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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of:

PETITION TO AMEND RULES 18.4 AND 18.5 OF THE ARIZONA RULES OF CRIMINAL PROCEDURE AND RULE 47(e) OF THE ARIZONA RULES OF CIVIL PROCEDURE	Supreme Court Number R-21-_______

Pursuant to Rule 28, Rules of the Supreme Court, Peter B. Swann, Chief Judge of the Arizona Court of Appeals, Division I, and Paul J. McMurdie, Judge of the Arizona Court of Appeals, Division I, respectfully petition this

Court to adopt the attached proposed amendments to Rules 18.4 and 18.5 of the Arizona Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure. *See* App. A.

I. INTRODUCTION

Despite many federal and state efforts at reform over the years, Arizona (like other American jurisdictions) faces persistent problems with unlawful discrimination on the basis of race, gender, religion and other impermissible classifications in jury selection. The primary tool by which this discrimination is practiced is the peremptory strike. This petition recommends the abolition of peremptory strikes of jurors by both sides in civil and criminal trials.

Consistent with its strategic agenda, this Court recently announced an initiative to study and address racial justice issues, an effort that commenced at the December 2020 meeting of the Arizona Judicial Council. We submit that the Court has a clear opportunity to end definitively one of the most obvious sources of racial injustice in the courts. Adoption of the changes proposed in this petition would effectively put a stop to intentional and unintentional bias in jury selection without burdening counsel and the courts with increasingly complex motion and appellate practice. We

recognize that the concept of eliminating peremptory challenges is distasteful to many trial lawyers, because they present a perceived opportunity for an advocate to structure a jury favorable to his or her cause. But if elimination of racial, gender and religious bias in the court system is truly a controlling goal, we respectfully submit that the Court should deem practitioners' concerns secondary and implement a simpler system of jury selection that is inherently fair.[1]

The elimination of peremptory challenges would be both constitutional and forward-thinking. Washington and California have recently implemented well-intentioned rules designed to strengthen the safeguards first announced in *Batson v. Kentucky*, 476 U.S. 79 (1986), but for reasons discussed below, we consider these measures too nuanced to achieve their desired effect in the real world. Though no American jurisdiction has yet eliminated these strikes outright, the United Kingdom

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[1] Another petition filed this year by Jodi Feurhelm and Larry Matthew (the "Working Group Petition") advocates the adoption of a rule in the mold of the efforts by Washington and California. Petitioner Swann has also signed that Petition, because it represents a constructive effort to identify and address the problem. Though we advocate the abolition of peremptories as the better solution, we embrace and incorporate the scholarship underlying the Working Group Petition.

(which invented peremptory strikes centuries ago) abolished them in 1988. Criminal Justice Act 1988, ch. 33, § 118(1) (Eng.). And Canada abolished peremptory strikes in 2019. *See* Bill C-75, S.C. 2019, c 25 (Can.), available at https://www.parl.ca/DocumentViewer/en/42-1/bill/C-75/royal-assent#ID0EZC; *R. v. Chouhan*, 2019 ONSC 5512 (Can.). Indeed, Arizona itself has experimented in this field by sharply reducing the number of available strikes during the COVID-19 pandemic. Ariz. Sup. Ct. Admin. Order No. 2020-143 at 8, ¶ 3 (Aug. 26, 2020).

The abolition of peremptory challenges would substantially streamline the jury system itself. Currently, between 8 and 20 prospective jurors are summoned for each trial in Arizona superior court with the intent that they never serve—this number simply accommodates the number of peremptory strikes allowed by the Arizona rules. Given that the average venire (depending on case type) comprises 35–60 prospective jurors, allowances for peremptory strikes mean that a substantial percentage of jurors who make the effort to appear for jury service are merely fodder for arbitrary hunch-based strikes. We submit that respect for the jurors themselves, together with considerations of cost to the courts and the public,

also counsel in favor of shedding this pre-renaissance device for molding juries.

II. ORIGIN OF PEREMPTORY STRIKES

Our system of peremptory strikes is based on ancient English law. The system was initially introduced in an attempt to make juries more impartial but has been substantially modified (often in lopsided ways) over the years. In England, the Crown lost the use of peremptory strikes in 1305—*all challenges to jurors by the prosecution in the last 715 years have been for cause only in the British system.* Yet it seems odd that in a quest for impartiality, one side would have less access (or no access at all) to the device of peremptories. Of course, racial and gender equality were not at the heart of the thinking behind the English system in the 14th century—the courts were addressing more primordial concerns, such as the balance of power between the government and the individual, at that time. As the discussion below will illustrate, while criticism is usually leveled at prosecutors, evidence strongly suggests that race-based strikes are used by defense counsel as well. We submit that complete abolition is the fairest way to end the practice across the board.

Inspired by the English process of jury selection, most American states did not initially provide the prosecution a right of peremptory strikes. American courts introduced this power in the years after the Civil War. (A cynical observer might note that the power came into being in the years after black Americans obtained the right to serve on juries.) Indeed, New York and Virginia did not allow the state to use peremptories at all until 1881 and 1919, respectively. April J. Anderson, *Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies as Seen in Practitioners' Trial Manuals*, 16 Stan. J. of Civ. Rts. & Civ. Liberties 1, 19 n.118 (2020). There can be no doubt that race-based peremptory strikes were rampant well into the latter half of the twentieth century, a situation the Supreme Court repeatedly observed and attempted (unsuccessfully) to remedy in *Batson v. Kentucky*, 476 U.S. 79 (1986). In some areas, juries were even more lopsided when it came to exclusion based on gender. As recently as 1975, five states automatically excluded from service all women who did not wish to serve. *Duren v. Missouri*, 439 U.S. 357, 359–60 (1979).

The use of peremptories has always been the subject of tinkering in an effort to make the process more fair. Even today, in our federal courts, in non-capital felony cases, the defense gets 10 peremptory strikes while the

prosecution only gets 6 strikes. Fed. R. Crim. Pro. 24(b). Such structural imbalances can be seen as attempts to calibrate a system fraught with unfairness in the direction of fairness. But plainly, experience has caused rule makers to recognize the potential for abuse of peremptories and alter the system—even before the invention of the printing press.

Arizona has no such facial imbalances. Each side gets the same number of strikes, and the number depends on the nature of the case. But the fact that the numbers are equal in Arizona tells us nothing about the overall fairness of the system. Is the federal imbalance more fair? Less fair? However one might answer the question, it seems clear that rule makers have struggled in the dark with means of curbing abuse of this procedural tool.

III. THE ARGUMENT FOR ABOLITION

A. History Does Not Support the Need for Peremptory Strikes: Our Regime of Bilateral Peremptory Strikes Neither Comes From English Common Law, Nor Is It Grounded in the U.S. Constitution.

Peremptory strikes predate our Constitution, but they are not constitutionally required. *See Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) ("We have long recognized that peremptory challenges are not of constitutional

dimension."). What *is* constitutionally required is that juries be selected from "a representative cross section of the community [which] is an essential component of the Sixth Amendment right to a jury trial." *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). If this constitutional rule is to have integrity, it cannot be interpreted to mean that the initial panel must be representative while the parties are free to strive for a favorable imbalance on the final jury. Indeed, peremptories resemble a vestigial organ—they can be safely excised from the system, curing the harm without damaging the host.

Though developed as a means of ensuring impartiality, anyone who has competently tried a case in the last century knows that the practical use of peremptories is to achieve some (perhaps illusory) partiality in the final jury. Lawyers can justify such aims to themselves by pointing to the equal opportunity that both sides have in Arizona to distort the jury pool. And to an advocate who believes in her cause, it might seem only natural that the jury should be predisposed to that cause as well. But while peremptories might be an irresistible tool for trial tacticians, it is exceedingly difficult to argue that the practice of striking jurors who pass a challenge for cause is consonant with the constitutional imperative of ensuring that the jury is comprised of a "representative cross section."

B. Combating Partiality by Offsetting Peremptory Strikes Is Inherently Unfair; and Worse Now Given the Distrust That Comes From the Differential Rates of Exclusion By Race.

Study after study shows that peremptories are exercised in a discriminatory fashion in states throughout the United States. A study of capital cases in North Carolina, for example, found that of the 307 jurors who were struck,

> [T]he prosecution's strikes were responsible for eliminating 12% of whites who went through the voir dire process without being removed, and 35% of blacks who did so. It shows that the defense's strikes eliminated 35% of whites who were not removed during voir dire, and 3% of blacks. The differences are statistically significant at the .001 level.

Anne M. Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, 9 Northeastern University L. Rev. 299, 339 (2017).

A recent Mississippi study concluded:

> . . . Black venire members are 4.51 times as likely to be excluded from a jury due to peremptory challenges from the prosecution in comparison to White venire members. Conversely, White venire members are 4.21 times as likely to be excluded through peremptory challenges by the defense in comparison to Black venire members . . . After controlling for all observed variables, there remain significant differences between White and Black

> venire members, suggesting racial discrimination by both the prosecution and the defense in peremptory challenge usage. Black individuals are more likely to be excluded from juries through these effects, resulting in less racially diverse juries.

Witney DeCamp & Elise DeCamp, *It's Still About Race: Peremptory Challenge Use on Black Prospective Jurors*, 57 J. of Rsch. in Crime and Delinq. 3, 3 (2020).

Professors Catherine Grosso and Barbara O'Brien of the Michigan State University College of Law canvassed studies of the impact of race on jury selection existing as of 2012. They noted a study from North Carolina finding that "[p]rosecutors used 60% of their strikes against black jurors, who constituted only 32% of the venire. In comparison, defense attorneys used 87% of their strikes against white jurors, who made up 68% of the venire." Catherine M. Grasso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 Iowa L. Rev. 1531, 1539 (2012). And in a study of capital cases from Philadelphia County, a study revealed that "prosecutors struck on average 51% of the black jurors they had the opportunity to strike, compared to only 26% of comparable non-black jurors. Defense strikes exhibited a nearly identical pattern in reverse: defense counsel struck only

26% of the black jurors they had the opportunity to strike, compared to 54% of comparable non-black jurors." *Id.*

These data are troubling, if not unexpected. Whatever the underlying motives, they describe a system in which race plays a significant role in determining the decision makers. Bear in mind that these are strikes that were used on jurors who passed for cause. And the strikes considered in these studies occurred *after Batson*. Unless one is prepared to say that these studies are simply false, there can be no doubt that race continues to play a major role in the exercise of peremptories decades after *Batson* was decided.

The current system is not only ineffective at combatting the use of race in jury selection—it is also inefficient. Decades of litigation over *Batson* challenges have consumed countless hours of attorney time and judicial resources. Yet in Arizona, only five cases have been reversed over a *Batson* challenge. *See* Working Group Petition, App. E. We now have the worst of all worlds—a discriminatory practice successfully perpetrated by litigants on all sides, an avalanche of collateral litigation, and no meaningful remedy.

While no academic study of the role of race in peremptories has been conducted in Arizona, it is reasonable to expect that the patterns that exist in other states are not miraculously absent here. (Maricopa County, for

example has recently been the subject of federal court oversight in the wake of findings of racial profiling.)

Data 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. In criminal cases, the proportion of white jurors seated varied only 3% from their representation in the population. But the story is not the same for other groups. By the "representative cross section" measure, black jurors were underrepresented by 16%, Native American jurors were underrepresented by 51% and Hispanic jurors were underrepresented by 21%. In civil cases, the proportion of white jurors to white citizens was identical to within 0.03%. Yet black jurors were underrepresented by 24%, Native American jurors were underrepresented by 76%, and Hispanic jurors were underrepresented by 16%.[2] Though this analysis of the AOC data is far from a scientific statistical study, it lends credence to the notion that Arizona suffers, at least

[2] Petitioner Swann, when in private practice, became sadly familiar with recommendations from well-paid civil jury consultants who brazenly recommended striking all Latino jurors. Those recommendations were never implemented.

to some degree, from the same practices that exist elsewhere in the United States.

To be sure, perfect statistical parity is not in itself the measure of a nondiscriminatory justice system, and not all of the disparities identified above can be attributed to the misuse of peremptory challenges. But for a court striving to eliminate racial inequality in its own house, these numbers are not comforting. A myriad of reasons contributes to imbalances in jury demographics, but only one device allows *intentional* imbalances—the peremptory strike.

C. A Neutral Rule Best Fulfills this Court's Objective of Building Public Trust and Confidence, and Abandoning Peremptories Demonstrably Eliminates Bias in All Directions.

Public confidence is the currency of the judicial system. "[I]t is particularly important we identify and address concerns or issues that may affect the public's trust and confidence in our justice system." *2019–2024: Justice for the Future, Planning for Excellence*, Ariz. Sup. Ct., 19 (2019). Even if it were somehow possible to claim with a straight face that the patterns of race-based jury selection in other states have not infected Arizona, and that the peremptory strikes in all cases except the five mentioned were exercised in the utmost good faith, the perception legitimately exists that our rules

authorize a practice that is *de facto* discriminatory. That perception will not aid in the fostering the confidence that the branch needs to do its work in the future.

A stable system of justice must not only deliver impartial results, it must also show respect for citizens who are called to serve. Many citizens view jury service as a burden at first. But all trial judges know that jurors generally come to value the experience, and it constitutes the most significant participation that most people will have in their government. Indeed, citizens' overall satisfaction with their jury experience helps promote the perception of integrity of the courts in the community and serves as a point of civic pride.

Yet today, our rules require the courts to summon 8–20 jurors for each case merely to serve as disposable chattel for peremptory strikes. This is expensive, inefficient and offensive to those who give their time only to be peremptorily stricken. It generates discussions in the community about the unfairness and inefficiency of the court system and diminishes the standing of the judicial branch in the eyes of the public.

We do not believe that a Washington-style "*Batson* plus" approach will be effective enough at eliminating the role race plays in jury selection. It will,

of course, generate years of collateral litigation over strikes and may even increase the number of successful challenges. But it is not a death blow to the racially inappropriate use of peremptory strikes, a solution which is easily within reach. And it does nothing to redress the indignity to which we currently subject large numbers of our citizens—telling them that though there is no cause to think they would be unfair, their participation is unwelcome simply because a lawyer dislikes the cut of their jib.

Nor do we believe that further study is needed. Acting at the request of the State Bar, and with the awareness of this Court, the Working Group devoted long hours over nearly a year to the study of the problem, and we agree with their observations. But while the Working Group ultimately chose to recommend the intermediate approach embodied in its Petition, the Court has enough information before it to make an important choice: (1) accept the current system; (2) implement a rule that attempts to afford more protection than *Batson* by making peremptory strikes easier to challenge; or (3) abolish peremptory strikes altogether and eliminate race discrimination in jury selection. We respectfully recommend that the Court modify the existing rules as set forth in Appendix A to this petition.

RESPECTFULLY SUBMITTED

January 11, 2021

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Hon. Peter B. Swann

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Hon. Paul J. McMurdie