

Peremptory Challenges Retrospective

By Travis W. Ivy

Effective January 1, 2022, the Arizona Supreme Court eliminated peremptory challenges in Arizona. This amendment made Arizona the first and, so far, only state to eliminate peremptory challenges in jury selection. We're three years out and a retrospective is in order, but I will confine this article to criminal litigation.

As background, peremptory challenges allow a party to strike a limited number of prospective jurors without a stated reason, in contrast to the unlimited number of for-cause juror strikes that either party may still make. The general idea behind peremptory challenges is that a party can strike jurors for reasons that don't require approval from the trial judge, who might not pick up on or correctly interpret certain cues that might betray juror bias or other problematic traits like general inattentiveness. Although they have a strategic use, a longstanding critique is that they allow jurors to be struck for any number of unconstitutional or otherwise undesirable reasons, such as race, gender, or a lesser susceptibility being misled.

Beginning with *Batson v. Kentucky*, the U.S. Supreme Court devised a mechanism for preventing attorneys from striking jurors based on their race. Modified by state and federal caselaw, *Batson* was expanded to protect against sex discrimination (and, in the Ninth Circuit, discrimination against sexual orientation), yet "*Batson* challenges" remained a difficult tool to employ, not least because the opponent to a peremptory challenge must prove to the trial judge's satisfaction that the proponent engaged in "purposeful discrimination," meaning that the judge must be willing to publicly deem the proponent to be deliberately engaged in discriminatory conduct.

To solve this problem, to reduce the number of jurors who are summoned and then struck, and to bolster confidence in the judicial system (by achieving the former two aims), Arizona Court of Appeals Judges, Peter B. Swann and Paul J. McMurdie, submitted Petition R-21-0020 (Petition). The Arizona Supreme Court granted the Petition and modified Rules of Criminal Procedure 18.4 and 18.5, and Rule of Civil Procedure 47(e) to eliminate



peremptory challenges. See Order No. R-21-0020 (Ariz. 2021). Three years out, there is little publicly available research as to the consequences of this modification, though it appears that the Petition has achieved at least some of its aims.

One can confidently say that the Pima County Public Defender and County Attorney's offices are adapting to the procedural change. Speaking on her own behalf, Katherine Daubert, Supervising Attorney and Crimmigration Team Leader at the Public Defender's Office, told the Writ that the PDs had refined their methods for arguing for-cause strikes, including organizing CLEs and preparing jury questionnaires by which a specific basis for such strikes might be identified. She added that she had been "pleasantly surprised by the jury panels produced without the use of peremptory strikes," and has become a "strong proponent" of the new system.

Pima County Attorney Laura Conover expressed similar sentiment. Although she acknowledged an ongoing adjustment, she emphasized that "the goal is worthy" and that the "preliminary data looks good." Consistent with Ms. Daubert's observations, there is an intuitive basis for predicting an increase in the diversity of juries, simply because, subject to the same number of strikes, a group that is smaller

to begin with will be reduced by a greater percentage (and, of course, would sooner be eliminated entirely). This idea appears to be borne out by research cited in the Petition showing that black individuals are more likely than white individuals to be excluded from juries, resulting in a reduction of racial diversity. See Petition, p. 9-10 (citing to Witney DeCamp & Elise DeCamp, *It's Still About Race: Peremptory Challenge Use on Black Prospective Jurors*, 57 J. of Research in Crime and Delinquency 3, 3 (2020)). But there is little in the way of publicly available research directly evaluating Order No. R-21-0020's impact on juries' racial composition, though a study funded by the National Institute of Justice should give a more specific picture. (Jessica Salerno and Cassia Spohn, *A Quantitative and Qualitative Analysis of The Impact of Arizona's Ban on Peremptory Challenges on Voir Dire Questioning, Jury Diversity and Case Outcomes* <https://nij.ojp.gov/funding/awards/15pnij-21-gg-04710-nijb>.)

Simply put, the dust has not settled on empirical results of Order No. R-21-0020, but if the currently available information is representative, there's reason for cautious optimism. Policymakers looking for an alternative to *Batson* have every reason to continue monitoring Arizona's progress.