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IN THE ARIZONA SUPREME COURT

IN THE MATTER OF: PETITION TO AMEND THE RULES OF THE SUPREME COURT OF ARIZONA: RULE 24 – JURY SELECTION	R- PETITION TO AMEND THE RULES OF THE SUPREME COURT OF ARIZONA: RULE 24 – JURY SELECTION

Pursuant to Rule 28 of the Rules of the Supreme Court of Arizona, the Central Arizona National Lawyers Guild (Central AZ NLG), respectfully submits this petition to amend the Rules of the Supreme Court of Arizona by adopting a new rule, proposed here as Rule 24: Jury Selection, to eliminate the unfair exclusion of potential jurors based on race or ethnicity. The proposed rule would apply to all jury trials conducted by any court in Arizona.

Central AZ NLG's proposed amendment is incorporated into this pleading and attached to this petition.

I. INTERESTS OF PETITIONER

The Central Arizona National Lawyers Guild is a local chapter of the National Lawyers Guild located in the greater Phoenix metropolitan area.

The National Lawyers Guild (NLG) is the nation's oldest and largest progressive bar association and was the first one in the US to be racially integrated. Our mission is to use law for the people, uniting lawyers, law students, legal workers, and jailhouse lawyers to function as an effective force in the service of the people by valuing human rights and the rights of ecosystems over property interests**.** This is achieved through the work of our members, and the Guild's numerous organizational committees, caucuses and projects, reflecting a wide spectrum of intersectional issues. Guild members effectively network and hone their legal skills in order to help create change at the local, regional, national, and international levels.

The NLG is dedicated to the need for basic change in the structure of our political and economic system. Our aim is to bring together all those who recognize the importance of safeguarding and extending the rights of workers, women, LGBTQ people, farmers, people with disabilities and people of color, upon whom the welfare of the entire nation depends; who seek actively to eliminate racism; who work to maintain and protect our civil rights and liberties in the face of persistent

attacks upon them; and who look upon the law as an instrument for the protection of the people, rather than for their repression.

The proposed rule goes to the heart of Central AZ NLG's mission by ensuring that no person is ever denied a fair trial because a juror was excluded from serving on the jury because of racial or ethnic bias.

II. THE PURPOSE OF THE PROPOSED AMENDMENT

There is a strong consensus among legal scholars that racial and ethnic discrimination persists during jury selection. Reform is needed to address the subtle and persistent forms of discrimination that current procedures have permitted to continue unchecked.

A. *Batson v. Kentucky* has failed to eliminate racial and ethnic discrimination from jury selection.

"From its inception, the United States Supreme Court's landmark decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), has been roundly criticized as ineffectual in addressing the discriminatory use of peremptory challenges during jury selection, largely because it fails to address the effect of implicit bias or lines of voir dire questioning with a disparate impact on minority jurors." State v. Holmes, 334 Conn. 202, 204–05 (2019) (citing *Batson* v. *Kentucky*, supra, 476 U.S. at 106, 106 S.Ct. 1712 (Marshall, J., concurring); *State* v. *Veal*, 930 N.W.2d 319, 359–61 (Iowa 2019) (Appel, J., concurring in part and dissenting in part); *State* v. *Saintcalle*, 178 Wash. 2d 34, 46–49, 309 P.3d 326 (overruled in part on other grounds by *Seattle* v. *Erickson*, 188 Wash. 2d 721, 398 P.3d 1124 [2017]), cert. denied, 571 U.S. 1113, 134 S. Ct. 831, 187 L. Ed. 2d 691 (2013); J. Bellin & J. Semitsu, "Widening *Batson*'s

Net To Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney," 96 Cornell L. Rev. 1075, 1077–78 (2011); N. Marder, "*Foster* v. *Chatman*: A Missed Opportunity for *Batson* and the Peremptory Challenge," 49 Conn. L. Rev. 1137, 1182–83 (2017); A. Page, "*Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge," 85 B.U. L. Rev. 155, 178–79 and n.102 (2005); T. Tetlow, "Solving *Batson*," 56 Wm. & Mary L. Rev. 1859, 1887–89 (2015).).

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court held the Equal Protection Clause of the Fourteenth Amendment is violated when the State exercises peremptory strikes in a discriminatory manner. 476 U.S. at 85–86. The right to a jury that represents a fair cross section of society extends to all defendants, regardless of whether the defendant is a member of a minority group.

To evaluate whether a prosecutor struck a juror for discriminatory reasons, courts must engage in a three-step process:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Miller-El v. Cockrell, 537 U.S. 322, 328–29 (2003) (internal citations omitted); *accord State v. Hardy*, 230 Ariz. 281, ¶ 12 (2012).

At the second step, "the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez v. New York*, 500 U.S. 352, 360 (1991). The second step "does not demand an explanation that is persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995). Thus, even "implausible or fantastic justifications" satisfy the second step. *Id*. at 768.

The third step is when the trial court evaluates the proffered reasons. *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). The proffer of a pretextual reason for striking a juror "naturally gives rise to an inference of discriminatory intent." *Id.* at 485.

However, trial courts are reluctant to find that a member of the bar has committed misconduct by providing a pretextual reason to mask discriminatory intent that served as the basis for striking the juror. *See* J. Bellin & J. Semitsu, "Widening *Batson*'s Net To Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney," 96 Cornell L. Rev. 1075, 1113 (2011) ("so long as a personally and professionally damning finding of attorney misconduct remains a prerequisite to awarding relief under *Batson*, trial courts will be understandably reluctant to find *Batson* violations"); M. Bennett, "Unraveling the Gordian Knot of

Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of *Batson*, and Proposed Solutions," 4 Harv. L. & Policy Rev. 149, 162–63 (2010) (noting dual difficulties that "[m]ost trial court judges will ... find such deceit [only] in extreme situations," while other troubling cases indicated that "some prosecutors are explicitly trained to subvert *Batson*"); R. Charlow, "Tolerating Deception and Discrimination After *Batson*," 50 Stan. L. Rev. 9, 63–64 (1997) ("[S]hould courts apply *Batson* vigorously, it would be even less appropriate to sanction personally those implicated. Moreover, judges may be hesitant to find *Batson* violations, especially in close cases, if doing so means that attorneys they know and see regularly will be punished personally or professionally as a result."); T. Tetlow, "Solving *Batson*," 56 Wm. & Mary L. Rev. 1859, 1897–98 (2015) ("[The *Batson* rule's focus on pretext] requires personally insulting prosecutors and defense lawyers in a way that judges do not take lightly, calling them liars and implying that they are racist. Technically, as some have argued, lying to the court constitutes an ethics violation that the judge should then report to the bar for disciplinary proceedings. Disconnecting the regulation of jury selection from the motives of lawyers will make judges far more likely to enforce the rule." [Footnotes omitted.]).

Even if trial judges were not reluctant to find that a member of the bar sought to strike a juror for discriminatory reasons, the existing *Batson* framework does

nothing to address the problems that implicit biases inject into our justice system's efforts to root out discrimination during jury selection.

B. Implicit bias is difficult to assess, and discriminatory motives are easily veiled.

"Implicit biases" are discriminatory biases based on either implicit attitudes-feelings that one has about a particular group-or implicit stereotypes-traits that one associates with a particular group." *See* Anthony G. Greenwald & Linda Hamilton Krieger, Implicit Bias: Scientific Foundations, 94 Calif. L. Rev. 945, 948-51 (2006).

The Connecticut Supreme Court recently explained why an understanding of implicit bias is paramount to addressing the evil of discrimination in our justice systems:

> In a leading article on implicit bias, Professor Antony Page makes the following observation with respect to a lawyer's own explanations for striking a juror peremptorily: "[W]hat if the lawyer is wrong? What if her awareness of her mental processes is imperfect? What if she does not know, or even cannot know, that, in fact, but for the juror's race or gender, she would not have exercised the challenge?" (Emphasis omitted.) A. Page, "*Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge," 85 B.U. L. Rev. 155, 156 (2005). "The attorney is both honest and discriminating based on race or gender. Such unconscious discrimination occurs, almost inevitably, because of normal cognitive processes that form stereotypes." (Emphasis omitted.) *Id.*, 180. Professor Page's landmark article "examines the findings from recent psychological research to conclude that the

lawyer often will be wrong, will be unaware of her mental processes, and would not have exercised the challenge but for the juror's race or gender. As a result (and not because of lying lawyers), the *Batson* peremptory challenge framework is woefully ill-suited to address the problem of race and gender discrimination in jury selection." (Emphasis omitted.) *Id*., 156.

The studies reviewed by Professor Page demonstrate that "few attorneys will always be able to correctly identify the factor that caused them to strike or not strike a particular potential juror. The prosecutor may have actually struck on the basis of race or gender, but she plausibly believes she was actually striking on the basis of a [race neutral] or [gender] neutral factor. Because a judge is unlikely to find pretext, the peremptory challenge will have ultimately denied potential jurors their equal protection rights." (Footnote omitted.) *Id*., 235. Although Professor Page argues that the social psychology research supports addressing implicit bias by eliminating peremptory challenges entirely; *id*., 261; in the alternative, he proposes (1) to eliminate the *Batson* procedure's requirement of subjective discriminatory intent, which also relieves judges of "mak[ing] the difficult finding that the lawyers before them are dishonest," (2) to instruct jurors about the concepts of unconscious bias and stereotyping, (3) to require educating attorneys about unconscious bias, with a requirement that they "actively and vocally affirm their commitment to egalitarian [nondiscriminatory] principles," and (4) to increase the use of race blind and gender blind questionnaires. *Id*., 260–61.

Similarly, Judge Mark W. Bennett, an experienced federal district judge, considers the "standards for ferreting out lawyers' potential explicit and implicit bias during jury selection ... a shameful sham"; he, too, urges (1) the inclusion of jury instructions and presentations during jury selection on the topic of implicit bias, to adequately explore a juror's impartiality, and (2) the administration of implicit bias testing to prospective jurors. M. Bennett,

> supra, 4 Harv. L. & Policy Rev. 169–70. *But see* J. Abel, "*Batson*'s Appellate Appeal and Trial Tribulations," 118 Colum. L. Rev. 713, 762–66 (2018) (discussing *Batson*'s greater value in direct and collateral postconviction review proceedings, particularly in habeas cases that afford access to evidence beyond trial record to prove discrimination).

State v. Holmes, 334 Conn. 202, 238–40 (2019).

In *Holmes*, the Connecticut Supreme Court concluded that it should follow the lead of the Washington Supreme Court by exploring ways that discrimination during jury selection could be ameliorated with the adoption of new rules. *Id*. at 248-249. This petition invites this Court to adopt the same rule that Washington promulgated as Washington General Rule 37.

C. The proposed rule provides guidance to litigants and the courts by creating standards that ameliorate the lack of guidance offered by *Batson* and its progeny.

To date, Arizona law has not been especially concerned with the failure of *Batson* to remedy the ongoing evil of discrimination during the jury selection process; rather Arizona law has emphasized whether its *Batson* approach is merely "sufficient" under the Fourteenth Amendment. *See*, *e.g*., *State v. Urrea*, 244 Ariz. 443, ¶ 10 (2018) (assessing the sufficiency of a trial court's remedy of a *Batson* violation). Arizonans deserve more than a "minimally adequate" framework to root out discrimination in jury selection. *Id*. at ¶ 20.

Rather than permit juries to be selected in a manner that is minimally adequate under the Fourteenth Amendment, the proposed rule will ensure that Arizona's *Batson* procedures are robust enough to effectively combat discrimination in the selection of juries. The proposed rule accomplishes this goal by providing explicit guidance to parties and the courts by outlining the procedures for conducting a *Batson* inquiry during jury selection.

The proposed rule is the product of extensive consideration of a working group established by the Washington Supreme Court. *See* "Proposed New GR 37- Jury Selection Workgroup: Final Report" (available at https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf).

In addition to outlining the procedures for courts, subsection (e) of the proposed rule accounts for implicit bias by modifying the third prong of the *Batson* analysis to establish an objective observer test. This objective observer test ameliorates the well-documented problems that judges face when confronted with the proposition that a member of the bar has committed misconduct by intentionally misleading a court about the party's discriminatory intent. Instead of requiring a finding of purposeful discrimination, the court would be tasked with assessing whether an objective observer would, under the totality of the circumstances, view race or ethnicity as a factor in the use of the peremptory strike.

The objective observer test would also empower appellate courts to remedy discriminatory acts during jury selection. In *State v. Jefferson*, the Washington Supreme Court explained the impact of the adoption of the objective-observer test:

> Whether "an objective observer could view race as a factor in the use of the peremptory challenge" is an objective inquiry. It is not a question of fact about whether a party intentionally used "purposeful discrimination," as step three of the prior *Batson* test was. It is an objective inquiry based on the average reasonable person—defined here as a person who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision making in non-explicit, or implicit, unstated, ways. For that reason, we stand in the same position as does the trial court, and we review the record and the trial court's conclusions on this third *Batson* step *de novo*. This is a change from *Batson*'s deferential, "clearly erroneous" standard of review of the purely factual conclusion about "purposeful discrimination."

State v. Jefferson, 192 Wash. 2d 225, 249–50, 429 P.3d 467, 480 (2018).

Perhaps most importantly, subsections (h) and (i) of the proposed rule eliminate pretextual justifications for discriminatory strikes by establishing that certain explanations for striking a juror are presumptively invalid because they are historically connected to the life experiences of jurors who are often subject to racial and ethnic discrimination.

The proposed rule is easy to comprehend, provides fair notice to all parties about the applicable standards, and is fair.

III. THE PROPOSED AMENDMENT

Rules of the Supreme Court of Arizona: Rule 24

a) **Policy and Purpose.** The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.

(b) Scope. This rule applies in all jury trials.

(c) Objection. A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.

(d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons that the peremptory challenge has been exercised.

(e) Determination. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

(f) Nature of Observer. For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors.

(g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

(i) the number and types of Questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to Question the prospective juror about the alleged concern or the types of Questions asked about it;

(ii) whether the party exercising the peremptory challenge asked significantly more Questions or different Questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;

(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

(iv) whether a reason might be disproportionately associated with a race or ethnicity; and

(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

(h) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection, the following are presumptively invalid reasons for a peremptory challenge;

(i) having prior contact with law enforcement officers;

(ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;

(iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;

(iv) living in a high-crime neighborhood;

(v) having a child outside of marriage;

(vi) receiving state benefits; and

(vii) not being a native English speaker.

(i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

IV. CONCLUSION

"Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019). There is great "constitutional value in having diverse juries," insofar as "equally fundamental to our democracy is that all citizens have the opportunity to participate in the organs of government, including the jury. If we allow the systematic removal of minority jurors, we create a badge of inferiority, cheapening the value of the jury verdict. And it is also fundamental that the defendant who looks at the jurors sitting in the box have good reason to believe that the jurors will judge as impartially and fairly as possible. Our democratic system cannot tolerate any less." *State* v. *Saintcalle*, 178 Wash. 2d 34, 49–50, 309 P.3d 326 (overruled in part on other grounds by *Seattle* v. *Erickson*, 188 Wash. 2d 721, 398

P.3d 1124 [2017]), *cert. denied*, 571 U.S. 1113, 134 S. Ct. 831, 187 L. Ed. 2d 691 (2013).

Yet, there is a strong consensus that discrimination during jury selection has not been remedied by the existing procedures established by this Court and the United States Supreme Court.

Reform is necessary to ensure the integrity of our justice systems.

The proposed rule provides the reform needed to root out discrimination during jury selection.

For these reasons, this Court should adopt the proposed rule.

Respectfully submitted January 09, 2020.

CENTRAL ARIZONA NATIONAL LAWYERS GUILD

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