. Despite a long and unanimous history of the right to peremptory strikes and the fact that they are one tool to help deliver an impartial jury, the Petition seeks to eliminate them.

Judges are human and subject to making mistakes just like anyone else in the system. Judges do not know the nuances of a case as well as the litigants do. What strikes a litigant as a clearly biased response from a juror might not strike the judge the same way. While the litigants make every effort to explain why a juror should be stricken for cause, without a full comprehension of evidence and issues in the case, a judge is unlikely to release many of these jurors for cause.

Regardless of the reasons, judges sometimes fail to remove jurors for cause when they should do so. In most situations in Arizona today, the party then uses a peremptory strike to remove that juror and there is no reversible error as long as the jury that decided the case was impartial. *See State v. Hickman*, 205 Ariz. 192, 68 P.3d 418 (2003) (trial court erred in not removing two prospective jurors for cause but both were removed with peremptory strikes and thus the jury was impartial and no reversible error occurred). If peremptory strikes were eliminated the State would have no recourse in a criminal trial if a judge failed to grant an appropriate challenge for cause. Were that to happen, the trial would go forward with the biased juror and the case would likely result in, at best, a mistrial, requiring a new trial, or an acquittal.

A defendant could fare a little better if a judge sat a juror who should have been removed for cause because, if convicted, the defendant would have the right to appeal that error and get a new trial. In either scenario, however, there is a significant increase in litigation and judicial resources when a simple peremptory strike would have prevented the harm.

Although the Petition dismisses peremptory strikes as “hunch based” (and that is likely true at times), that view minimizes the importance of these strikes. Rather than relying on “hunches,” parties typically use peremptory strikes on jurors who have given answers during the jury selection process that suggest they could not fairly evaluate certain evidence, would potentially favor the opposing side for reasons having nothing to do with the evidence, do not respect the gravity of the process, or are just not interested in being jurors. Empaneling these types of jurors should be concerning for the litigants, the court, and the community at large. Courts are often reluctant to strike prospective jurors for cause as long as the juror ultimately says that they can be fair and impartial, even when their answers to specific questions indicate the contrary.

Expecting a prospective juror to candidly admit that they cannot be fair is not realistic. Most people do not think of themselves as unfair or biased. Others, even if they recognize a bias in themselves, likely do not want to express their true opinions on sensitive topics like race, their views on the law, or their beliefs in the

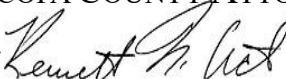
equity or inequity of the legal system in front of a group of strangers. Is it reasonable to ask a person to assess whether they are fair-minded and then ask them to admit they are not in a public setting?

While most prospective jurors would no doubt try to be fair, and most would even believe they could be, they do not really know what to expect in the trial process, what the evidence will be, or how difficult it may be to set aside lifelong beliefs about the way they see the world. Peremptory challenges allow a litigant to remove a prospective juror who has revealed deeply held biases even if the juror has said the magic words that they think they can be fair and impartial. Far from being “hunch based,” these peremptory strikes are based on the answers provided by the prospective jurors and, used in that way, they are an important tool for securing the right to an impartial jury for all.

An impartial jury is a critical component for our justice system. Whether in the civil or criminal system, litigants should have confidence that the jurors deciding the case can fairly and impartially evaluate the evidence. While a judicial determination on whether there is cause to believe a juror cannot be fair is one tool for ensuring a fair jury, the right to peremptory strikes is an equally important tool to achieve that goal. Finding manageable and appropriate ways to ensure this tool is not used in a discriminatory fashion is vital, but simply discarding this important tool in all cases is not the answer.

Respectfully submitted this 3rd day of May 2021.

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By /s/ 
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CHIEF DEPUTY