IN THE ARIZONA SUPREME COURT

FRANCISCO MIGUEL URREA, Petitioner, v. STATE OF ARIZONA Respondent.	No. CR-17-0261-PR Arizona Court of Appeals, Div. 2 No. 2 CA-SA 15-0416 Pinal County Superior Court No. CR 201402545

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF ARIZONA AND THE ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER

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IDENTITY AND INTERESTS OF AMICI

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

The American Civil Liberties Union of Arizona (ACLU-AZ) is a state-wide nonpartisan organization with over 22,000 members and the state affiliate of the national American Civil Liberties Union. ACLU-AZ is dedicated to protecting the constitutional principles of liberty and equality, while working to achieve racial justice, in part, by eliminating racial disparities in the criminal justice system. ACLU-AZ frequently files amicus curiae briefs in Arizona courts on a wide range of civil liberties and civil rights issues.

ARGUMENT

I. Racial Disparities Plague Arizona's Criminal Justice System.

Arizona courts are tasked with providing "justice for all."[1] Despite this aspiration, Arizona's criminal justice system is plagued by racial disparities. Arizona has the highest rate of imprisoned Latinos in the country.[2] One in 40 Latino adults in Arizona is in prison.[3] Despite making up 30 percent of the overall state population, Latinos account for almost 40 percent of the prison population.[4] Black Arizonians fare even worse. One in 19 black men in Arizona is imprisoned.[5] While Black people constitute less than 5 percent of the state's population, they

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[1] 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).

[2] 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/ (last visited Mar. 15, 2018).

[3] United States Census Bureau, "Annual Estimates of the Resident Population by Sex, Age, Race, and Hispanic Origin for the United States and States, 2016 Population Estimates," *available at:* https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (last viewed Mar. 15, 2018); Arizona Department of Corrections, *Corrections at a Glance*, Jan. 2018, *available at:* https://corrections.az.gov/sites/default/files/REPORTS/CAG/2018/cagjan18.pdf (last viewed Mar. 15, 2018).

[4] *Id.*; United States Census Bureau, "Quick Facts: Arizona," Jul. 2017, *available at:* https://www.census.gov/quickfacts/AZ (last viewed Mar. 15, 2018).

[5] United States Census Bureau, *supra* note 3; Arizona Department of Corrections, *supra* note 3.

make up over 14 percent of the entire prison population.[6] In 2016, the Black imprisonment rate in Arizona was the sixth highest in the country.[7]

Unfortunately, Arizona's criminal justice system is not unique. Racial disparities infect criminal justice systems throughout the county, wreaking havoc on communities of color.[8] Worse, racial disparities are found throughout every stage of the criminal justice system. From increased harassment by police[9] to arrest rates;[10] from pre-trial detention rates[11] to sentencing outcomes;[12] the statistics on racial disparities confirm that justice is not equal for all.

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[6] *Id*.
[7] The Sentencing Project, *supra* note 2.
[8] *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).
[9] *See* Philip Bump, *The Facts About Stop-and-Frisk in New York City*, Wash. Post, Sep. 26, 2016, *available at*: https://www.washingtonpost.com/news/the-fix/wp/2016/09/21/it-looks-like-rudy-giuliani-convinced-donald-trump-that-stop-and-frisk-actually-works/?utm_term=.298d46a6863f (last viewed Mar. 15, 2018).
[10] 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, *available at*: http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf (last viewed Mar. 15, 2018).
[11] Pretrial Justice Institute, "Race and Bail," *available at*: http://projects.pretrial.org/racialjustice/ (last viewed Mar. 15, 2018).
[12] *See* The Sentencing Project, *supra* note 2; 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).

Such disparities have wide-ranging effects that "touch the entire community," not just those directly impacted.[13] Whereas justice and the perception of justice are essential to the health of a free and democratic society, racial discrimination "undermine[s] public confidence in the fairness of our system of justice."[14]

Although the problems of racial disparities and racial discrimination in the criminal justice system do not begin and end with proper jury selection, juries provide a functional and symbolic bulwark against the misuse of government power. "The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge."[15] Juries are "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[16] They are "a prized shield against oppression…that fence[s] round and interpose[s] barriers on every side against the approaches of arbitrary power."[17] More specifically, "[i]t is the jury that is a criminal defendant's fundamental protection of life and liberty against race or color prejudice."[18]

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[13] *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).
[14] *Id*.
[15] *Id*. at 86.
[16] *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).
[17] *Glasser v. United States*, 315 U.S. 60, 84-85 (1942).
[18] *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880).

II. *Batson* Provides an Inadequate Framework for Ensuring Jury Selection is Not Tainted by Racial Discrimination.

In *Snyder v. Louisiana*, the United States Supreme Court reaffirmed its commitment to ending racially discriminatory jury selection.[19] The Court also reaffirmed its commitment to doing so through the framework established in *Batson*.[20] Despite the United States Supreme Court's belief that the procedures established by *Batson* can protect against racially discriminatory jury selection, countless studies show that *Batson*'s "guarantee of equal protection [has] become nothing more than empty words."[21]

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."[22] The authors concluded that federal courts provide "little relief to *Batson* claimants," finding 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.[23]

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[19] 552 U.S. 472, 474 (2008).
[20] *Id*. at 476-77.
[21] *State v. Cruz*, 175 Ariz. 395, 400 (1993).
[22] 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).
[23] *Id*.

Unfortunately, such results are not surprising when considering the "charade that has become the *Batson* process."[24] 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." It might include: too old, too young, divorced, "long, unkempt hair," free-lance writer, religion, social worker, renter, lack of maturity, improper demeanor, unemployed, improper attire, juror lived alone, misspelled place of employment, living with girlfriend, unemployed spouse, spouse employed as school teacher, employment as part-time barber, friendship with city council member, failure to remove hat, lack of community ties, children same "age bracket" as defendant, deceased father, and prospective juror's aunt receiving psychiatric care.[25]

Sadly, recognition of a laundry list of rote excuses that can successfully rebut an allegation of race-based juror exclusion is often not enough for a court to grant relief to a defendant raising a *Batson* claim.[26] Indeed, the California Supreme Court did just that before rejecting a defendant's challenge to the prosecutor's exercise of peremptory strikes to remove all six of the Black venirepersons.[27] Despite being presented with a record that included an admission by the trial court that the prosecutor's "credibility [was] beginning to wear a little thin," the Court

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[24] *People v. Randall*, 671 N.E.2d 60, 65 (Ill. 1996).
[25] *Id*. at 65-6.
[26] *People v. Hamilton*, 200 P.3d 898, 929-37 (Cal. 2009).
[27] *Id*.

found the prosecution's reasons sufficient under *Batson*.[28] As such, race-based peremptory strikes "continue to plague American trials."[29] For these reasons, it is of the highest importance that the courts fashion appropriate remedies when violations are found to exist.

III. *Batson* Establishes a Remedial Floor When Prosecutors Engage in Racially Discriminatory Jury Selection, but State Courts are Free to Impose More Severe Remedies.

In a footnote, the *Batson* Court described two potential remedies following a finding of discriminatory jury selection: (1) discharging the venire and selecting a new jury panel not previously associated with the case, and (2) disallowing the discriminatory challenges and resuming jury selection with the improperly

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[28] *Id*.

[29] Bellin, *supra* note 22, at 1076, citing *Rice v. Collins*, 546 U.S. 333, 343 (2006) (Breyer, J., concurring) (criticizing "*Batson*'s fundamental failings"); Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 Wis. L. Rev. 501, 501, 528 (decrying "Batson's toothless bite" and opining that *Purkett v. Elem*, 514 U.S. 765 (1995) (per curiam) "marked the final demise of the Batson doctrine into the rule of useless symbolism"); Camille A. Nelson, *Batson, O.J., and Snyder: Lessons from an Intersecting Trilogy*, 93 Iowa L. Rev. 1687, 1689 (2008) (arguing that "Batson's promise of protection against racially discriminatory jury selection has not been realized"); Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and Peremptory Challenge*, 85 B.U. L. Rev. 155, 178, 179 (2005) (stating that "Batson has engendered an enormous amount of virulent criticism" and contending that "[m]ost of the criticism of Batson is justifiable"); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. Mich. J.L. Reform 229, 236 (1993) (arguing that "in almost any situation a prosecutor can readily craft an acceptable neutral explanation to justify striking black jurors because of race").

challenged jurors reseated.[30] In so doing, however, the Supreme Court did not limit additional state-court remedies. The Court specifically made "no attempt to instruct" state or federal courts about how they should implement the Court's ultimate holding.[31]

Moreover, the Court's 2008 decision *Danforth v. Minnesota* holds state courts may impose more severe remedies for federal constitutional violations than those available in federal court.[32] As the Arizona Court of Appeals correctly noted, "state courts are entitled to give broad effect to rules of constitutional procedure."[33] As the United States Supreme Court and scholars have noted, while a state court may not set its own standards for determining whether a federal constitutional violation has occurred, it is "free to provide a remedy beyond that available in federal court."[34]

In its opinion, the Court of Appeals acknowledges a variety of remedies potentially available to trial courts in Arizona,[35] claiming that its holding does "not

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[30] *Batson*, 476 U.S. at 99 n.24.
[31] *Id*.
[32] 552 U.S. 264 (2008) ("[T]he remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law.").
[33] *State v. Urrea*, 242 Ariz. 518, ¶ 23 (App. 2017), citing *Danforth*, 552 U.S. at 306.
[34] Jason Mazzone, *Batson Remedies*, 97 Iowa L. Rev. 1613, 1628 (citing *Danforth*, 552 U.S. at 290-91).
[35] *Urrea*, 242 Ariz. 523 at ¶¶ 18-20.

foreclose the possibility of [such] remedies."[36] Despite this concession, the Court of Appeals nonetheless held "that when a *Batson* objection has been sustained, the trial court may impose *either* of the remedies identified in that seminal case."[37] Such a holding is confusing to lower courts as it contradicts the Court's previous statement and suggests Arizona courts are, in fact, limited to only one of two remedies described in *Batson*. Worse, the Court of Appeals fails to acknowledge that *Batson* created a remedial floor.[38]

As such, this Court should overturn the Court of Appeals decision in this case and clearly establish that Arizona courts may impose remedies more severe than those discussed in *Batson*.[39] Additionally, this Court should also hold that trial courts in Arizona may impose additional sanctions, as appropriate, when imposing one of the two remedies specifically mentioned in *Batson*. As discussed below, Arizona courts have the power to impose a myriad of remedies to root out and prevent racially discriminatory jury selection, and to shape those remedies to the particular circumstances of the case and the nature of the violations.

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[36] *Id*. at ¶ 23.
[37] *Id*. at ¶ 22 (emphasis added).
[38] *See Danforth*, 552 U.S. 290-91.
[39] *Id*.

IV. The Arizona Constitution Provides Elevated Protection for the Right to a Fair Trial and an Independent Protection Against Racial Discrimination in Jury Selection.

Arizona courts, and this Court particularly, have a duty under the state Constitution to ensure that all criminal defendants receive a fair trial free from racially discriminatory jury selection.

a. The Equal Privileges and Immunities Clause is More Robust Than the Comparable Federal Constitutional Provisions.

Article 2, Section 13 of the Arizona Constitution states:

> No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.

This language is markedly different from the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and in fact predates its closest federal equivalent.[40] This clause and the similar language of Article 4, part 2, section 19 of the Arizona Constitution, likely reflects a shared "distrust of railroads, mines, and big business in general" among the delegates to the Arizona Constitutional Convention.[41] Yet the framers of the Arizona Constitution "chose to

[40] John D. Leshy, The Arizona State Constitution: A Reference Guide 53 (Greenwood Press) (1993).
[41] Stanley G. Feldman & David L. Abney, *The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*, 20 Ariz. St. L.J. 115, 139 (1988).

go beyond a mere guarantee of equal protection to each citizen."[42] Indeed, at the time of Arizona's constitutional convention in 1910, the delegates would have understood that equal protection of the laws guaranteed jury selection free from racial discrimination.[43]

b. The Arizona Constitutional Provisions Guaranteeing the Right to Trial by Jury Offer Greater Protection Than Their Federal Counterparts.

The Arizona Constitution provides "greater protection of the right to trial by jury than does the federal constitution." [44] Arizona's Constitution explicitly guarantees an impartial jury,[45] requires unanimity,[46] and specifies the number of jurors necessary to reach a verdict in criminal cases.[47]

Sections 23 and 24 of the Arizona Constitution did not create a defendant's jury trial rights. Instead, those sections preserved those rights that already existed prior to statehood.[48] The Territorial Howe Code, which pre-dates both the adoption of the Arizona State Constitution and *Batson*, guaranteed that "[t]he right of trial by jury shall be secured to *all*…."[49] Arizona judges are obligated to assure that "the

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[42] *Id*. at 140.
[43] *Batson*, 476 U.S. at 85, citing *Strauder*, 100 U.S. 303.
[44] *Derendal v. Griffith*, 209 Ariz. 416, ¶ 6 (2005).
[45] Ariz. Const. art II, § 24.
[46] Ariz. Const. art. II, § 23.
[47] *Id*.
[48] *Derendal*, 209 Ariz. 416 at ¶ 8.
[49] HOWELL CODE, Bill of Rights, art. 8 (1864) (emphasis added).

right to trial by jury [] remain inviolate."[50] Because of the additional protections provided under the Arizona Constitution and this Court's duty to assure that the right to trial by jury remains inviolate, this Court is not bound by *Batson* and its progeny in determining the appropriate remedy for racial discrimination in jury selection. This Court can and should look to the State constitution and its guarantees in determining how to properly remedy intentional racial discrimination against venirepersons.

The Washington Supreme Court illustrates this approach. Sections 23 and 24 of the Arizona Constitution, like most of Arizona's Declaration of Rights, was borrowed in part from the Washington Constitution.[51] In Washington, this language also "provides greater protection for jury trials than is provided in the federal constitution."[52] In the *Batson* context, therefore, the Supreme Court of Washington recently amended its framework by adopting a bright-line rule: "the peremptory strike of a juror who is the only member of a cognizable racial group constitutes a prima facie showing of racial discrimination requiring a full *Batson* analysis by the trial court."[53]

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[50] Ariz. Const. art. II, § 23.
[51] Wash. Const. art. I, §§ 21 and 22; *see* Leshy, *supra* note 40, at 36.
[52] *State v. Hicks*, 181 P.3d 831, ¶ 35 (Wash. 2008).
[53] *City of Seattle v. Erickson*, 398 P.3d 1124, ¶ 2 (Wash. 2017).

Although such additional protections like this are not mandated by Supreme Court case law, this Court can and should guarantee additional protections against race-based jury selection pursuant to the Arizona Constitution.[54] This Court has long declared "the concept of federalism assumes the power, and duty, of independence in interpreting our own organic law," further noting that it "cannot and should not follow federal precedent blindly" when construing important liberty protections found in the state constitution.[55] *Pool* involved the double jeopardy clause, a provision of the Arizona Constitution that is virtually identical to its federal counterpart.[56] "Even when [state constitutional] provisions are identical to those in the U.S. Constitution, state courts are free to interpret them differently than federal courts, but only in one direction: state courts may apply state constitutional provisions as more protective of freedom than their federal counterparts, but not less."[57]

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[54] *See* Feldman, *supra* note 41, at 116 (explaining that "[t]he doctrine of incorporation was virtually unknown in 1910," so no one "could have intended that *federal* constitutional law would protect the rights and liberties of Arizona's populace") (emphasis in original); Clint Bolick, *State Constitutions: Freedom's Frontier*, Sep. 15, 2016, at 15 (arguing that "state constitutions were intended to be primary, not secondary" sources of "protections of our rights").
[55] *Pool v. Superior Court*, 139 Ariz. 98, 108 (1984).
[56] *See* Ariz. Const. art. 2, § 10; U.S. Const. amend. V.
[57] Bolick, *supra* note 54, at 16-17.

Here, Article 2, Sections 13, 23, and 24 are markedly different from their federal counterparts, where such counterparts exist. Thus, the need to construe them in lock-step with federal interpretations is further diminished.

c. This Court Should Take the Opportunity to Strengthen Arizona's Procedure to Prevent Race-Based Peremptory Strikes by Prosecutors.

First, relying on the Arizona Constitution, this Court should reaffirm its reasoning in *State v. Cruz*, which forbade "peremptory strikes [based on race] by any party based solely on an unverified subjective impression."[58] This Court was correct to fear that allowing such strikes to pass constitutional muster would cause "*Batson*'s guarantee of equal protection [to] become nothing more than empty words."[59]

Next, this Court should make clear that trial courts must more aggressively protect the right of defendants to a fair and impartial jury selected without the use of race-based peremptory strikes.[60] By doing so, trial courts will protect the rights of jurors to serve, as "[p]eople excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of

[58] 175 Ariz. at 400 (1993).
[59] *Id*., citing *Daniels v. State*, 768 S.W.2d 314, 317 (Tex.App. 1988).
[60] *See State v. Superior Court (Gardner)*, 157 Ariz. 541, 545-46 (1988) (finding the constitutional guarantee of trial by jury supports courts in applying "the *Batson* principle … to situations going beyond *Batson*'s specific facts….").

racial exclusion."[61] Such aggressive court action will also build public confidence in the fairness of our courts and our system of justice. As the Supreme Court has repeatedly observed, "[r]ace discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system, and prevents the idea of democratic government from becoming a reality."[62]

Finally, in the rare instance that a trial court finds a *Batson* violation, the court should be given clear discretion to craft an appropriate remedy that is stronger than the two remedies described in *Batson*. For example, in addition to reseating improperly struck jurors or discharging the venire, a trial court might forfeit peremptory strikes of the offending party,[63] or grant additional strikes to the aggrieved party,[64] or both. The trial court might impose sanctions on the offending attorney such as a fine.[65] Should the racially discriminatory conduct be consistent

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[61] *Carter v. Jury Commission*, 396 U.S. 320, 329 (1970).
[62] *Rose v. Mitchell*, 443 U.S. 545, 556 (1979).
[63] *See e.g. People v. Luciano*, 890 N.E.2d 214, 216-19 (N.Y. 2008).
[64] *See e.g. People v. Perez*, 829 N.Y.S.2d 61, 64 (App. Div. 2007); *People v. Chin*, 771 N.Y.S.2d 158, 159 (App. Div. 2004); *Commonwealth v. Hill*, 727 A.2d 578, ¶ 15 (Pa. Super. Ct. 1999).
[65] *See e.g. People v. Willis*, 43 P.3d 130, 137 (Cal. 2002). Importantly, California courts may only impose alternative sanctions less severe than declaring a mistrial when the complaining party "consents to a remedy short of dismissing the venire." *People v. Morris*, 131 Cal.Rptr.2d 872, 877-78 (2003). Thus, contrary to the Court of Appeals opinion, *Urrea*, 242 Ariz. 523 at ¶ 18, discharging the entire venire and

or especially egregious, or if it "damage[s] the structural integrity" of the court system, the trial court could choose to bypass the remedies discussed in *Batson* and dismiss the charges with prejudice.[66]

V. The Trial Court's Remedy Violates *Batson*.

a. The Trial Court Improperly Dismissed Juror 20.

The trial court improperly dismissed Juror 20 from sitting on the petit jury in violation of *Batson*. Prior to the use of peremptory strikes in this case, the venire consisted of 21 jurors.[67] Once each side used its six peremptory strikes, a petit jury would have been selected, consisting of eight jurors and one alternate.[68] However, at least three of the prosecution's peremptory strikes were made for racially discriminatory reasons and were, therefore, disallowed.[69] Jurors number 2, 14, and 20 could not have been peremptorily struck as the prosecution was unable to provide a race-neutral reason for doing so.[70] As such, had the prosecutor conducted his peremptory strikes in a race-neutral way, he would have had to strike jurors other than Jurors 2, 14, and 20. Thus, the taint of the prosecutor's race-based

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starting anew is the only remedy available to California courts in a case like ours where the aggrieved party objects to less severe remedies.

[66] *See State v. Minnitt*, 203 Ariz. 431, ¶ 44 (2002); *Pool v. Superior Court*, 139 Ariz. 98, 108-09 (1984).

[67] Reporter's Transcript of Proceedings (Voir Dire) ("RT") at 94, ln. 23-25 (Jul. 28, 2015).

[68] *Urrea*, 242 Ariz. 529 at ¶ 40 n. 11 (Miller, J., dissenting).

[69] RT at 103, ln. 6–104, ln. 8.

[70] *Id*.

strikes was not cured by placing Jurors 2, 14, and 20 back on the venire to simply dismiss one of them later. The trial court was obligated, at a minimum, to seat all three of those jurors on the petit jury or to "to discharge the venire and select a new jury from a panel not previously associated with the case" as Mr. Urrea requested.[71]

As the Supreme Court of Missouri explained, "the proper remedy for discriminatory strikes is to quash the strikes and permit those members of the venire stricken for discriminatory reasons *to sit on the jury if they otherwise would*."[72] Similarly, the Supreme Court of Mississippi held, "[h]aving determined that the state's explanation did not provide a valid reason for striking [a juror], the trial court was *obligated to seat her on the jury* unless the state could suggest another racially neutral reason for striking her."[73]

The trial court's remedy of seating the three improperly struck jurors on the venire and then immediately dismissing one of them rewarded the prosecutor who had engaged in racially discriminatory jury selection. Such a "remedy" is no remedy at all and must be reversed.

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[71] *See State v. Superior Court (Gardner)*, 157 Ariz. at 545 (finding the right to an "impartial jury" prohibits discrimination "in the selection of the jury panel [and] in the selection of the trial jury.").
[72] *State v. Grim*, 854 S.W.2d 403, 416 (Mo. 1993) (emphasis added).
[73] *Conerly v. State*, 544 So.2d 1370, 1372 (Miss. 1989) (emphasis added); *see Urrea*, 242 Ariz. 530 at ¶ 42 (Miller, J., dissenting).

b. Defendants Must Not Be Discouraged from Forcefully Raising an Objection to Racially Discriminatory Jury Selection by Prosecutors.

The dissenting judge found "the trial court imposed only an incomplete version of [a *Batson*] remedy, and it impaired [Mr.] Urrea's right to peremptory challenges under Rule 18.5(g)."[74] The judge is correct that "[a] defendant who perceives a *Batson* violation should not be given a Hobson's choice whether to assert his right to a constitutionally valid jury or to relinquish his Rule 18.5 right to exercise his peremptory challenges."[75]

The discriminatory exclusion of jurors, however, has far wider impacts. As this Court explained,

> [t]he harm done by such state discrimination is not limited to violation of defendant's constitutional rights. It also damages our system of justice by depriving minorities of their opportunity for jury service, one of the most important privileges and responsibilities of citizenship. Worse yet, such methods create a perception that the American criminal justice system is imposed on certain minorities rather than operating to protect the further rights of all citizens.[76]

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[74] *Urrea*, 242 Ariz. at ¶ 42 (Miller, J., dissenting).
[75] *Id*.
[76] *State v. Superior Court (Gardner)*, 157 Ariz. at 545-46.

Unfortunately, serious obstacles prevent jurors from asserting their own rights when they are improperly excluded from serving.[77] The United States Supreme Court, however, has found a sufficient nexus between the interests of litigants and those of jurors to ensure that the litigants will aggressively advocate for jurors' rights.[78] In Arizona, criminal defendants expressly have "standing to raise [an] excluded venireperson's claim" not to be discriminatorily excluded.[79] As the Supreme Court noted, "[a] rejected juror may lose confidence in the court and its verdicts, as may the defendant *if his or her objections cannot be heard*."[80]

Thus, defendants must be allowed to forcefully raise a challenge to a prosecutor's use of race-based peremptory strikes without fear that doing so might weaken another important right. Condoning the trial court's remedy in this case, which pitted Mr. Urrea's right to raise a *Batson* challenge against his Rule 18.5 right to exercise his peremptory challenges, would destroy the important nexus between the interests of litigants and jurors. Allowing such a remedy would guarantee jurors discriminatorily struck will not have their rights upheld in the future.

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[77] *Powers v. Ohio*, 499 U.S. 400, 414 (1991).
[78] *Id*. at 413-14.
[79] *State v. Anaya*, 170 Ariz. 436, 440 (App. 1991).
[80] *Powers*, 499 U.S. at 414 (emphasis added).

CONCLUSION

For almost a century and a half, courts have attempted to root out and prevent racially discriminatory jury selection. Despite their efforts the problem of race-based peremptory strikes by prosecutors persists. This Court should seize the opportunity here to (1) strengthen Arizona's procedures for identifying discrimination in jury selection and (2) provide authority for trial courts to craft appropriate remedies more severe than those described in *Batson*. In so doing, *amici* urge this Court to reverse the opinion of the Court of Appeals, granting Mr. Urrea a new trial free from the racially discriminatory jury selection in which the prosecutor engaged during his first trial.

Respectfully submitted, this 15th day of March, 2018.

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