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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:

) No. R-21-0020

)

) **COMMENT OF ARIZONA**

Petition to Amend Rules 18.4 and 18.5,
Rules of Criminal Procedure, and Rule
47(e), Rules of Civil Procedure.

) **ATTORNEYS FOR CRIMINAL**

) **JUSTICE**

)

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) hereby submits the following comment to the above-referenced petition.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public

awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ principally supports the petition in R-21-0008 for the reasons stated in its comment to that petition. *Batson v. Kentucky* sought to accomplish a tremendous goal—to address the discriminatory use of peremptory strikes—but *Batson* has proved unworkable in Arizona. Instead, the current framework has permitted discrimination (conscious and unconscious) to flourish. This discrimination typically goes unchecked on appeal. *But see State v. Porter*, 248 Ariz. 392 (App. 2020), *review granted* (Nov. 3, 2020); *State v. Ross*, -- Ariz. --, 483 P.3d 251 (App. 2021). The reforms offered in R-21-0008 provide a functioning and workable framework to address the very real problem of discriminatory use of peremptory strikes.

With that said, if this Court does not agree with the overwhelming majority of the bench and bar that R-21-0008 is a workable solution to the problem of discriminatory use of peremptory strikes, then AACJ could support the elimination of peremptory strikes as an alternative solution. It may not be ideal, and it does look a lot like “throwing the baby out with the bathwater”; but as the petitioners aptly state, it would definitely solve the problem of discriminatory strikes. If given the choice between the current practice of prosecutors striking venirepersons based on

race or gender and an alternative where no strikes are permitted, it seems that the latter may be preferable.

Between “doing nothing” and the Petitioners’ proposed solution, however, are several other options. First, this Court could choose to abolish peremptory strikes only for prosecutors. Petitioners acknowledge that the practice in England for more than seven centuries was to allow peremptory strikes to the defendant but not to the Crown. Petition at 5. Rather than cite this as a viable option for Arizona, however, the petition rejects it out of hand because “it seems odd” to allow one side but not the other to have peremptory strikes. *Id.* Petitioners fail to note the obvious imbalance in criminal cases between the government and the individual, and it is this imbalance that leads the government to require several structure protections for the criminal defendant such as appointed counsel, a unanimous jury verdict, and a finding of guilt by the standard of beyond a reasonable doubt.

A second alternative would be to suspend peremptory strikes on an experimental basis for one or two years and collect data. During the COVID-19 pandemic, this Court reduced the number of peremptory strikes from six to two per side. Of course, in the past year there have been very few jury trials (Pima County went a full calendar year without a single felony jury trial), so any available data is not statistically significant. Although the Petition notes that the United Kingdom outlawed peremptory strikes in 1988 and Canada in 2019, the Petition does not offer

any information showing how the British experiment has worked or what inspired the Canadian change. Knowing more about these experiences would be very helpful to this Court when deciding to change a practice that is a fixture in the American jury system.

CONCLUSION

For these reasons, AACJ requests this Court consider this petition as a less-preferable alternative to R-21-0008, but as worthy of consideration as an alternative to the status quo, which is clearly untenable.

DATED: May 3, 2021.

By /s/ David J. Euchner
David J. Euchner

This comment e-filed this date with:

Supreme Court of Arizona

Copy of this Comment
E-mailed this date to:

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