

ARIZONA SUPREME COURT

STATE OF ARIZONA

Appellee,

v.

KEYAIRA PORTER

Appellant.

No. 20-0147-PR

No. 1 CA-CR 18-0301

Maricopa County Superior Court No.
CR 2017-137407-001

BRIEF OF *AMICI CURIAE*

**THE AMERICAN CIVIL LIBERTIES UNION OF ARIZONA,
ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE, AND
LOS ABOGADOS HISPANIC BAR ASSOCIATION
IN SUPPORT OF APPELLANT**

**AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
ARIZONA**

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Wendy Sawyer, *How Race Impacts Who is Held Pretrial*, Prison Policy Initiative (2019)3

INTRODUCTION

This case is yet another troubling example of a prosecutor who “sought to remove all jurors of color from the jury pool” and a trial court that denied a challenge under *Batson v. Kentucky*¹ by accepting the prosecutor’s subjective demeanor-based explanation for a peremptory strike.² Yet, as the Court of Appeals correctly noted, the trial court was able to accept this demeanor-based explanation only by failing to engage in *Batson*’s “critical” third stage of analysis.³

As such, this case presents an opportunity for this Court to clarify, as the Court of Appeals did below, that trial courts must comply with all three steps of the *Batson* procedure. It also presents an opportunity for this Court to strengthen the protections against racially discriminatory jury selection “lest *Batson*’s guarantee of equal protection become nothing more than empty words.”⁴ Indeed, this Court should accept the invitation by the United States Supreme Court and establish more robust rules for the “particular procedures to be followed upon a defendant’s timely objection to a prosecutor’s [peremptory] challenges.”⁵ Specifically, this Court should require – even if only prospectively – that trial courts expressly determine

¹ 476 U.S. 79 (1986).

² *State v. Porter*, 248 Ariz. 392, 394 ¶ 1 (2020).

³ *Id.* at 396-97 ¶¶ 12-13.

⁴ *State v. Cruz*, 175 Ariz. 395, 400 (1993).

⁵ *Batson*, 476 U.S. at 99.

whether peremptory strikes are a product of discrimination and further re-adopt this Court’s “objective verification” requirement any time a party offers a “facially neutral, but wholly subjective, reason for a peremptory strike.”⁶ Not only is the adoption of such protections contemplated by *Batson*, but they are also necessary to protect the rights of *both* criminal defendants and potential jurors from racial discrimination in jury selection.

ARGUMENT

I. Racial Disparities Continue to Plague Arizona’s Criminal Legal System.

Four years ago, this Court redoubled its efforts to ensure that Arizona courts provide “justice for all.”⁷ Yet despite increased public concern about the problem of racism in American society,⁸ Arizona’s criminal legal system continues to be plagued by racial disparities. Arizona continues to have the highest Latinx imprisonment rate and the sixth highest Black imprisonment rate in the nation.⁹

⁶ *Cruz*, 175 Ariz. at 399.

⁷ Supreme Court of Arizona, *Justice for All: Report and Recommendations of the Task Force on Fair Justice for All: Court-Ordered Fines, Penalties, Fees, and Pretrial Release Policies*, 13 (2016).

⁸ See Eugene Scott, *Majority of Americans Say Race Discrimination is a Big Problem in the U.S.*, Wash. Post, Jul. 10, 2020, available at: <https://www.washingtonpost.com/politics/2020/07/10/majority-americans-say-race-discrimination-is-big-problem-us/>.

⁹ The Sentencing Project, *The Color of Race and Justice: Racial and Ethnic Disparity in State Prisons* (Jun. 14, 2016), available at: <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

Such racial disparities wreak havoc on communities of color.¹⁰ From increased harassment by police¹¹ to arrest rates,¹² and from pre-trial detention rates¹³ to sentencing outcomes,¹⁴ persistent racial disparities confirm that justice is not equal for all.

¹⁰ See e.g. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 6-7, 13, 16-19 (The New Press) (2010); Chris Hayes, *A Colony in a Nation* 23, 32-39 (W. W. Norton and Co.) (2017).

¹¹ See Radley Balko, *There's Overwhelming Evidence That the Criminal Justice System is Racist. Here's the Proof*, Wash. Post, Jun. 10, 2020 (cataloguing research studies on “policing and profiling”), available at: <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/>.

¹² Christopher Hartney & Linh Vuong, *Created Equal: Racial and Ethnic Disparities in the US Criminal Justice System*, National Council on Crime and Delinquency, 2009, at 3, 10-12, (finding that “people of color were overrepresented among those arrested” with rates of arrests for African Americans “2.5 times higher than the arrest rates for Whites”), available at: http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf.

¹³ Wendy Sawyer, *How Race Impacts Who is Held Pretrial*, Prison Policy Initiative, Oct. 9, 2019 (finding that “young Black men are 50% more likely to be detained pretrial than white defendants”), available at: https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.

¹⁴ United States Sentencing Commission, “Demographic Differences in Sentencing: An Update to the 2012 *Booker* Report, Nov. 2017 (finding that when black men and white men commit the same crime, black men on average receive a sentence almost 20 percent longer after controlling for variables such as age and prior criminal history), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf; see also The Sentencing Project, *supra* note 9; Brandon L. Garrett, *End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice* 1147-49, 192 (Harvard University Press) (2017) (discussing racial disparities in capital sentencing and execution rates).

In Arizona, sentencing disparities are particularly troublesome. Overall, communities of color in Arizona experience imprisonment at higher rates than white people.¹⁵ In addition to the “stark differences” regarding who is sent to prison, there are also racial and ethnic disparities in how much time people spend in prison.¹⁶ After controlling for gender, offense type, and the number of prior felonies, Black people receive the longest average prison sentences in Arizona.¹⁷ While Black people comprise only 5 percent of the state’s population, they make up 13 percent of the prison population.¹⁸ Latinx people are also disproportionately represented in prison admissions. In 2017, they comprised 31 percent of Arizona’s population, but 37 percent of people admitted to prison.¹⁹ Such disparities have wide-ranging effects that “touch the entire community.”²⁰

Racial disparities also exist in prosecution outcomes in Maricopa County, where Ms. Porter was prosecuted. A recent review of all criminal cases handled by the Maricopa County Attorney’s Office from January 1, 2013, to December 31, 2017 concluded that “Black and Hispanic people prosecuted by that office spent

¹⁵ FWD.us, *Arizona’s Imprisonment Crisis: Part 2, The Cost to Communities*, Nov. 2018 at 10-16, available at: <https://36shgf3jsufe2xojr925ehv6-wpengine.netdna-ssl.com/wp-content/uploads/2018/11/PART-2-The-cost-to-communities-1.pdf>.

¹⁶ *Id.* at 13-14.

¹⁷ *Id.* at 13.

¹⁸ *Id.* at 10.

¹⁹ *Id.*

²⁰ *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

significantly more time incarcerated than white people.”²¹ At the same time, “white people were more likely to have cases dismissed or not filed than individuals of any other race.”²²

Although the problems of racial disparities and racial discrimination in the criminal legal system neither begin nor end with proper jury selection, juries provide a functional and symbolic bulwark against the misuse of government power. “It is the jury that is a criminal defendant’s fundamental protection of life and liberty against race or color prejudice.”²³ Thus, urgent need remains for this Court to strengthen the constitutional protections against racially discriminatory jury selection in an effort to fulfill the promise of *Batson* and to truly provide “justice for all.”

II. Despite the “Vigorous” Enforcement of *Batson*, the Promise of Racially Bias-Free Jury Selection Has Not Been Realized.

Since *Batson* was decided, the Supreme Court has “vigorously enforced and reinforced the decision, and guarded against any backsliding.”²⁴ Yet despite the Court’s efforts, innumerable studies show that *Batson*’s “guarantee of equal

²¹ Analise Ortiz & Melissa Kovacs, *The Racial Divide of Prosecutions in the Maricopa County Attorney’s Office*, ACLU of Arizona (2020), available at: https://www.acluaz.org/sites/default/files/7.16embargofinal_the_racial_divide_2020.pdf.

²² *Id.*

²³ *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880).

²⁴ *Flowers v. Mississippi*, 139 S.Ct. 2228, 2243 (2019).

protection [has] become nothing more than empty words.”²⁵ One study examined “all opinions and orders between January 1, 2000 and December 31, 2009 in which a federal court evaluated a race-based *Batson* challenge in either a civil or criminal case ... unearth[ing] 269 federal decisions.”²⁶ The authors concluded that federal courts provide “little relief to *Batson* claimants,” finding that reviewing courts granted a new trial in only 6.69% of the cases reviewed while the courts rejected *Batson* claims altogether in 85.1% of cases.²⁷

Such results are not surprising when considering the “charade that has become the *Batson* process.”²⁸ This process allows that:

[t]he State may provide the trial court with a series of pat race-neutral reasons for exercise of peremptory challenges. Since reviewing courts examine only the record, we wonder if the reasons can be given without a smile. Surely, new prosecutors are given a manual, probably entitled, “Handy Race-Neutral Explanations” or “20 Time-Tested Race-Neutral Explanations.”²⁹

²⁵ *Cruz*, 175 Ariz. at 400.

²⁶ Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson’s Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1075, 1092 (2011), available at: <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2275&context=facpub>

S.

²⁷ *Id.*

²⁸ *People v. Randall*, 283 Ill. App. 3d 1019, 1025 (1996).

²⁹ *Id.* at 1025-26.

Importantly, the almost inexhaustible list of rote excuses that can successfully rebut an allegation of race-based juror exclusion are often demeanor-based.³⁰

Recently, the Death Penalty Clinic at Berkley Law School conducted an exhaustive review of hundreds of cases in which *Batson* claims were raised and concluded that “[r]acial discrimination is an ever-present feature of jury selection in California.”³¹ Moreover, the report found that “prosecutors most often relied on demeanor to strike Black jurors” and further explained that these demeanor-based reasons “correlate with racial stereotypes of African Americans....”³² Such findings, which are the result of both conscious and unconscious bias, undermine the promise of *Batson* and should motivate this Court to act by requiring additional procedural protections aimed “toward eliminating the shameful practice of racial discrimination in the selection of juries.”³³

³⁰ Michael Raphael & Edward Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. Mich. J. L. Ref. 229, 237 (1993) (finding that “[a] juror’s demeanor is an extremely frequent neutral explanation in our study” because it is also “the most subjective type of explanation and thus, the easiest and most likely pretext for striking black jurors”), available at:

<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1674&context=mjlr>.

³¹ Berkeley Law Death Penalty Clinic, *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors*, June 2020, at iv, available at: <https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf>.

³² *Id.* at 16.

³³ *Batson*, 476 U.S. at 102 (Marshall, J., concurring).

III. Batson Allows States to Adopt Procedures to Effectuate the Constitutional Guarantee of Racially Biased-Free Jury Selection.

The Supreme Court left it to state courts to devise their own procedures “to be followed upon a defendant’s timely objection to a prosecutor’s challenges,”³⁴ explaining that “[s]tates have flexibility in formulating appropriate procedures to comply with *Batson*.”³⁵ Courts have devised a variety of approaches to fulfill *Batson*’s promise of racially biased-free jury selection.³⁶

As the Court of Appeals pointed out, “[t]he *Batson* framework is not pro forma – it is ‘designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process.’”³⁷ Thus, procedures adopted by state courts should be aimed at accomplishing that goal. This is particularly important during the third step of the *Batson* process, which “necessarily is gestalt,”³⁸ being the only time the trial court evaluates the purported reasons for a peremptory strike and tests whether they are the result of either conscious or unconscious bias.³⁹ As the Court of Appeals correctly observed, if state courts fail

³⁴ *Id.* at 99.

³⁵ *Johnson v. California*, 545 U.S. 162, 168 (2005).

³⁶ *Cruz*, 175 Ariz. at 397-98 (acknowledging that “many state and federal cases since *Batson* have extended its application); *State v. Urrea*, 244 Ariz. 443, 446-47, ¶¶ 11-16 (2018) (noting the variety of approaches state courts have taken in the *Batson* context).

³⁷ *Porter*, 248 Ariz. at 396 ¶ 10.

³⁸ *Id.* at 397 ¶ 14.

³⁹ *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008).

to “vigorously enforce[]” this third step, “a *Batson* analysis becomes nothing more than a rubber stamp allowing the government to discriminate with impunity.”⁴⁰

The Supreme Court agrees, explaining that it is not until *Batson*’s third step that “implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.”⁴¹ The Court’s belief that trial courts “probably will” root out pretextual justifications for race-based peremptory strikes during this third step assumes the procedures employed are, in fact, effective in doing so. Unfortunately, Arizona’s procedures for rooting out race-based peremptory strikes fall short and must be strengthened – on this point, all three judges below agree.⁴²

IV. This Court Should Address the Problem of Race-Based Jury Selection by Prospectively Strengthening the Procedures Arizona Courts Must Follow Under *Batson*.

This case presents an example of why additional protections against race-based jury selection are needed in Arizona. Here, the prosecutor “sought to remove all jurors of color from the jury pool”⁴³ and was successful in removing all Black people from Ms. Porter’s jury – state actions even the dissenting judge on the Court of Appeals found “troubling.”⁴⁴ Equally troubling is the trial court’s failure to

⁴⁰ *Porter*, 248 Ariz. at 397 ¶ 15.

⁴¹ *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

⁴² *Porter*, 248 Ariz. at 399 ¶ 22, 405 ¶ 44 (McMurdie, J., dissenting).

⁴³ *Id.* at 394 ¶ 1.

⁴⁴ *Id.* at 401 ¶ 30.

meaningfully engage in the critical third step of the *Batson* analysis.

As this Court has noted, once a defendant makes a prima facie showing of racial discrimination under *Batson* and the prosecutor provides a race-neutral reason for the strike, “the trial court *will then* ‘have the duty to determine if the defendant has established purposeful discrimination.’”⁴⁵ Such a duty cannot be accomplished summarily as this step “turns on factual determinations.”⁴⁶ Yet here, while the trial court “did determine that the proffered race-neutral justifications were indeed race neutral” – thereby satisfying *Batson*’s second step – it failed to “make a determination that those justifications were *credible* in the face of a pattern of [potentially race-based] peremptory strikes.”⁴⁷ Such conflation of the second and third steps violates *Batson*.⁴⁸ As such, this Court must affirm the appellate court’s decision below.

Yet affirming the decision below is not enough as “virtually every commentator (and numerous judges) who have studied the issue have concluded that race-based juror strikes continue to plague American trials.”⁴⁹ This court should go

⁴⁵ *Urrea*, 244 Ariz. at 445 ¶ 9, quoting *Batson*, 476 U.S. at 98 (emphasis added).

⁴⁶ *Foster v. Chapman*, 136 S.Ct. 1737, 1747 (2016).

⁴⁷ *Porter*, 248 Ariz. at 396 ¶ 13 (emphasis in original).

⁴⁸ *Batson*, 476 U.S. at 96-98; *Miller-El v. Cockrell*, 537 U.S. 322, 328-29 (2003); see also *Purkett*, 514 U.S. 765, 767-68 (explaining that “implausible or fantastic justifications” satisfy only *Batson*’s second step).

⁴⁹ Jeffrey Bellin, *supra* note 26 at 1077 (surveying court opinions and articles).

further to prevent *Batson* from being “merely aspirational” in Arizona.⁵⁰ First, should this Court agree with the dissenting judge below that “*Snyder v. Louisiana* does not require trial courts to make express findings” when reviewing demeanor-based peremptory strikes,⁵¹ it should nonetheless prospectively require trial courts to do so. As the Court of Appeals correctly noted, “[t]he *Batson* framework contemplates meaningful appellate review, not blind assent.”⁵² Only through express findings by the trial court when presented with demeanor-based peremptory strikes can such meaningful review take place, which is necessary to “foster[] confidence in the administration of justice without racial animus.”⁵³

Second, this Court should re-adopt the “objective verification” requirement that it required a generation ago in *State v. Cruz*.⁵⁴ In *Cruz*, this Court held that where “the state offers a facially neutral, but wholly subjective, reason for a peremptory strike, it must be coupled with some form of objective verification before it can overcome the prima facie showing of discrimination.”⁵⁵ With extraordinary prescience this Court correctly reasoned that if “a wholly subjective impression of a juror's perceived qualities, without more, overcomes a prima facie showing of

⁵⁰ *Porter*, 248 Ariz. at 399 ¶ 22.

⁵¹ *Id.* at 403 ¶ 36 (McMurdie, J., dissenting).

⁵² *Id.* at 397 ¶ 16.

⁵³ *Id.*

⁵⁴ 175 Ariz. at 399.

⁵⁵ *Id.*

discrimination, *Batson* could easily and quickly become a dead letter.”⁵⁶

Shortly after *Cruz*, however, the United States Supreme Court decided *Purkett v. Elem* and clarified that the proffered race-neutral reason for a peremptory strike need not be “persuasive, or even plausible” at step two of the *Batson* process.⁵⁷ Following *Purkett*, the Court of Appeals in *State v. Henry* held that the Supreme Court had “reinterpreted *Batson* in a way that eliminates the *Cruz* requirement” without waiting for this Court to overturn its own precedent.⁵⁸ Interestingly, the day *after* the Court Appeals issued its *Henry* decision, this Court acknowledged *Purkett* but declined to address whether it undercut “the continued validity of *Cruz*.”⁵⁹ Because in practice this has meant that trial courts in Arizona no longer require objective verification when presented with demeanor-based and other subjective strikes, this Court should again explicitly adopt the “objective verification” rule to guard against any backsliding that would make *Batson* even more of a dead letter in Arizona.

The re-adoption of the “objective verification” rule would break no new ground in Arizona.⁶⁰ At the same time, it would allow Arizona to join other states who have adopted similar rules to protect against race-based jury selection. For

⁵⁶ *Id.*

⁵⁷ *Purkett*, 514 U.S. at 767-78.

⁵⁸ 191 Ariz. 283, 286 (App. 1997).

⁵⁹ *State v. Trostle*, 191 Ariz. 4, 12 (1997).

⁶⁰ *See Cruz*, 175 Ariz. at 399.

example, the Supreme Court of Alabama has explained that “[a]fter a prima facie case is established [during *Batson*’s first step], there is a presumption that the peremptory challenges were used to discriminate on the basis of race.”⁶¹ The Court further requires that “[t]he state then has the burden of articulating a clear, specific, and legitimate reason for the challenge which relates to the particular case to be tried, and which is nondiscriminatory.”⁶² In reaching its decision, the Supreme Court of Alabama opined that although such a rule was required by *Batson*, “subsequent decisions of the United States Supreme Court ... can be interpreted to ease the federal standard,” thereby necessitating Alabama’s adoption of greater protections against race-based jury selection.⁶³

While Alabama’s procedural requirements that offer greater protection against race-based jury selection rest upon adequate and independent state law grounds, the Supreme Judicial Court of Massachusetts requires them under the federal constitution even after *Purkett*.⁶⁴ In *Commonwealth v. Maldonado*, the Supreme Judicial Court explained that “[c]hallenges based on subjective data such as a juror’s looks or gestures, or a party’s ‘gut’ feeling should rarely be accepted as adequate because such explanations can easily be used as pretexts for

⁶¹ *Looney v. Davis*, 721 So.2d 152, 164 (Ala. 1998).

⁶² *Id.* (emphasis omitted).

⁶³ *Id.* at 164 n.3.

⁶⁴ 788 N.E.2d 968, 973 (Mass. 2003), *abrogated on other grounds as stated in Commonwealth v. Robertson*, 105 N.E.3d 253, 265 n. 10 (Mass. 2018).

discrimination.”⁶⁵ The court continued, requiring any race-neutral reason proffered at *Batson*’s second step be “genuine,” explaining that “[a]n explanation is *genuine* if it is in fact the reason for the exercise of the challenge.”⁶⁶ Thus, explanations that are neither persuasive nor plausible do not suffice. Indeed, the *Maldonado* court specifically rejected the *Purkett* view “that a ‘silly’ or ‘superstitious’ reason (so long as it is race neutral) is adequate to overcome a prima facie case of discrimination.”⁶⁷ Instead, the court adopted the view of the *Purkett* dissent “that the [United States Supreme] Court’s unnecessary tolerance of silly, fantastic, and implausible explanations ... demeans the importance of the values vindicated by our decision in *Batson*.”⁶⁸ This Court should conclude the same and re-adopt its “objective verification” rule.

CONCLUSION

Without stronger procedural protections *Batson*’s promise of racially biased-free jury selection will certainly be “merely aspirational and ... easily be sidestepped.”⁶⁹ This Court should affirm the Court of Appeals in refusing to allow this to happen in Arizona. Additionally, this Court should re-adopt its “objective verification” requirement. Only by doing both can this Court fulfill the promise of

⁶⁵ *Id.*

⁶⁶ *Id.* (emphasis in original).

⁶⁷ *Id.* at 973 n.7.

⁶⁸ *Id.*

⁶⁹ *Porter*, 248 Ariz. at 399 ¶ 22.

Batson and truly begin to provide “justice for all.”

Respectfully submitted, this day of December 2020.

By /s/Jared G. Keenan

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