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ARIZONA SUPREME COURT

PETITION TO AMEND THE RULES OF THE SUPREME COURT OF ARIZONA TO ADOPT RULE 24—JURY SELECTION

R-21-0008

MARICOPA COUNTY ATTORNEY'S COMMENT IN OPPOSITION

Petitioner's goal is commendable, and it is one that is shared by the Maricopa County Attorney's Office (MCAO). All lawyers should work towards ensuring that the criminal justice system is free of bias and prejudice. Practices of the past, particularly in certain states, that intentionally excluded anyone from jury service based on stereotypical assumptions about race, gender, or other protected characteristics undermine the core principles of equality and justice that our legal system strives to uphold. Identifying a common goal to eliminate a particular evil does not, however, mean that reasonable minds will all agree on the best way to achieve that goal. The rule proposed in the Petition is one such example. While

well intentioned, the proposal is an untenable and illogical solution that ultimately does not further the pursuit of justice.

MCAO welcomes the Court's recent announcement of Administration Order 2021-35 forming the Task Force on Jury Data Collection, Practices and Procedures. This Task Force has been asked to, among other things, make recommendations about data collection to better understand jury composition, as well as to assess the overall jury selection process from summons, to response rates, to the use of strikes. The recommendations of this Task Force, and an analysis of the data after collection, will allow all system stakeholders to make informed recommendations and decisions about the best way to empanel juries that are representative of our community. Only a comprehensive look at how juries are formed from start to finish, based on actual Arizona data, will allow us to achieve this goal. Making any changes to the process before the Task Force completes its work will be based on guesswork and is not only unlikely to achieve the common goal of representative juries, but is likely to make the jury selection process worse.

In the absence of any specific data, the Petition presumes that there is a problem with jury selection in Arizona. Moreover, there is a further assumption that the cause of this presumed problem rests solely with the lawyers, particularly prosecutors, and their use of peremptory strikes. The first presumption is based on law review articles, none based on Arizona data, and the list of cases included at

Appendix D. With the information presented in Appendices D and E, Petitioners appear to conclude that if a challenge was raised under *Baston v. Kentucky,* 476 U.S. 79 (1986) or its progeny, the challenge itself is conclusive evidence that inappropriate strikes were made. Merely because a lawyer raises an issue on appeal does not mean it is meritorious. The information in those appendices can equally be viewed as evidence that trial courts are properly applying *Batson* and that the very few reversals indicate strikes are *not* being used in an improper manner. Additionally, we do not have any information about cases where trial courts sustained *Batson* challenges and the impacted jurors served on the jury. With that data, we may find that *Batson* is working as it should; or that the application of *Batson* is not the only factor contributing to underrepresented groups on Arizona juries; or that *Baton* is not a factor to the degree Petitioners assert. The point being that we just do not know what the issues are or what is causing them. Jury formation is a complex process with many components. Presuming that there is a problem and that the problem has only one cause may actually do harm, rather than advance the system toward the goal of equal representation.

Petitioners proclaim that "*Batson* is broken," [Petition at 3[1]] apparently assuming that the use of peremptory strikes is the only point in the jury formation process where discrimination might occur. Yet, within the jury formation process

[1] Reference is to pages as numbered in the Petition.

there are many different actions that could potentially cause individuals of one group to be removed from the jury selection process at a higher rate than others. Perhaps, for example, it occurs when the initial juror summons lists are created. Perhaps it is when potential jurors are excused by a jury commissioner, or when prescreening is done before potential jurors even get to a courtroom for possible selection. Perhaps hardship strikes—a system that itself is subject to widely different interpretations in different courtrooms—are being used to remove a certain group more often than others. Perhaps there are reasons that strikes for cause are being applied in a disproportionate manner.[2] Of course, peremptory challenges may be a source of bias as well. In a complex, multi-faceted process like jury selection, isolating one part of that process to try and explain the cause and effect of the ultimate outcome is inadequate. Any serious inquiry into this issue must be driven by data and analyzed at each step in the process. Without defining exactly what that problem is, when it occurs, and what the surrounding circumstances are, it is impossible to craft a

[2] For example, one study cited in the Petition and in R-21-0020, Eisenberg, A., *Removal of Women and African Americans In Jury Selection in South Carolina Capital Cases, 1997-2012,* 9 Ne. U. L. Rev. 299 (Summer, 2017), to support the proposition that peremptory strikes are used in a discriminatory manner (a study which notes that it "unfortunately did not control for race-neutral explanations for the use of strikes" *id.* at 344) concluded that judges removed a higher percentage of black potential jurors for cause. *Id.* at 335, 345 (finding that in the 23 capital cases reviewed in South Carolina, 56% of black venire members (compared to 33% of white venire members) were excused for cause).

meaningful solution. Systemic issues can only be properly corrected when the entire system is fairly evaluated.

Petitioners note that only two states (Washington and California) have adopted any rule similar to what they propose. They provide no discussion, however, of how those rules have been implemented. We have no information about whether they have had any success in achieving the desired results or whether they have had unintended consequences. Before blindly following those states, it would be prudent to take some time to understand the impact of these rules and whether their implementation has been successful.

Even assuming *Batson*'s framework needs to be modified to help achieve the goal of representative juries, the proposed rule is not the solution. The rule somehow manages to be both excessively detailed and overly vague. It creates labyrinthian procedures that might seem good on paper, but its application in courtrooms will take what should be a straightforward process and turn it into a series of hearings complete with landmines of error that serve only to keep appellate courts busy.

Starting with the list of protected groups, the mandates of the proposed rule are not as simple as the Petition presumes. Does the new rule presume that courts will create juror information forms that provide spaces for each juror to indicate their race, sex, gender, religion, national origin, ethnicity, disabilities, age, and sexual orientation? If not, will courts question every juror a party strikes to learn about

things like the person's national origin, ethnicity, or sexual orientation to provide the opposing party, or the court on its own, a basis to object under the rule? Is it reversible error if a court fails to raise a possible objection on its own motion? What happens if a potential juror refuses to answer some or all of these personal questions? Are objections and arguments to be based on what a particular lawyer thinks might be true about the stricken juror, or will the rule apply only if a juror's identification in one of the protected categories comes out during voir dire? Do intrusive questions, like these, whether on a form or in a courtroom, make people *more* willing to serve on a jury?

The timing of the objection under the proposed rule provides more fodder for litigation. Although the Petition mentions that this rule will specifically permit an objection after a jury is empaneled, presumably up to the moment of discharge, it provides no examples of why anyone would be permitted to object to a peremptory strike after the jury is empaneled, other than to say it could be based on information that was not known when the jury was sworn. What new information about a stricken juror, unknown at the time of the strike, could have motivated a discriminatory reason for the strike and then suddenly come to light and make it necessary to declare a mistrial (a remedy causally suggested in the Petition like it is really no big deal)? Neither the Petition nor the cases cited explain why a party should not be required to raise a challenge under this proposed rule prior to the jury

being empaneled. The proposed timeline provisions of the rule will invite delayed objections and potentially create unnecessary mistrials but will do nothing to help ensure that our juries resemble our population.

The proposed standard the court must apply in determining whether to allow a challenged strike is concerningly vague.[3] While the "reasonable person" standard is a well-known facet of the law, in this context it is useless. How is a judge to know what "*any* reasonable person *could* view" as a "conscious or *unconscious*" factor in a decision? Is a judge really in a position to rule, as a matter of law, whether a reason for a strike could possibly be seen by a reasonable person somewhere to *unconsciously* indicate that race, for example, was a factor in some way in the decision to strike? With this standard, the striking party and the judge could both be "consciously" certain that a strike was not racially based, but the judge could still find that some reasonable person somewhere *could* think that, even unconsciously, the reason had a racial component and be required to overrule the strike. The standard also raises the question of what type of evidence the challenging party will be permitted to introduce to prove to the judge that a reasonable person somewhere could consider the proffered reason to be discriminatory. In the end it is a completely

[3] The standard in the proposed rule deviates from the standard in the Washington rule that served as a basis for this proposal. [Petition at 15]. We are told the change was to make the proposed standard "far simpler," but how it does so is not readily apparent.

rudderless standard that will keep appellate courts busy (assuming any strike is ever upheld under this standard) but does little to create representative, impartial juries. The current standard means something and it makes sense. If a party is engaging in purposeful discrimination—a party is using strikes to intentionally remove members of a protected group from the jury—the strike is not allowed. The proposed rule replaces that with no real standard at all.

Having created a standard that effectively allows a judge to overrule any reason for a strike, the rule then lists reasons that are presumptively invalid. We are told these are reasons that have been "associated with improper discrimination" at some point. Annual petitions will no doubt follow to add new reasons to this list anytime a new law review article identifies another objective fact that might be associated with discrimination somewhere in some context. While the rule allows a party to rebut the presumption by clear and convincing evidence, it is not clear what a party could possibly present that would overcome the presumption and the "unconsciously could" standard the judge must apply under the rule.

The rule further mandates what a striking party must do when a strike is based on a reason even Petitioners must concede is completely unbiased—the conduct of a potential juror while in the courtroom. These mandates will do little to advance the goals of the Petition but they will certainly change jury selection, as parties will be forced to interrupt voir dire to ensure a record is made of a sleeping juror, a juror

reading a book, a juror texting, a juror glaring or rolling their eyes at counsel table, etc. Although the descriptions of conduct in the rule are broad, we can likely expect regular petitions to add to this section of the rule as well.

Given the broad scope of the rule and the vague standard for judicial review, lawyers on all sides will likely challenge all or most strikes of the other side to force them to explain the basis of the strike because all the objecting side must do is object and cite the rule. We can certainly expect litigation as to whether the failure to make such a challenge constitutes malpractice or ineffective assistance of counsel. Then, unless specific questions have already been asked of the jurors in some way to cover all the possible areas of potential discrimination in the rule, the judge will presumably conduct a hearing with the challenged juror to determine which areas listed in the rule might apply to that person to make an appropriate record. With that information, the judge will then determine whether any reasonable person could view the juror's race, sex, gender, religion, national origin, ethnicity, disability, age, or sexual orientation as a conscious or unconscious factor in striking the juror. Presumably the party challenging the strike will be given the opportunity to argue or present some type of evidence explaining how a reasonable person could view the proffered reasons and the striking party would have the opportunity to respond or, if the reason is presumptively invalid, to argue clear and convincing evidence as to why the presumption should not apply in this case. Presumably, the judge rules and

then moves to the next strike and a new hearing on that strike begins. Petitioners ask this Court to adopt this convoluted procedure without any evidence that it will fix whatever problems exist in jury composition.

No one suggests that *Batson* is perfect; few judicially created rules or legislative enactments are. But the Petition seeks to completely alter one piece of a very complex system, without specific evidence justifying the alteration, just in the hopes of achieving better outcomes in the compositions of our juries. The Arizona judicial system would be far better served to take the time needed to better understand the scope of any problem and its causes. Whatever those problems and causes may be, this particular proposal is not the solution.

Respectfully submitted this 3rd day of May 2021.

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By /s/ Kenneth N. Vick
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