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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 the Rules of the
Supreme Court of Arizona to Adopt Rule

) **ATTORNEYS FOR CRIMINAL**

24—Jury Selection.

) **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 supports this petition for the reasons stated in the comment of the American Civil Liberties Union Foundation of Arizona. *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.

Academic research has long found peremptory strikes are used in a discriminatory manner. And the research continues to reach this same conclusion. Just last year, a study in Mississippi concluded Black venire members were 4.51 times as likely to be excluded by a prosecutor's peremptory strike. Whitney DeCamp & Elise DeCamp, *It's Still about Race: Peremptory Challenge Use on Black Prospective Jurors*, [57 J. Research in Crime & Delinquency 1](#), 20 (2020).

Some opponents of R-21-0008, however, refuse to believe discrimination is a problem until they see data of discrimination in Arizona. The Arizona Prosecuting

Attorneys' Advisory Council (APAAC), for example, complains: "For any proposal to be meaningful, the existence, context, nature, cause and extent of any bias must first be established." APAAC Comment at 2. But these opponents ignore the surplus of research cited in the Petition, as well as the research cited in Petition R-21-0020 to abolish peremptory strikes. And these opponents provide no citation or data to support their suggestion that Arizona is a bastion of non-discrimination.

More to the point, these opponents ignore data that confirms the need for reform, even if it does not expressly prove the point. In Petition R-21-0020, Judges Swann and McMurdie explain that "[d]ata recently compiled by the Administrative Office of the Courts reveals an empirical imbalance between the demographics of the overall population and jurors seated under our current system." Petition R-21-0020, at 12. In that analysis, Black jurors were underrepresented by 16%, Latinx jurors underrepresented by 21%, and Native American jurors underrepresented by 51%. *See id.*; *see also* Comment of Los Abogados Supporting R-21-0008. And APAAC cannot claim ignorance since they also submitted a comment opposing R-21-0020.

These opponents raise a valid complaint that discrimination can occur at different stages of the jury selection process. Investigation into that potential for discrimination is worthwhile. But that is no reason to reject R-21-0008. The discriminatory use of peremptory strikes is well-established. *See* Jeffrey Bellin &

Junichi Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1075, 1077 (2011); Mimi Samuel, *Focus on Batson: Let the Cameras Roll*, 74 Brooklyn L. Rev. 95, 95 (2008).

Studies have repeatedly shown peremptory strikes are used in a discriminatory manner, and Arizona's empanelment rates bear out that finding. This Court should not allow the discriminatory use of peremptory strikes to persist while opponents of this petition try to find other sources of discrimination. This Court has the information needed to act on peremptory strikes now.

The proposal offered in R-21-0008 is a functional solution that will reduce the discriminatory use of peremptory strikes. Critics of R-21-0008—not just APAAC but also the Committee on Superior Court¹ and the Mohave County Superior Court bench—all seemingly argue the proposal is an unworkable or impracticable solution. These concerns are misplaced.

Washington Supreme Court Chief Justice Steven Gonzalez explained in his letter encouraging the adoption of R-21-0008 that the rule this proposal was based upon “appears to be working to deter and mitigate racial discrimination in the use of

¹ Notably, the Committee on Superior Court agrees in their Comment in Support of R-21-0020 that the discriminatory use of peremptory strikes is a problem. The Committee on Superior Court simply prefers elimination of peremptory strikes.

peremptory challenges.” C.J. Steven Gonzalez letter, at 1. Because of the reforms, “[s]uspect challenges are now being subjected to meaningful scrutiny and oversight” in Washington. *Id.* AACJ’s sister organization Washington Association of Criminal Defense Lawyers (“WACDL”) joins in this assessment. WACDL reports that “[a]necdotal evidence indicates that jury selection in Washington has become more fair and less discriminatory in the three years since GR 37 was adopted.” WACDL Letter, at 2. One of the chief improvements noted is the appellate review of discriminatory strikes. *Id.* If the changes proposed by R-21-0008 were truly “unworkable” or “impracticable,” problems in Washington would be manifest. Instead, Washington’s system is working to reduce the discriminatory use of peremptory strikes.

CONCLUSION

Years of studies and articles show what intuitively makes sense—peremptory strikes are being used to discriminate. There is no reason to think Arizona is a statistical anomaly that has somehow evaded this overwhelming conclusion. Moreover, three years of application in Washington proves that the reforms proposed by R-21-0008 are workable and successful.

For these reasons, AACJ joins the overwhelming majority of attorneys and organizations in calling upon this Court to to adopt this petition.

DATED: May 3, 2021.

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

This comment e-filed this date with:

Supreme Court of Arizona

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