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IN THE ARIZONA SUPREME COURT

In the Matter of: PETITION TO AMEND ARIZONA RULES OF THE SUPREME COURT, RULE 24 REGARDING JURY SELECTION	ARIZONA SUPREME COURT No. R-21-0008

The Arizona Capital Representation Project (ACRP) is a statewide non-profit legal services organization that assists indigent persons facing the death penalty in Arizona through direct representation, *pro bono* training and consulting services, and education. ACRP tracks and monitors all capital prosecutions in Arizona. ACRP is thoroughly familiar with the standards for constitutional and fair jury proceedings in criminal trials. ACRP supports the proposed rule change and urges this Court to grant the Petition to Amend the Rules of the Supreme Court of Arizona to Adopt Proposed Rule 24-Jury Selection ("Petition"). For the reasons explained below and in the Petition, *Batson v. Kentucky*, 476 U.S. 79 (1986) is not sufficient to prevent the discriminatory use of peremptory strikes.

I. Racial Discrimination is a Significant Problem in Capital Cases

a. Jury Selection Has Long Suffered from Racial Discrimination, Especially in Capital Cases

Peremptory strikes and restrictive master jury lists are inextricably linked with State efforts to exclude African Americans from serving on juries. Equal Justice Initiative, *Illegal Racial Discrimination* (August 2010) at 9-10 ("EJI"). Although the Civil Rights Act of 1875 prohibited racial discrimination in jury selection, the Jim Crow era brought with it a host of strategies employed by States to eliminate or reduce the ability of African Americans to serve. *Id.* (citations omitted). In 1935, the U.S. Supreme Court considered the complete exclusion of African Americans from the jury pool in the trial of Clarence Norris, one of nine African American teenagers wrongly convicted and sentenced to death for the sexual assault of two white women. *Norris v. Alabama*, 55 S. Ct. 579 (1935). The Supreme Court held that it would no longer tolerate the "total exclusion" of African Americans from juries but did nothing to stop the systemic under-representation of African Americans on jury rolls and on juries.

In much of the United States, trials during the Jim Crow period "took place against the background of state-sponsored and -condoned terror, in the form of lynch mobs and extra-judicial killings." EJI at 10. Southern whites argued that "summary trials of Black defendants by all-white juries" was better than lynching. *Id.* (citing

Michael J. Klarman, *From Jim Crow to Civil Rights* at 119-20 (2004)). Historically, the death penalty was used against African Americans for a far greater variety of crimes than white Americans, including "rape, slave revolt, burglary, and arson." Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 Colum. Hum. Rts. L. Rev. 261, 272 (2007) (citation omitted). And extra-judicial lynchings "were not exceptions to the law" but were an ingrained part of the justice system and "a broader system of racial control." *Id.* at 274.

In the 20th century, lynchings subsided and were replaced with the disproportionate use of capital punishment against African Americans. Roberts at 274. While the method of executions has evolved from extra-judicial lynchings to lethal injection, the American criminal justice system has continued its racist legacy.[1]

b. African Americans and Other Minority Groups are Chronically Underrepresented in Arizona Jury Pools

This Court should adopt the proposed rule change because racial discrimination has long been recognized as a problem in Arizona jury selection. In Arizona, the list of names of eligible potential jurors is drawn from voter registration records and Arizona Department of Transportation records. Ariz. Rev. Stat. §21-

[1] Of course, African Americans are not only disproportionately subject to the death penalty but are subject to harsher penalties across the board and are incarcerated at significantly disproportionate rates than their white counterparts. African American men make up 13% of the male population, but 35% of the incarcerated population. Elizabeth Hinton, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf (May 2018).

101(6); Maricopa County Superior Court, Juror Selection Process, https://superiorcourt.maricopa.gov/jury/juror-selection-process/ (last accessed April 19, 2021). This process through which prospective jurors are called to serve jury duty results in the underrepresentation of African American venire members and the overrepresentation of white venire members. Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 Nat'l Black L.J. 238, 238 (1994) (finding that "potential jurors with specific human capital factors, such as higher income, higher education, and white racial background, were more likely to be represented on juries because they were more inclined to register to vote and could afford to take time off work to serve on juries.") (internal citation omitted). Although there are no recent studies on the racial makeup of prospective jurors in Arizona, this Court recognized twenty-five years ago that voter registration and drivers' license records result in a list that is not representative of the population of the state. *Jurors: The Power of 12, Report of the Arizona Supreme Court Committee on More Effective Use of Juries*, https://www.azcourts.gov/Portals/15/Jury/Jury12.1.pdf (1994). Voter registration rolls, in particular, were identified as "negatively impact[ing] minorities in a disproportionate way." *Id.* at 38.

This Court's Committee on More Effective Use of Juries recognized that "[c]hronically unrepresentative juries raise serious, *sometimes constitutional* questions, about justice in fact and the appearance of justice. Minorities not fairly represented on juries miss out on opportunities to exercise an important duty and privilege of

citizenship." *Id.* at 39-40 (emphasis added). The committee made a number of recommendations to improve the diversity of juror lists in Arizona, but the changes have never been adopted. Decades after recognizing a significant and, at least "sometimes constitutional" problem, Arizona continues to draw jurors from a pool that systematically excludes people of color.

The systematic exclusion of African Americans from Arizona jury pools is particularly harmful in capital cases. Recent studies show that, while 68% of white respondents favor the use of capital punishment, only 39% of African American respondents do. *Poll: Americans Divided by Race on Death Penalty*, https://www.newsweek.com/poll-americans-divided-race-death-penalty-384170 (10/16/15) (discussing Gallup poll). And, while 29% of white respondents oppose the death penalty, 55% of African American respondents oppose capital punishment. *Id.* These results are reflected in numerous studies on the attitudes and beliefs of capital juries, as studied by the Capital Jury Project.[2] In *every* statistical model from the Capital Jury Project, African American jurors are significantly more likely to oppose[3] the

[2] The Capital Jury Project (CJP) is a long-term research project that began in 1991 with support from the National Science Foundation. The CJP has conducted thousands of in-depth interviews with jurors across more than a dozen states to assess jurors' decision-making. "[T]he CJP was designed to: (1) systematically describe jurors' exercise of capital sentencing discretion; (2) assess the extent of arbitrariness in jurors' exercise of such discretion; and (3) evaluate the efficacy of capital statutes in controlling such arbitrariness." Jelani Jefferson Exum, *Should Death Be So Different?: Sentencing Purposes and Capital Jury Decisions in an Era of Smart on Crime Sentencing Reform*, 70 Ark. L. Rev. 227, 241-42 (2017)

[3] The respondents in this study are individuals who served on capital juries and were subject to death qualification. 74 S. Cal. L. Rev. at 380. Therefore, their "opposition" to the death penalty is not true

death penalty than are white jurors. Theodore Eisenberg, Stephen Garvey & Martin Wells, *The Deadly Paradox of Capital Jurors*, 74 S. Cal. L. Rev. 371, 385 (2001).[4] Additionally, Capital Jury Project research shows that the presence of an African American male juror reduced the likelihood of a death sentence being imposed. William Bowers, Benjamin Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Juror's Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171, 193 (2001). The exclusion of African Americans from capital juries has the highest of consequences for capital defendants.

Research also shows that African American jurors and white jurors hold significantly different attitudes about aggravating and mitigating circumstances,[5] which lead to different outcomes for capital defendants based on nothing more than the racial makeup of their jury. For example, African American jurors are more likely than white jurors to have lingering doubts about a capital defendant's guilt, to see the defendant as remorseful, and to identify with the defendant's family history. William J.

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opposition that would have rendered them ineligible to serve under *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

[4] A study published in 2003 examined "the roots of white support for capital punishment in the United States" by conducting "a quantitative case study of white death penalty support in the U.S., as it stood in 1992." Joe Soss Laura Langbein & Alan R. Metelko, *Why Do White Americans Support the Death Penalty*, 65 J.Pol. 397, 399 (2002). The survey found that racial prejudice is a "comparatively strong predictor of white support for the death penalty." *Id.* at 397.

[5] Although there is less research on the impact of how demographic factors other than race affect jurors' attitudes about the death penalty, research from the Capital Jury Project shows that "[f]emale jurors were consistently more receptive to mitigation than their male counterpart on the jury." Thomas W. Brewer, *Race and Jurors' Receptivity to Mitigation in Capital Cases: The Effect of Jurors', Defendants', and Victims' Race in Combination*, 28 Law & Hum. Behav. 529, 539 (2004).

Bowers, Benjamin D. Steiner & Michael E. Antonio*, The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 413 (James Acker et al. eds., 2d ed., 2003). By contrast, white jurors were more likely to view the defendant as dangerous and to underestimate the length of time the defendant would serve in prison if he were not sentenced to death. *Id.* Although the proposed rule change will not directly solve the chronic underrepresentation of racial and ethnic minorities in Arizona jury pools, it will help mitigate the distorting effects of that underrepresentation and offer a significant step towards protecting the right of defendants and the individual prospective jurors themselves.

II. Problems with Batson Framework

a. The Current *Batson* Analysis Allows Little Opportunity for Trial Counsel to Make a Record of Racially-Motivated Strikes

One of the most significant problems with the *Batson* framework is that this Court nearly always finds that trial counsel failed to make a sufficient record on which to find the state[6] exercised a peremptory strike on the basis of the prospective juror's race. *See, e.g. State v. Smith*, 250 Ariz. 69, --- ¶71 (2020) (arguing for the first time on

[6] Although racial discrimination is prohibited in civil cases as well as criminal cases, this comment focuses on criminal matters because of the role of the Arizona Capital Representation Project and the uniquely harmful effects of racial discrimination in criminal—and particularly in capital—matters.

appeal that the Court must conduct a comparative analysis of the jurors). Comparative juror analysis, which compares struck minority jurors with similarly situated white jurors who were not struck, has been endorsed by the U.S. Supreme Court[7] and utilized by that Court in its recent *Batson* cases: *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Foster v. Chatman*, 136 S. Ct. 1737 (2016); *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

Despite the Supreme Court's clear adoption of comparative juror analysis as the method for determining whether a purportedly race-neutral peremptory strike was in fact motivated by racial bias, this Court has never engaged in such analysis.[8] This Court has reviewed *Batson* challenges in 18 capital cases and has only granted relief a single time, on a principle that has since been overruled. *State v. Cruz*, 175 Ariz. 395 (1993). In *Cruz*, this Court held that where "the state offers a facially neutral, but wholly subjective, reason for a peremptory strike, it must be coupled with some form of objective verification before it can overcome the prima facie showing of discrimination." *Id.* at 399 (citation omitted). Since *Cruz*, the Court has, in all capital cases, affirmed the trial court's finding that the prosecutor's race-neutral reasons for striking the jurors were sufficient. In some cases, this Court's analysis has drifted from Supreme Court precedent in ways beyond rejecting comparative juror analysis on appeal. In *State v. Garcia*, 224 Ariz. 1, 10 ¶27 (2010), this Court denied the *Batson* claim

[7] *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Miller-El v. Dretke*, 545 U.S. 231 (2005)

[8] This Court has rejected arguments that comparative juror analysis can be conducted on appeal when such analysis was not done in the trial court. *E.g. State v. Medina*, 232 Ariz. 391 (2013).

in part because "at least one juror with a Hispanic surname was ultimately chosen." *See also State v. Hardy*, 230 Ariz. 281, 286 ¶15 (2012) (affirming trial court's denial of *Batson* challenge where "three minority jurors remained on the panel."); *State v. Roque*, 213 Ariz. 193, 204 ¶15 (2006) ("Although not dispositive," the state did not strike every minority juror). Whether one juror with a Hispanic surname survived the state's peremptory challenges is not part of the three-step *Batson* analysis. *See, e.g. Flowers v. Mississippi*, 139 S. Ct. 2228, 2235 (2019) (finding a *Batson* violation where state used peremptory strikes against five of six African American prospective jurors).

This Court should adopt the proposed rule change to offer a more achievable way for defendants to assert their right to a jury where peremptories have not been exercised against members of minority classes.

b. *Batson* Does Not Account for Implicit Bias

This Court should also adopt the proposed rule change because it recognizes the harm of implicit bias. Petition at 6, 15. "Implicit racial bias describes the cognitive processes whereby, despite even the best intentions, people automatically classify information in racially biased ways." Robert J. Smith, Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U. L. Rev. 795, 797 (2012). The *Batson* decision was intended to challenge "purposeful discrimination," and does not address implicit bias and discrimination. 476 U.S. at 98. Justice Marshall, in his *Batson* concurrence, warned that ending purposeful discrimination "will not end

the racial discrimination that peremptories inject into the jury-selection process." *Id.* at 102-03 (Marshall, J., concurring). Justice Marshall foresaw that "[a] prosecutor's own conscious *or unconscious* racism may lead him easily to the conclusion that a prospective black juror is 'sullen' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically." *Id.* at 106 (emphasis supplied).

"Operating outside of our conscious awareness, implicit biases are pervasive, and they can challenge even the most well-intentioned and egalitarian-minded individuals, resulting in actions and outcomes that do not necessarily align with explicit intentions." Staats, Cheryl, *Understanding Implicit Bias: What Educators Should Know*, American Educator Winter (2015-16) at 29, available at https://files.eric.ed.gov/fulltext/EJ1086492.pdf. Due to implicit bias, lawyers may strike a juror for a racially-motivated reason without knowing or intending as much. Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. Rev. 155, 234 (2005). Recently, the Arizona Court of Appeals examined a case where the prosecutor relied on, or at least offered as race-neutral, racial stereotypes to support striking the only African American member of the venire. *State v. Ross*, ---Ariz. ---, 483 P.3d 251 (App. 2021). In *Ross*, the prosecutor claimed, among other reasons, that he struck the juror because he was "extremely inarticulate" and "wasn't going to mesh well" with the other "more articulate" jurors. *Id.* at ¶8. For decades, such language has been commonly invoked as a stereotype of African Americans. *See, e.g.* Mikah K. Thompson, *Blackness as Character Evidence*, 20 Mich. J. Race & L. 321, 339 (2015);

LaVonda N. Reed-Huff, *Radio Regulation: The Effect of a Pro-Localism Agenda on Black Radio*, 12 Wash. & Lee J. Civil Rts. & Soc. Just. 97, 127 (2006). Nevertheless, the Court of Appeals did not find that the prosecutor's use of racially-coded language indicated that the peremptory strike was racially motivated.

c. Arizona's Constitution Provides Greater Protection than the U.S. Constitution for the Right to a Jury Trial and Jurors' Right Not to be Discriminated Against

The proposed rule change should also be adopted because it is necessary to protect the right to a jury trial, which is afforded greater protection under state law than U.S. Constitutional law. *Derendal v. Griffith*, 209 Ariz. 416, ¶6 (2005). As this Court explained in *Derendal*, Arizona's constitution preserves the strong right to a jury trial that existed prior to statehood. *Id.* at ¶¶7-8 (citing Ariz.Const. art. 2, §§23, 24).

Also unique to Arizona's constitution is protection for jurors' right to not be discriminated against for their religious beliefs. Ariz.Const. art. 2, §12. Although the U.S. Supreme Court has recognized a juror's right not to be discriminated against, *Powers v. Ohio*, 499 U.S. 400, 409 (1991), that Court has not extended *Batson* to jurors' religious views. Although the Mohave County Superior Court Judges have opposed[9] the proposed rule change because, among other reasons, it will create too many protected groups of jurors, *Batson* is simply inadequate to protect the state constitutional rights of defendants and jurors.

[9] Comment to R-21-0008 (4/16/2021).

d. Similar Rules Are Being Adopted and Implemented in Other Jurisdictions

The judges of the Mohave County Superior Court have submitted a comment opposing the Petition because they believe the proposed rule is "impracticable" and they are concerned that "all peremptory strikes will be motivated for inappropriate reasons." These concerns are unfounded, especially in comparison to the significant problem of racial discrimination in jury selection, which *Batson* has failed to correct. Two other jurisdictions—Washington and California—have recently adopted similar rules. Wash. Ct. Gen. R.37; CA Assembly Bill 3070.[10] And, while the rules are still fairly new, there is no evidence to indicate they are unworkable or result in all peremptory strikes being challenged. In practice, Washington's rule seems to have resulted in "a light chilling effect on the use of peremptory challenges against jurors of color." Annie Sloan, Note, *What to Do About Batson?: Using A Court Rule to Address Implicit Bias in Jury Selection*, 108 Cal. L. Rev. 233, 257 (2020). Washington's rule has not resulted in the elimination of peremptory strikes or bogged down the court system with endless challenges. Like the rule proposed here, Washington's GR37 "maintains the spirit of peremptory challenges, barring only strikes rooted in bias, implicit or otherwise." *Id.* at 263.

The Mohave judges' concern that too many groups are protected by the proposed rule is undermined by the fact that *Batson* itself is evolving to protect more

[10] California's AB3070 will take effect in criminal cases in 2022 and civil cases in 2026.

groups that have been historically excluded from and underrepresented in juries. First, the Supreme Court held that *Batson* prohibits striking jurors on the basis of ethnicity. *Hernandez v. New York*, 500 U.S. 352 (1991). In 1994, the Supreme Court held *Batson* applies to gender discrimination, a relatively new concern because for most of American history, women were not permitted to serve on juries. *J.E.B. v. Alabama, ex rel. T.B.*, 511 U.S. 127 (1994).[11] The Second Circuit has extended *Batson* to religion discrimination. *U.S. v. Brown*, 352 F.3d 654 (2nd Cir. 2003). The Ninth Circuit has extended *Batson* to protect against discrimination on the basis of sexual orientation. *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014). While the Supreme Court has not yet followed suit, they have, in recent years, found significantly greater protection for LGBTQ individuals. *E.g. Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). As such, the proposed rule accurately reflects the classes of persons that warrant protection from discriminatory peremptory strikes under state and federal equal protection.

III. Conclusion

The Arizona Capital Representation Project supports the proposed rule change and asks this Court to grant the Petition.

[11] In 1968, Mississippi became the last state to allow women to serve on juries. *Breaking into the Glass Box (Women as Jurors)*, https://ramseylawlibrary.org/?p=1805 (last accessed 5/3/21).