IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA, APPELLEE, v. DWANDARRIUS JAMAR ROBINSON, APPELLANT.	)	CR-18-0284-AP MARICOPA COUNTY SUPERIOR COURT NO. CR2012-138236-001 DT

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF APPELLANT

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INTRODUCTION

This case presents another example of how the procedures established in *Batson v. Kentucky* fail to protect against racial discrimination in jury selection. Here, the prosecutor used four peremptory strikes to remove jurors of color, including strikes against two of only three empaneled Black jurors, and the only empaneled Native American juror. Despite providing purportedly race-neutral justifications for these strikes, the government's disparate questioning of similarly situated white jurors shows the prosecutor's actions were motivated by purposeful discrimination in violation of the jurors' and Mr. Robinson's constitutional rights.

Unfortunately, there is a long history of prosecutors striking jurors of color from jury service.[1] While the Supreme Court tried to remedy this widespread problem in *Batson v. Kentucky*, studies since have proven this remedy unsuccessful.[2] Jurors of color continue to be struck for "pretextual reasons" that work to hide overt racial bias.[3] Indeed, a recent study looking at jury selection data from the Maricopa

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[1] EQUAL JUSTICE INITIATIVE, *Illegal Racial Discrimination in Jury Selection*, *a Continuing Legacy*, (Aug. 2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf.

[2] *State v. Holmes*, 221 A.3d 407, 411 (Conn. 2019) (declaring that *Batson* "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").

[3] Elisabeth Semel, *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors*, Death Penalty Clinic – Berkeley Law (Jun. 2020) (discussing the study's findings that black and latinx

County Superior Court shows that prosecutors from Arizona's largest prosecuting agency use peremptory strikes against Black potential jurors at over three times the rate that defense attorneys do.[4] Moreover, because the problem of racial discrimination in jury selection is so well-documented, the State Bar of Arizona has a strong interest in combating the problem. To do so, it established a *Batson* Working Group, which was tasked with proposing a rule change to combat the problem. [5] Following the lead of other states, like Washington and Connecticut, the State Bar's *Batson* Working Group proposed changes to Rule 24 to combat both explicit and implicit bias.[6]

While the need to strengthen the protections against racial discrimination is great, the fact remains that racial discrimination violates the United States and Arizona Constitutions. Unfortunately, the problem of race-based jury selection is

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jurors are far more likely to be struck for pretextual reasons, such as distrusting law enforcement, having close relationships with incarcerated people, or having had prior interaction with law enforcement).

[4] Report: Racial and Ethnic Representation through the Jury Selection Process: An Analysis of 2019 Jury Selection Data from the Superior Court of Arizona in Maricopa County (May 2021), *available at*: https://www.azcourts.gov/Portals/74/Jury%20TF/Meetings/051420/Jury%20Representation%20Report.pdf?ver=2021-05-14-191357-977.

[5] Petition to Amend the Rules of the Supreme Court of Arizona: Rule 24 – Jury Selection, at 11.

[6] *Id*. at 12.

especially evident in capital trials where the stakes are the highest.[7] Pretextual reasons vary widely, and prosecutors continually strike jurors of color at stunning rates.[8] Reasons have included, but are not limited to, a juror's expressed concern over imposing a death sentence,[9] having a relationship with an incarcerated individual,[10] having had prior negative interactions with law enforcement,[11] or believing that police racially profile people of color.[12] All of these reasons are at issue in this case.

Here, Mr. Robinson, a Black man, was sentenced to death by a jury that was unfairly stripped of jurors of color by those prosecuting his case. Importantly, had the trial court meaningfully investigated the actions of the prosecutor who repeatedly struck jurors of color, the trial court would have concluded that these strikes were the result of purposeful discrimination and disallowed them. Because the trial court

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[7] See EQUAL JUSTICE INITIATIVE, *Illegal Racial Discrimination in Jury Selection*, *a Continuing Legacy*, (Aug. 2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf.
[8] Francis X. Flanagan, *Race, Gender, and Juries: Evidence from North Carolina*, 61 J. L. Econ. 189 (2018) (study finding that prosecutors use their peremptory strikes in North Carolina to strike Black jurors at a rate of five times greater than for white jurors); Shamena Anwar, Patrick Bayer, Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Quarterly J. Econ, 1017, 1032-40 (2012) (explaining the study's findings that Florida prosecutors disproportionately use their peremptory strikes on Black jurors for allegedly "race-neutral" reasons).
[9] *Miller-El v. Dretke*, 545 U.S. 231 (2005).
[10] See Semel, *supra* note 2, at 21.
[11] *Id*.
[12] *Id*.

failed to do so, it falls on this Court to adhere to the principles of the Arizona and United States Constitution, which require this Court to reverse Mr. Robinson's conviction.

LAW & ARGUMENT

The Sixth and Fourteenth Amendments to the United States Constitution and Art. II, § 24 of the Arizona State Constitution prohibit discrimination in jury selection.[13] As the United States Supreme Court noted, "[i]t is the jury that is a criminal defendant's fundamental protection of life and liberty against race or color prejudice."[14] As such, the Supreme Court established a procedure in *Batson* to protect against racially discriminatory jury selection and has "vigorously enforced and reinforced the decision, and guarded against any backsliding."[15]

A *Batson* challenge involves a three-step process:

> [O]nce the opponent of a peremptory challenge has made out a *prima facie* case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the

[13] *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding that the Constitution bars exercising a peremptory strike based on a juror's race); *see also J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 140 (1994) (holding that the Constitution prohibits discrimination in jury selection based on race and gender); *see also State v. Rodarte*, 173 Ariz. 331, 336 (App. 1992) (holding Art. II, § 24 of the Arizona Constitution afforded the same protection as the Sixth Amendment).
[14] *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880).
[15] *Flowers v. Mississippi*, 139 S.Ct. 2228, 2243 (2019).

> opponent of the strike has proved purposeful racial discrimination.[16]

If a race-neutral explanation is provided, then the trial court must decide whether the opponent has proven purposeful racial discrimination.[17] The Equal Protection Clause of the Fourteenth Amendment bars exercising peremptory strikes based on a juror's race.[18]

When making a determination during *Batson*'s third step, the question is not whether the stated reason is sound, but rather "whether counsel's race-neutral explanation for a peremptory challenge should be believed."[19] To answer this question, the court must evaluate the facts and consider "all circumstantial evidence that bears upon the issue of racial animosity."[20]

DISCUSSION

I. The State violated *Batson* when it successfully struck Juror 145, who is Black, but failed to strike similarly situated Juror 64, who is White, suggesting the reasons for the strike were motivated by racial discrimination.

The Supreme Court has cautioned against the use of peremptory strikes against jurors of color when the same "race-neutral" reason used to justify the strike applies

[16] *Purkett v. Elem*, 514 U.S. 765, 767 (1995).
[17] *Id.* at 768.
[18] *Batson*, 476 U.S. at 89.
[19] *Kesser v. Cambra*, 465 F.3d 351, 359 (9th Cir. 2006).
[20] *Foster v. Chatman*, 136 S. Ct. 1747, 1748 (2016).

to potential white jurors who were not stricken.[21] In *Miller-El*, the state struck one prospective black juror because the juror had expressed hesitation over whether or not he could impose death.[22] In finding this to be a constitutionally insufficient reason, the Court explained that prospective white jurors had also expressed reservations about imposing a death sentence, but were not struck from service.[23]

Here, the trial court should not have allowed the state's strike of Juror 145, who was black, because the prosecutor failed to strike similarly situated Juror 64, who was white. The prosecutor justified their strike of Juror 145 by relying on the Juror's alleged hesitation over imposing a death sentence. However, the State failed to challenge another similarly situated white juror, Juror 64, who also expressed hesitation over imposing a death sentence.[24] When asked his feelings about the death penalty, Juror 64 commented that:

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[21] *Miller-El v. Dretke*, 545 U.S. 231 (2005) (finding that the state's use of a peremptory strike against a Black juror because he expressed fear over imposing death, as had a non-struck white juror, to be violative of the Equal Protection Clause).

[22] *Id*. at 243-44 (the state claimed that the juror said "he could only give death if he thought a person could not be rehabilitated," but the Court considered this a "mischaracteriz[ation], iterating that the juror "unequivocally stated that he could impose the death penalty regardless of the possibility of rehabilitation").

[23] *Id*. at 244-45.

[24] *Miller-El*, 545 U.S. at 244 (finding that the state's use of a peremptory strike against a Black Juror because he expressed fear over imposing a death sentence, as had a non-struck white juror, to be violative of the Equal Protection Clause).

> It's probably the most harsh punishment you could give anybody and it would have to be really – I don't know the right word, but something that really emotionally affected me to go that way.[25]

When asked whether the death penalty can be "an appropriate sentence,"[26] Juror 145 replied:

> Well, the whole idea here are [sic] the two options of death penalty or life. And so if it's appropriate, it would be with aggravation and no mitigation or not enough of preponderance of mitigation, then I think it would be appropriate. But if you don't know – so for me sitting in this early part of it all, I think right now they're equally – equal options.

The defense counsel asked if Juror 145 felt the same as Juror 64 did, to which Juror 145 responded:

> I don't know if I would include the emotional aspect of it, although it is terrifying to consider what we're talking about, but – but the idea of it just being an option of the two options, then there's the aggravation and then, you know, there's the mitigation. So that's what I mean by it could be appropriate.[27]

Defense counsel then asked, "Okay. So do you both – on a balance, you could impose either one?"[28] Juror 145 replied, "Sure."[29] The State's given reason for using a peremptory strike of Juror 145 was:

> He indicated – when he was being questioned about the ability to impose the death penalty, he said: It is terrifying for me to consider

[25] Tr. 01/30/18, at 47.
[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] *Id*.

> what we're even talking about. That alone was of concern to the State. He did indicate that he did feel the death penalty could be appropriate, but that this decision terrifies him. And that is of great concern to the State.[30]

The State struck Juror 145 based on his position on the death penalty but failed to strike Juror 64, even though Juror 65 expressed as much or more hesitation about the death penalty than Juror 145. Juror 64 stated that he "would have to be … really emotionally affected" to support a death sentence. Juror 145, by contrast, indicated that he might not include that emotional requirement to support a death sentence. When asked if he could impose either death or a life sentence, Juror 145 replied with an unqualified "Sure."

The prosecutor's strike of Juror 145 but not Juror 64 indicates that the State struck Juror 145 because of his race. The reasons the State gave for its strike of Juror 145 is implausible because the State failed to strike Juror 64, a white Juror, for the same reasons, despite the fact that Juror 64 was less favorable toward the death penalty than Juror 145.

[30] *Id*. at 126.

II. The State's peremptory strike of Juror 300, who is Native American, violated *Batson* because the reasons given for the strike applied to similarly situated Juror 55, who is a white Christian and whom the State did not strike.

The State struck Juror 300 in violation of *Batson* because the reason they gave for her strike – her Native American traditions – is not supported by her questionnaire or *voir dire* responses. Additionally, other religious jurors, including Juror 55 who is a white Christian male and whose beliefs were more strongly in opposition to the death penalty, were not struck. In reviewing a ruling claimed to be *Batson* error, the Supreme Court has held that "all of the circumstances that bear upon the issue of racial animosity must be consulted."[31] Comparing prospective jurors who were struck and not struck "can be an important step in determining whether a *Batson* violation occurred."[32]

In *Flowers v. Mississippi*, the Court stated that "precedent allow[s] criminal defendants raising *Batson* challenges to present a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race."[33] "For example, defendants may present side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case."[34] Additionally, "[d]etermining whether invidious discriminatory purpose was

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[31] *Snyder v. Louisiana,* 552 U.S. 472, 478 (2008).
[32] *Id.* at 483–484.
[33] *Flowers v. Mississippi,* 139 S. Ct. 2228, 2243 (2019).
[34] *Id.*

a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available."[35]

Here, the State questioned Juror 300 about her Native American religion and culture asking:

> I know when—and when it comes to individuals that are Native American that there are some tribes that say you're not allowed to look at these types of things and there's like a religious type of component.

After Juror 300 responded that this was "[c]orrect," the State asked:

> I don't know what tribe you're in or anything like that. is that something that you have or is that something you follow or—

Juror 300 then responded:

> Not that I follow. I don't make a practice of looking at pictures like that but, for example, my daughter is a massage therapist and part of that is researching with cadavers and, of course, after when she is done, we smudge her and bless her, but it's not forbidden.[36]

The defense also questioned Juror 300, asking:

> Okay. Juror number 300, you said on your questionnaire, number 85, you said when you were asked to explain, you said all are ingrained to be morally good even in the worst of conditions. Can you just explain what you meant by that?

Juror 300 then responded:

> Even though a crime may have been committed, I don't believe that that is really the core of any of us, is that we – it may be something that

[35] *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 266 (1977).
[36] Tr. 01/31/18, at 222–23.

> has been conditioned. But I think deep down inside, all of us have good morals.[37]

Later, the State continued its questioning regarding Juror 300's Native American traditions and beliefs:

> Kind of along those same lines when it comes to the death penalty. Certain tribes have certain stances on that. sounds like at least when it comes to graphic photos, it's something that you guys address or talk about but it's not something that you follow to the letter of the – I don't say the law – but regarding the death penalty, what are your feelings on that?

Juror 300 again responded:

> I don't have an issue with that. again, all evidence. it is customary, if you will, and handed down for many generations that when there were wars, there was always – you always have to have that measure of balance. So if – culturally if something was removed from this group of war years, let's say over to those that they fought against, if there was an imbalance due to the war, due to death, there was a position to have it go back to – what word am I looking for – to reestablish that balance which is part of an act of war between the tribes. . . so I don't have an issue with it but it's not something that I practice.

The State then asked whether Juror 300 could impose a death sentence, to which the Juror responded, "I could." The State then asked if the Juror could impose a life sentence, and the Juror responded "I could" again.[38]

Additionally, in response to Question 83, "Which of the following statements reflects your view on the death penalty the closest?" Juror 300 selected, "I am neither

[37] Tr. 01/31/18, at 241–42.
[38] Tr. 01/31/18, at 223–225.

opposed nor in favor of the death penalty."[39] To Question 84, "Do you have any personal, moral, religious, philosophical or conscientious objections to the imposition of the death penalty?" Juror 300 responded "No."[40]

In response to Question 95, "If after hearing the evidence, reviewing the instructions, and deliberating with your fellow jurors, you believe that death is the appropriate sentence, would you personally be able to enter a death verdict?" Juror 300 responded "Yes."[41] In response to Question 96, "If after hearing the evidence, reviewing the instructions, and deliberating with your fellow jurors, you believe that life is the appropriate sentence, would you personally be able to enter a death verdict?" the juror responded "Yes."[42] In response to Question 105, "If you ascribe to a particular religion, does that religion have a view on the death penalty?" Juror 300 responded "No."[43]

The State then used one of its peremptory strikes on Juror 300, providing the following reasons:

> She was similar to another juror that says she believes that all people are good and have good morals, and that's her starting point. She indicated that life – she had some issues with life in prison, that it should not be a way of life, but that some people can make a life in prison.

[39] Juror 300, Questionnaire, Question 83 at 25–26.
[40] Juror 300, Questionnaire, Question 84 at 26.
[41] Juror 300, Questionnaire, Question 95 at 29.
[42] Juror 300, Questionnaire, Question 96 at 29.
[43] Juror 300, Questionnaire, Question 105 at 31.

> But she clearly had issues, indicating that we are all ingrained – and this is her words – we are all ingrained to do morally good, even in the worst conditions. And that is her starting belief.
>
> She has relatives who have been in prison, she said in the '60s at one point and at the '70s on another point. She – I believe she had a stepson who was charged with a sexual assault-related offense. She said the photos may be an issue for her, under Question 77. She indicated that it would be hard for her. She did say that she felt it was a necessity, but it would be a hard decision for her whether or not she could impose the death penalty.
>
> She said that crime is – committing crime is not the core of any one of us. You have to be conditioned to do it.[44]

The prosecutor's purported justification for striking Juror 300 is implausible in light of the State's decision not to strike Juror 55, who expressed greater hesitation about the death penalty, based on his religion, than did Juror 300.

> The State questioned Juror 55:
>
> And I want to draw your attention to – I believe you had indicated that you're – that you go to church or at least you had some religion in your life. And you had indicated in your questionnaire that your church doesn't support the death penalty.

Juror 55 responded:

> Well, I don't know if it has a – I mean, the Episcopal Church is fairly liberal. I don't know if it specifically has a death sentence stand or edict. But I would imagine that most people that I go to church with would be opposed to the death penalty.

[44] Tr. 03/08/18, at 125.

The State then followed up:

> Okay. And when you get down to the very end, all these phases are tough questions. I mean, guilt or innocence, aggravating factors, and life and death. I mean, these are going to be tough decisions. And you have 11 other jurors in that room that you can talk to and work through all the facts. You said you were a fact-based type of person. And you have all of these individuals you can rely on back there to talk through the process. I guess the question I have is, would you seek outside counsel from maybe your church, or something like that, knowing that these are difficult questions or anything like that?

Juror 55 responded:

> No, definitely not.[45]

Although the State summarized Juror 55's questionnaire response as stating that his church "doesn't support the death penalty," and Juror 55 further acknowledged that "most people that I go to church with would oppose the death penalty," the State did not strike Juror 55. Instead, the State struck a Native American juror, Juror 300, who did not state that her religion or community were opposed to the death penalty. The fact that the State struck the Native American juror who was less hesitant about the death penalty than the white juror it left on the panel shows that the State's professed reason for striking Juror 300 was pretextual.

[45] Tr. 01/29/18, at 141–142.

III. The State violated *Batson* when it struck Juror 358, who is Black, based on mischaracterizing the juror's statements, indicating the strike was motivated by racial discrimination.

When the prosecution's "race-neutral" justification for a peremptory strike is based on "a mischaracterization of [the juror's] testimony," that justification must be heavily scrutinized.[46] This is because the third step of the *Batson* inquiry requires the court to assess whether the State's "race-neutral" reason for the challenge should be believed.[47] Here, the prosecutor's purported justification for striking Juror 358 was based on a mischaracterization of the Juror's statements, indicating the reason for the strike was pretextual for race. When asked why the State challenged Juror 358, the State reasoned that:

> [S]he was treated unfairly by the police when they pulled her over.
>
> But the one more concerning for the State is that she said that she must have DNA or a witness when it comes to the evidence that she wants. And in our case, as the Court knows, the DNA is really hit or miss. And we don't have an eyewitness. It's a circumstantial case.
>
> And she also wants video. It was actually, I believe, video, a witness, or DNA was what she said kind of the State had to have in its case, all three, which we're lacking, which goes heavily towards a guilt determination in this case, Judge.[48]

However, in Juror 358's questionnaire, in response to the question "Do you believe that in each case the State must present scientific evidence, such as DNA or

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[46] *Miller-El*, 545 U.S. at 232.
[47] *Hernandez v. New York*, 500 U.S. 352, 365 (1991).
[48] Tr. 02/01/18, at 126-27.

fingerprint evidence, to prove guilt beyond a reasonable doubt?" Juror 358 responded "No," and explained, "It would help prove the case however, if a witness saw the crime or there is video this can impact my Thoughts."[49] In response to Question 53, "Do you believe that in each case the State must present eyewitness testimony or a confession to prove guilt beyond a reasonable doubt?" Juror 358 responded "No," and explained "If there is video or DNA take [sic] can change my view [sic]."[50] No follow up questions were asked of Juror 358.

The State's purported justifications for its peremptory strike of Juror 358 – that she "must have DNA or a witness" – misrepresents Juror 358's response. As a result, the State's proffered race-neutral reason for striking Juror 358 cannot be believed.

IV. Striking jurors who have negative encounters with law enforcement has a discriminatory effect that violates the spirit of *Batson*.

Despite the United States Supreme Court's claim that it has "vigorously enforced and reinforced" its *Batson* decision "and guarded against any backsliding," courts routinely allow prosecutors to strike prospective jurors whose views are reasonable, established by their lived experiences, and widely accepted in their communities. Such strikes and courts' acceptance of them has led to racial disparities

[49] Juror 358, Questionnaire, Question 52, at 16.
[50] Juror 358, Questionnaire, Question 53, at 17.

in who serves on juries. It allows prosecutors to question prospective jurors about a topic that would have the effect of excluding minority jurors, and use the answers to these questions, which are often considered race-neutral, to avoid triggering *Batson* violations.[51]

For years scholars have written about the failed state of the *Batson* framework and its inability to prevent racial bias in jury selection.[52] Likewise, a growing number of courts have discussed disparate impact as a form of racial discrimination under *Batson*.[53] Moreover, some state courts have revamped their procedures so as to recognize disparate impact as a form of discrimination, while others have discussed the possibility of expanding protection against disparate impact by looking at their state constitutions.[54]

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[51] *Washington v. Davis,* 426 U.S. 229, 246 (1976)(holding that when there is a claim of discrimination, a constitutional violation may only be found where there is purposeful discrimination).

[52] J. Bellin & J. Semitsu, *Widening Batson's Net To Ensure More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1075, 1077-78 (2011); *see also* 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 BlindSpot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U.L. Rev. 155, 178-79 (2005); T. Tetlow, *Solving Batson*, 56 Wm. & Mary L. Rev. 1859, 1887-89 (2015).

[53] *See United States v. Alvarez-Ulloa*, 784 F. 3d 558, 567 (9th Cir. 2015); *see also United States v. Moore*, 651 F.3d 30, 43 (D.C. Cir. 2011); *People v. Hardy*, 418 P. 3d 309 (2018); *State v. Mootz*, 808 N.W. 2d 207, 219 (Iowa 2012); *Batiste v. State*, 121 So. 3d 808, 849 (Miss. 2013).

[54] *See State v. Saintcalle*, 309 P.3d 326, 329 (Wn. 2013) (the Court recognized the State must change its application of *Batson* to account for new forms of discrimination); *see also State v. Holmes*, 221 A.3d at 411 (Conn. 2019) (the Court

The Arizona Court of Appeals looked at disparate impact in *State v. Rodarte*, where the Court was asked to extend the protections afforded by the Arizona Constitution to include protection against disparate impact in jury selection.[55] The Court declined to extend the State's "impartial jury" protection beyond what is provided by the federal government through the Sixth Amendment.[56] However, the Court of Appeals declined by noting that extensions of the Arizona Constitution are left to the Arizona Supreme Court.[57] This Court has not yet addressed whether the "impartial jury" right within the Arizona Constitution includes protection against forms of discrimination that result in disparate impact against protected groups. At minimum, this Court should revise and strengthen the procedures that Arizona courts must follow under *Batson*.

A. People of color, especially Black people, have disproportionately negative contact with law enforcement.

The fact that people of color, especially Black and Brown people, have disproportionate contact with law enforcement in the United States is well

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refers the systematic concern about *Batson's* failure to address implicit bias and disparate impact to a Jury Selection Task Force, also noting that it did not conduct an analysis under the State Constitution because the Defendant did not brief an independent state constitutional claim).

[55] 173 Ariz. at 335-36.

[56] *Id.*

[57] *Id.*

documented.[58] For example, Black drivers, particularly Black men, are stopped by police at higher rates than people of other racial groups.[59] Repeatedly, since 1999, in its reports regarding police contacts with the public, the Bureau of Justice Statistics highlighted that Blacks and Hispanics were more likely than whites to experience police threat or use of force as a consequence of that contact.[60]

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[58] *See* A. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 Chi.-Kent L. Rev. 559, 561 (1998) ("[T]here is plenty of statistical evidence that a disproportionate number of African Americans are arrested, charged, and convicted for crimes. . . .").

[59] *See* F. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched and Stripped of Constitutional Protection*, 38 J. Marshall L. Rev. 439, 444 (2004) (citing to a study done by the Washington Post and the Black America's Political Action Committee, which determined that about 46% of African-American males who registered to vote believe they had been stopped by law enforcement on account of their race).

[60] E. Harrell & E. Davis, *Contacts Between Police and the Public, 2018*, (Dec. 2020), p. 1, Bureau of Justice Statistics, United States Department of Justice, available at https://www.bjs.gov/content/pub/pdf/cbpp18st.pdf (last visited April 29, 2021); E. Davis & A. Whyde, *Contacts Between Police and the Public*, 2015, (Oct. 2018), p. 1, Bureau of Justice Statistics, United States Department of Justice, available at https://www.bjs.gov/content/pub/pdf/cpp15.pdf (last visited April 29, 2021); S. Hyland & L. Langton & E. Davis, *Police Use of Nonfatal Force, 2002-11*, (Nov. 2015), p. 1, available at https://www.bjs.gov/content/pub/pdf/punf0211.pdf (last visited April 29, 2021); C. Eith & M. Durose, *Contacts Between Police and the Public, 2008*, (Oct. 2011), p. 1, available at https://www.bjs.gov/content/pub/pdf/cpp08.pdf (last visited April 29, 2021); M. Durose & E. Smith & P. Langan, *Contacts Between Police and the Public, 2005*, (Apr. 2007), p. 1, available at https://www.bjs.gov/content/pub/pdf/cpp05.pdf (last visited April 29, 2021); M. Durose & E. Schmitt & P. Langan, *Contacts Between Police and the Public Findings from the 2002 National Survey*, (Apr. 2005), p. v, available at https://www.bjs.gov/content/pub/pdf/cpp02.pdf (last visited April 29, 2021); P. Langan & L. Greenfeld & S. Smith & M. Durose & D. Levin, *Contacts Between Police and the Public Findings from the 1999 National Survey*, (Feb. 2001),

Additionally, since 1999, the same reports highlight that Black and Hispanic drivers were both ticketed and searched at higher rates than white drivers.[61] Racially targeted traffic stops have led to deep skepticism among minorities, especially Black men, about the fairness of law enforcement.[62]

In Arizona, there is a long, and troubling history of racially motivated traffic stops.[63] Most recently, SB 1070 brought national attention to the discriminatory police practices in the State.[64] But, even before SB 1070, racial profiling by law enforcement had been identified as a problem in Arizona.[65] A study published in *Arnold v. Arizona* in 2004, that was conducted by the Arizona Department of Public Safety ("DPS"), recognized that "Hispanics and African Americans are consistently being stopped by DPS officers at rates disproportionately greater than their representation within the violation population; and white, non-Hispanics are consistently being stopped at rates disproportionality less than their representation within the violator population."[66] This study also found that Hispanics and members

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p. 2, available at https://www.bjs.gov/content/pub/pdf/cpp99.pdf (last visited April 29, 2021),

[61] *Id.*

[62] *See* D. Harris, *The Stories, the Statistics and the Law: Why Driving While Black Matters*, 84 Minn. L. Rev. 265, 298 (1999).

[63] *See Melendres v. Arpaio*, 784 F. 3d 1254 (9th Cir. 2015).

[64] M. Romero, *Keeping Citizenship Rights White: Arizona's Racial Profiling Practices in Immigration Law Enforcement*, 1 L. J. Soc. Just. 97, 106 (2011).

[65] *Id.* at 107.

[66] *Arnold v. Ariz. Dep't of Pub. Safety*, No. CV-01-1463-PHX-LOA, 2006 WL 2168637 (D. Ariz. 2006).

of other racial/ethnic minority groups were significantly likely to be issued citations for violations as opposed to their white counterparts.[67]

Today, the consequences of discriminatory policing are broadcast in the media. Fatal shootings by on-duty police officers flood social media posts and news stories. Records of these shootings have revealed that Black people are about two to three times more likely to face deadly force than white people.[68] Fear of being on the receiving end of this contact is not only prevalent, but also justified.

B. Striking Juror 358 because she had been unfairly treated by police disparately impacts jurors of color.

When *Batson* was decided, no state had a statute that expressly limited people of color from serving on a jury.[69] Nonetheless, the *Batson* Court looked beyond the statutes defining juror qualifications.[70] The Court analyzed challenged selection practices and ruled that purposeful forms of discrimination violated the right to an "impartial jury."[71] Here, this Court should strengthen the procedural protections prescribed by *Batson* to better protect against discrimination, whether overt or not,

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[67] *Id.*
[68] *Id.*
[69] *Batson*, 476 U.S. at 88.
[70] *Id.*
[71] *Id.*

that lead to disparate racial impacts against protected classes.[72] As noted by the Washington Supreme Court:

> [R]acism itself has changed. It is now socially unacceptable to be overtly racist. Yet we all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate. Racism now lives not in the open but beneath the surface- in our institutions and our subconscious thought process- because we suppress it and because we create anew through cognitive processes that have nothing to do with racial animus.[73]

Thus, the *Batson* framework is ill-suited to address the current problem of discrimination in jury selection. Acknowledging disparate impact and implicit bias as forms of discrimination is necessary to protect the constitutional right to an "impartial jury."

Negative encounters with law enforcement are a common justification used by prosecutors to remove potential jurors.[74] One recent study revealed that this reason was used in nearly 35% of all cases where the prosecution struck a Black juror.[75] The issue arises in criminal prosecutions throughout the United States and

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[72] *Id.* at 99, n. 24 (explaining that state courts are free to develop their own procedures to implement *Batson*'s prohibition against racially discriminatory jury selection).
[73] *Saintcalle*, 309 P.3d at 335.
[74] Elisabeth Semel, *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors,* Death Penalty Clinic, Berkeley Law 15, 15 (June 2020).
[75] *Id.*

has even encouraged some state courts to re-evaluate the way that they allow peremptory strikes within their jurisdiction.[76]

Racial minority groups have disproportionately negative views regarding law enforcement and the criminal justice system when compared to the views of white people. A 2016 study of 4,538 adults in the United States by the Pew Research Center ("Pew") revealed that "only about a third of blacks but roughly three-quarters of whites say police in their communities do an excellent or good job in using the appropriate force on suspects, treating all racial and ethnic minorities equally and holding officers accountable for their misconduct."[77] Additionally, a 2019 survey administered by Pew revealed that opinions about police officers differed widely by racial and ethnic groups. "Roughly seven-in-ten white Americans (72%) say police officers treat racial and ethnic groups equally at least some of the time. By way of comparison, half of Hispanics and just 33% of black adults say the same."[78]

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[76] *See Alvarez-Ulloa*, 784 F. 3d at 567; *see also Moore*, 651 F.3d at 43; *Hardy*, 418 P. 3d at 309; *see also Mootz*, 808 N.W. 2d at 219; *Batiste*, 121 So. 3d at 849; *but see Saintcalle*, 309 P.3d at 329 (prompting the adoption of Rule 37 which makes the striking of a juror for distrust of law enforcement presumptively invalid).

[77] R. Morin & R. Stepler, Pew Research center, *The Racial Confidence Gap in Police Performance*, (September 29, 2016), available at https://www.pewresearch.org/social-trends/2016/09/29/the-racial-confidence-gap-in-police-performance/ (last visited April 29, 2021).

[78] Pew Research Center, *Why Americans Don't Fully Trust Many Who Hold Positions of Power and Responsibility*, (September 19, 2019), available at https://www.pewresearch.org/politics/2019/09/19/why-americans-dont-fully-trust-many-who-hold-positions-of-power-and-responsibility/ (last visited April 29, 2021).

In this case, the trial court allowed Juror 358 to be struck from the jury pool for two reasons: (1) she was treated unfairly by the police when she was pulled over;[79] and (2) the prosecutor claimed that she wanted specific types of scientific evidence.[80] The second reason is not supported by the record, and the first, if allowed to stand, would cause minorities to be systematically and substantially underrepresented in Arizona juries. Additionally, the first reason was pretextual since the prosecutor failed to strike a similarly situated white juror, Juror 246, who also had a negative experience with law enforcement.[81]

V. Striking a juror for having a relationship with someone who has been stopped, arrested, or convicted of a crime, disparately impacts jurors of color.

Questions concerning a juror's relationship with persons who have been stopped by police, arrested, or convicted of a crime are regularly asked in *voir dire*, including in Arizona.[82] Such questions infer a presumption that individuals with such relationships cannot be fair and impartial, thus impacting their fitness to serve on a jury.[83] Specifically, these individuals are presumed to have a negative view of law

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[79] Tr. 02/01/18 at 126-27.
[80] *Id.*
[81] *Id.* at 15-17 (stating that he has been wrongly accused by police).
[82] *See* Exhibit A.
[83] Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 Yale L. & Pol'y Rev. 387, 407 (2016) https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1700&context=ylpr.

enforcement and prosecutors, or that they will be overly sympathetic toward defendants. Accordingly, jurors who have a close relationship with someone who has been stopped, arrested, or convicted of a crime, are often dismissed from juries. This reasoning, although facially race-neutral, can serve as a pretext for racial or ethnic discrimination.

First, it is well established that minorities are stopped, arrested, and convicted at higher rates than their white counterparts. For example, a 2018 study from the Sentencing Project reported that nationwide, African American adults are 5.9 times more likely to be arrested than white Americans; Hispanics are 3.1 times more likely than white Americans.[84] As a result, 1 in 3 Black boys and 1 in 6 Hispanic boys can expect to go to prison at some point in their lives.[85] Comparatively, only 1 in 17 white boys can expect to go to prison in their lifetime.[86]

In Arizona, Black and Latino drivers are more likely to be stopped, searched, and arrested than white drivers, even though contraband is discovered at about the same rate for each ethnicity.[87] Further, incarceration rates for minorities in Arizona

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[84] The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, (April 19, 2018) https://www.sentencingproject.org/publications/un-report-on-racial-disparities/.
[85] *Id.*
[86] *Id.*
[87] Joseph Flaherty, *It Wasn't Just Sheriff Joe: DPS Troopers Are More Likely to Search Latino, Black Drivers, New Times Finds*, PHOENIX NEW TIMES (Aug. 14, 2017), https://www.phoenixnewtimes.com/news/black-latino-drivers-in-arizona-more-likely-searched-by-troopers-9570746

are much higher than those of white people. According to data compiled from the 2010 census, per every 100,000 Black persons in the state, 3,184 were incarcerated; per every 100,000 Native Americans in the state, 2,267 were incarcerated; and per every 100,000 Hispanics in the state, 1,453 were incarcerated.[88] Comparatively, per every 100,000 white persons in the state, 633 were incarcerated.[89]

Incarceration rates for minorities are an issue in the context of *voir dire* because minorities are more likely to have friends and family who are of the same race.[90] Additionally, white Americans are less likely to have friends and family who are not white.[91] Therefore, statistically speaking, a person of color is more likely to have a close relationship with someone who has been stopped, arrested, or convicted of a crime.[92] As such, allowing potential jurors to be struck for that reason alone

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[88] Prison Policy Initiative, *Arizona Profile*, https://www.prisonpolicy.org/profiles/AZ.html.

[89] *Id.*

[90] Lindsay Dunsmuir, *Many Americans have no friends of another race: poll*, THOMSON REUTERS (Aug. 7, 2013),https://www.reuters.com/article/us-usa-poll-race/many-americans-have-no-friends-of-another-race-poll-idUSBRE97704320130808.

[91] Christopher Ingraham, *Three quarters of whites don't have any non-white friends*, THE WASH. POST (Aug. 25, 2014),https://www.washingtonpost.com/news/wonk/wp/2014/08/25/three-quarters-of-whites-dont-have-any-non-white-friends/.

[92] Danielle Paquette, *One in nine black children has had a parent in prison*, THE WASH. POST (Oct. 27, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/10/27/one-in-nine-black-children-have-had-a-parent-in-prison/; *see also* Janelle Wood, *Mass incarceration hurts Arizona's moms and children,* AZ MIRROR (May 10, 2019),

leads to disproportionately white juries in violation of the constitutional rights of both potential jurors and the criminally accused.

Second, because minorities are stopped, arrested, and convicted at a higher rate than white people, they're already disproportionately excluded from jury pools. Many states, including Arizona, prohibit persons with felonies from serving on juries. Under Arizona law, persons convicted of a felony, whose civil rights have not been restored, are automatically disqualified from jury service.[93] Further shrinking the jury pool by disqualifying jurors who have close connections with people who have been stopped, arrested, or convicted of a crime disproportionately excludes a high rate of minorities. The result is juries whose racial compositions are whiter than that of the respective community.

Third, a potential juror's close connection to a person who has been stopped, arrested, or convicted does not automatically mean the juror will be biased against law enforcement or prosecutors. Alternative means exist for identifying jurors who may harbor such biases. For example, prosecutors can discover potential biases against law enforcement or prosecutors through explicit questions about such biases. Thus, no logical reason exists to continue to exclude jurors solely based on a close relationship to a person who has been stopped, arrested, or convicted. To permit

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https://www.azmirror.com/2019/05/10/mass-incarceration-hurts-arizonas-moms-and-children/.

[93] A.R.S. § 21-201(3).

otherwise only serves to systematically exclude minority jurors and prejudice minority defendants.

In this case, the State used peremptory strikes against two minority jurors due to their connection with persons who have been previously stopped, arrested, or convicted of a crime. The jurors in question are Juror 260, a Hispanic juror, and Juror 300, a Native American Juror.[94] Juror 260 responded "No" to Question 73, "Have you, a member of your family or close friend ever worked with any program dedicated to rehabilitating persons convicted of a crime?"[95] He followed up by stating that in 2016, he did briefly participate in a church program where he wrote to incarcerated inmates. The purpose of the program was to share the gospel and provide support. Juror 260 wrote two or three letters, but never established any sort of relationship with the inmate.[96] Further, he was specifically instructed not to give or ask the inmate for personal information.[97]

Juror 300 responded "Yes" to Question 40, "Have you, your spouse/partner, your child or any other family member, or a close personal friend ever been arrested for, charged with, or convicted of any crime other than minor traffic violations? This includes driving under the influence."[98] The juror's brother was convicted of assault,

[94] Appellant's Brief, at 52.
[95] *Id*. at 31.
[96] *Id*. at 32-34.
[97] *Id*. at 33-34.
[98] *Id*. at 36-37.

her stepdaughter of a DUI, and her stepson of sexual assault.[99] She also responded "Yes" to Question 41, which inquired whether she personally knew or communicated with anyone who was in jail or prison. She was referring to her brother in the early 1970's.[100] Juror 300 was later struck from the jury by the prosecution.

The State's striking of Jurors 260 and 300 for having relationships with individuals arrested or convicted of a crime violates the spirit of *Batson*. Allowing strikes of this type to pass constitutional muster also ignores the disproportionately negative realities of policing and the criminal justice system that Black Americans and other people of color face in this country. Given these realities, allowing prosecutors to strike jurors of color based on the lived experiences of those jurors undermines *Batson*.

CONCLUSION

The United States and Arizona Constitutions forbid racial discrimination during jury selection. *Batson's* attempt at remedying this problem has been unsuccessful. In this very case, the trial court allowed the prosecution to use four of its peremptory strikes on jurors of color, despite clear evidence that the prosecutor's purported justifications masked a clear goal of removing jurors of color from the

[99] *Id*. at 37.
[100] *Id*.

jury. As a result, the constitutional rights of those struck jurors as well as the constitutional rights of Mr. Robinson were violated. Accordingly, this Court should reverse Mr. Robinson's conviction and sentence and grant him a new trial free from racially discriminatory jury selection.

Respectfully submitted on May 28, 2021

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