michaels, kathryn

From:	dailey, john
Sent:	Tuesday, October 4, 2022 8:19 AM
To:	samour, carlos
Cc:	dailey, john; sberry@co.jefferson.co.us; gerdes, kandace; gilman, shelley; grohs, deborah; matt.holman@coag.gov; Abraham Hutt; malone, chelsea - DCC Judge; mcgreevy@rmwpc.com; nichols, dana; bob.russel@denverda.org; karen.taylor@coloradodefenders.us; Sheryl.uhlmann@coloradodefenders.us; christian.champagne@co.laplata.co.us; yacuzzo, karen; michaels, kathryn
Subject:	FW: Proposed Crim. P. 24 Majority, Minority, and Rule
Attachments:	Rule 24(d) minority report.pdf; Attachment 1.pdf; Attachment 2.pdf; Attachment 3.pdf; Majority Report Crim P Rule 24 10-3-2022.pdf; Rule 24 clean 7.15.22.docx; Rule 24 marked 7.15.22.docx

Justice Samour,

At the behest of several legislators, the supreme court's advisory committee on rules of criminal procedure considered once again a proposed rule to combat implicit bias in the selection of jurors.

At its July 2022 meeting, the committee discussed whether it was advisable to have such a rule. After determining that it was advisable to have such a rule, the committee discussed the possible contents of such a rule. The members of the subcommittee lead that discussion. On a number of proposed provisions, there was agreement among the members of the committee. On a number of other provisions, however, there was not. (A draft of the proposed minutes of the meeting will be forthcoming, showing various proposals, counterproposals, and votes thereon). Ultimately, the committee voted 8-4 to recommend adoption of the proposed rule attached to this email. Subcommittee members Kevin McGreevy and Bob Russel were tasked with presenting the supreme court with majority and minority reports, respectively, on the proposal.

Attached are the committee's recommended proposal to amend rule 24, the majority and minority reports, and other attachments which were forwarded with one of the reports. If you or any of the members of the court have any questions, please do not hesitate to ask.

John Daniel Dailey
Chair, Criminal Rules Committee

Rule 24. Trial Jurors

(a) - (c) [NO CHANGE]

(d) Peremptory Challenges.
(1) - (4) [NO CHANGE]

(5) **Improper Bias**: The exclusion of potential jurors based on race or ethnicity is prohibited.

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

(B) **Response**. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons for the peremptory challenge.

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

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

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

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

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

(iv) whether a reason given to explain the peremptory challenge might be disproportionately associated with race or ethnicity; and

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

(E) **Reasons Presumptively Invalid**. To provide context for the types of rationales that do not support the exercise of a peremptory challenge, the following are presumptively invalid reasons for a peremptory challenge:

(i) having prior contact with law enforcement officers;

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

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

(iv) living in a high-crime neighborhood;

(vi) receiving state benefits; and

(vii) not being a native English speaker.

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

(e) - (g) [NO CHANGE]

COMMENTS [NO CHANGE]

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(e) - (g) [NO CHANGE]

COMMENTS [NO CHANGE]

Kevin M. McGreevy
mcgreevy@ridleylaw.com

October 3, 2022

VIA U.S. MAIL
The Honorable Carlos A. Samour, Jr.
of the Colorado Supreme Court
Ralph L. Carr Judicial Center
1300 Broadway, Suite 500
Denver, Colorado 80203

RE: Majority Report Concerning Amending the Rules of Criminal Procedure to Address Implicit Bias of Race/Ethnicity in the Exercise of Peremptory Challenges During Jury Selection

Dear Justice Samour:

On July 15, 2022, the Committee on the Rules of Criminal Procedure voted by a super-majority (8-4) to recommend the adoption of a rule addressing the process, standard, and guidance for trial courts and litigants to evaluate the exercise of a peremptory challenge concerning race/ethnicity. This letter outlines our majority proposal and highlights of our Committee's discussions. The contents are as follows:

1. The proposed rule.
2. The history of the proposed rule.
3. The scope and impact of the proposed rule.
4. Discussion within our Committee concerning the proposed rule.
5. Concerns with the counterproposal of a minority of members.
6. Conclusion.

I. THE PROPOSED RULE

The proposed rule, voted 8 to 4 in favor, is as follows:

Crim. P. 24(d)(5) **Improper Bias**: The exclusion of potential jurors based on race or ethnicity is prohibited.

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

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II. THE HISTORY OF THE PROPOSED RULE

Unlike many rules proposed by our Committee, Crim. P. 24(d)(5) has a brief history. In response to the Court's June 2020 letter to Judicial Branch employees posted on its website urging the Branch to work for racial justice, our Committee formed a subcommittee in October 2020 to investigate and debate whether to recommend the adoption of a rule in Colorado modeled on Washington State's General Rule 37, which addressed implicit racial bias in jury selection. A majority of the Committee agreed that such a rule is needed in Colorado. The majority believed that *Batson,* which requires a finding of purposeful discrimination in order to invalidate a peremptory challenge, is simply not sufficient to prevent the improper exclusion of ethnic and racial minorities from jury service. As a result, the majority of our Committee proposed a rule to this Court following our January 2021 meeting, with one trial court judge and the four prosecutors on the Committee opposed to the proposal. The remaining trial court judges and defense lawyers supported the proposed rule. The Court responded with some additional questions to consider in advance of our April 2021 meeting. Our Committee considered those questions at length at that meeting and made a few modifications to the proposal. The four prosecutors continued not to support the proposal, though none of the other committee members opposed the proposed rule. The Court declined to adopt the rule, but left open the possibility for reconsideration while urging greater Committee consensus.

In the summer and early fall of 2021, some Colorado legislators took interest in the issue and introduced SB22-128, modeled on Washington's General Rule 37. That proposed legislation was eventually pulled from consideration. Our Committee was once again asked to consider the issue after four of the legislators supporting the legislation wrote to the Committee Chair, suggesting the Supreme Court attempt again to craft a rule. In April 2022, we re-formed our subcommittee, and in June 2022 we further debated, amended and passed the proposal described in this letter at our full committee meeting.

III. THE SCOPE AND IMPACT OF THE PROPOSED RULE

The rule we now propose addresses the improper exclusion of jurors based on race or ethnicity. While our Committee discussed including gender and other bases for exclusion in the rule, a majority--including all of the judges who voted--believed the other bases did not share the same history or impact in the exclusion of prospective jurors as race and ethnicity. The Committee noted that addressing implicit bias through rule-making leaves open the possibility of later amendment or even crafting a separate rule to address implicit bias against other marginalized groups. This approach would allow courts to test the practical impact and application of a rule addressing race and ethnicity before enacting a broader rule. This approach also allows for further study about the experiences of judges, practitioners, and appellate courts in California which has legislatively enacted prescriptions for gender (and gender identity, sexual orientation, national origin, religious affiliation, or perceived membership in any of these groups) as well as race/ethnicity in peremptory challenges.

Practically speaking, less than 1.5% of criminal filings in Colorado proceed to jury trial.[1] It is unlikely the proposed rule would impact all, or even most, of these trials. Nonetheless, a majority of Committee members believe that enacting this rule is essential to fostering fairness and inclusion in the jury trial process. The district and county court trial judges on our Committee recounted that they rarely see *Batson* challenges. Some judges expressed surprise that *Batson* was not raised more frequently, or recalled times when they expected a *Batson* challenge, but none was made. The perception of most of the trial judges on our Committee was that adoption of the proposed rule would lead to more people of color serving on juries for several reasons. First, the rule clearly spells out the steps and process for asserting a challenge (published opinions suggest that the bench and bar continues to misapprehend *Batson*'s procedural requirements). Second, the proposed rule offers a wide no-strike zone for peremptory challenges. And third, lawyers may simply opt not to exercise challenges against prospective jurors of color, rather than engaging the rule.

Our subcommittee met with judges and practitioners from Washington State to learn more about the impact of General Rule 27, adopted in 2018. One practitioner, a 29-year-career prosecutor in King County (Seattle), explained that he was adamantly opposed to the rule when it was first proposed. Like the Colorado prosecutors on our Committee, he feared that including distrust of law enforcement as a presumptively invalid reason for exercising a peremptory challenge would hurt the prosecution's ability to prove cases. He was also concerned that the rule would be difficult or burdensome to apply. By the time we interviewed him, two years after GR 37 was adopted, the prosecutor fully supported the rule. He explained that prosecutors were better trained to conduct jury selection and jury trials because of the rule. Jury selection was not prolonged, and the rule provided practical and clear guidance to trial courts. He related that some lawyers simply chose not to exercise peremptory challenges against persons of color since Gr 37's adoption and said that the Washington rule has resulted in more people of color serve on juries. He also pointed to evidence-based research showing that heterogeneous groups reach more reliable decisions than homogeneous groups and noted that the rule had not negatively impacted

[1] We focused on statistics for FY 2018 published by the Judicial Branch and engaged in some rough math.

prosecutors' ability to prove cases. Finally, he said that the adoption and implementation of Washington's rule opened his eyes to misperceptions he had about jurors, jury selection, and the relationship between prosecutors and the communities they seek to protect. Both the prosecutor and a Washington trial court judge the subcommittee interviewed reported that they believed more people of color serving on a jury increased the number of people of color who respond to juror summonses.

Statistically, adopting proposed Rule 24(d)(5), will have only a fractional impact on Colorado's criminal justice system. But the benefits of the rule, in addressing historic discrimination, and promoting fairness and inclusivity, cannot be overstated. The proposed rule will increase the reliability of the decision-making process by promoting more diverse juries and will unambiguously signal to the public that the Judicial Branch is making every effort to reduce racial bias in the criminal justice system.

IV. COMMITTEE DISCUSSION OF THE PROPOSED RULE

Virtually everyone on the Committee voted in favor of adopting some type of rule on this topic. On that, there was broad consensus. Most members of the Committee thought the proposed rule was very important because it addressed a vital promotion of fairness and spoke to the judicial system's efforts to ensure inclusion and equality. Some committee members were less enthusiastic than others, and disagreement remains over some of the language. Nevertheless, we agreed that a rule addressing implicit bias in the exclusion of jurors on peremptory challenges had benefits. One prosecutor pointed out that the symbolic significance of addressing racial bias likely outweighed any shortcomings the rule might have in practical effect.

Our Committee worked hard on trying to reach consensus on various aspects of the proposal. Members of the majority made several concessions to address concerns raised by the prosecutors (all of whom opposed the rule). For example, the majority removed language about historical discrimination in jury selection intended to provide context for the rule. The word "reasonably" was added to address prosecutors' concerns that peremptory challenges might be denied based on judicial whim or fancy. The majority also agreed to other changes to address the prosecutors' concerns but ultimately their opposition remained intractable. In the end, all of the trial judges who voted, voted in favor of the proposed rule, as did all four defense lawyers. As they did in 2021, all four prosecutors on the Committee voted against the majority proposal. Fundamentally, the prosecutors were opposed to a rule stating that a distrust of law enforcement is not a valid, racially neutral reason to justify a peremptory challenge. The eight Committee members who support the proposed rule believe that distrust of law enforcement is often based on the lived experiences of jurors from communities of color and excluding these citizens from jury service as a result is incongruent with a juror's right to service and our principles of trial by jury.

In discussing the 2022 proposal, trial court judges on the committee were the most vocal proponents of the rule. Four of the trial court judges recalled instances in their own courtrooms when jurors of color were excused on peremptory challenges but no *Batson* challenge was raised - even though there was no obviously race-neutral justification for the challenge. These judges did

not believe that *Batson* adequately addresses the improper exclusion of minority jurors. They noted that unfair jurors of any racial demographic should be excused for cause and including more minority jurors will promote robust decision-making and fairer results.

A. Unanimously Agreed Upon Changes. As for the rule itself, we agreed to start with a review of the 2021 rule a majority of the Committee proposed. There was unanimous agreement on certain changes, including:

1. In proposed Crim. P. 24(d)(5), eliminate the word "unfair" in the phrase, "The unfair exclusion of potential jurors based on race or ethnicity is prohibited."

2. In proposed Crim. P. 24(d)(5)(E), we agreed, if any presumptive invalid reasons are presented, to eliminate the historical background language and begin the paragraph, "The following are presumptively invalid reasons for a peremptory challenge." This was a compromise, as some members preferred to keep the original language, but agreed in the spirit of consensus to eliminate that language.

3. In proposed Crim. P. 24(d)(5)(E)(v), eliminate "having a child outside of marriage."

4. In proposed Crim. P. 24(d)(5)(F), eliminate, "or provide unintelligent or confused answers."

B. Unanimously Agreed Upon Portions of the Rule. The Committee was unanimous in the language of certain sections of the proposed rule, including the above changes, set forth in Crim. P. 24(d)(5) (A), (B) and (F). As discussed below, the Committee reached substantial consensus on (D), leaving subsections (C) and (E) as the two areas with some disagreement.

C. Substantial Consensus. Proposed Crim. P. 24(d)(5)(D) sets forth a non-exhaustive list of considerations the trial court may want to evaluate in making its ruling on an objection to a peremptory challenge pursuant to this rule. One member suggested the direction should be for the trial judge to consider "the totality of the circumstances" without illustrative examples. The majority of our committee, including the trial judges, thought the illustrative list, (i)-(v), was helpful in identifying potential circumstances that assist the court and practitioners in navigating the proposed rule. The debate on proposed Crim. P. 24(d)(5)(D) was relatively mild, with differing views on preferences, but a general acknowledgement that this subsection was not the heart of any strong disagreements.

D. Two Remaining Areas of Disagreement. Two areas of the proposed rule sparked the lengthiest debate. These are found at Crim. P. 24(d)(5)(C) and (E) and address the standard governing the trial court's determination, and what factors should be listed as presumptively invalid.

E. Standard for the Trial Court's Determination: Crim. P. 24(d)(5)(C). The Committee discussed four primary alternatives. The four proposals discussed were:

1. The court determines that an objective observer could view race or ethnicity as a factor.

2. The court determines race or ethnicity was a significant/substantial factor.

3. The court determines that an objective observer could reasonably view race or ethnicity as a factor.

4. The court finds that the challenge was based, even in part, on race, ethnicity, gender, sexual orientation, national origin, or religious affiliation. (From the minority report's proposal):

In evaluating the standard and its alternatives, we primarily discussed five subjects:

a. The role of the objective observer;

b. The difference between "could" and "would";

c. Whether "factor" should be modified by "significant/substantial";

d. Whether a reasonableness requirement should be included to mitigate the concern that peremptory challenges would be denied based on incredible or speculative reasons; and

e. The role of appellate review.

A majority of the Committee advocated for alternative (1) above, though in the spirit of compromise, the majority included standard (3) in its proposal to this Court, after prosecutors expressed that it was less objectionable to them. All of the judges who voted joined all the defense lawyers in voting against (4), above. This discussion on (4) is recapped in this letter's section on the minority's proposal, below.

a. Objective observer. Those in favor of keeping the "objective observer" standard offered several supporting arguments. First, it allows the judge to give some distance in sustaining the objection to the peremptory challenge without telling the attorney (or *pro se* litigant) that the judge personally perceives racial animus behind the strike. Second, it allows the no-strike zone to increase, which is a point of motivation for adopting the proposed rule. While the judge may not want to perceive racial bias, and while the perception of individual judges may vary greatly, the judge may determine an objective observer could find race played a role in the proposed juror excusal. Third, this language eliminates the need to show purposeful discrimination, thus permitting challenges based on implicit bias to be addressed. And fourth, this formulation has worked well in Washington State. The opponents of the objective observer standard raised concerns that it set up a straw level of determination that was unnecessary. Furthermore, one prosecutor suggested that the objective observer language invited a *de novo* review on appeal.

b. Could versus would. The disagreement over "could" versus "would" is largely based on how inclusive aa set of circumstances one wants to use to prevent race and ethnicity from being a factor in jury selection. "Could" allows for the possibility that race played a role in a peremptory challenge; "would" requires a certainty this was so. Committee members favoring "could" believed it better accomplished prohibiting the exclusion of potential jurors based on race or ethnicity. Those Committee members also noted that "would" is much closer to *Batson's* requirement of purposeful discrimination. For those favoring "would," the focus was whether the exclusion is *certainly* based on race or ethnicity, and not *possibly* based on race or ethnicity. A super-majority (8-4) of our subcommittee favored "could" over "would."

Modifying "factor" with" significant" or" substantial". SB22-128 included a legislative compromise that modified "factor" with "substantial" Committee members who favored that same modification in the 2022 proposed rule were concerned that because race could play an insignificant role in every peremptory challenge, failing to include it would result in all peremptory challenges being denied upon objection. Others on the Committee felt strongly that modification of "factor" was an allowance that some amount of racial or ethnic bias was permitted and acceptable, as long as it was not the predominant factor, and that this was contrary to the purpose of the rule (and contrary to a sense of justice in the grand scheme of the criminal court system). Again, members expressed concern that modifying "factor," particularly with in combination with "would," rather than "could," would fail to accomplish the proposed rule's goals (increasing jury service opportunities for people of color, reducing racial bias in this aspect of jury selection). Our Committee voted 8-4 in favor of not modifying "factor."

"Reasonably view" race as a factor. In response to the concern that race could always be a theoretical factor in every challenge, a member proposed language that did not modify "factor" but rather inserted a measure of reason into the determination. For some on the Committee, this was an acceptable compromise. Others thought that it added an element of allowance of race to impact a decision, or that it was not clearly addressing the problem that race could reasonably be factored into every peremptory challenge. One member opined that "reasonably" should be unnecessary, because a rule of reasonableness is presumed in judicial decision-making. In the end, "reasonably view" is included in the standard as a compromise aimed at greater consensus.

Appellate review. One prosecutor opined that the mechanism and standard for determination was less vital than the standard of review appellate courts will apply in reviewing issues involving the new rule. This prosecutor was concerned about whether an appellate court would analyze a denial of an objection to a peremptory strike *de novo* or for plain error. Prosecutors worried that *de novo* would give defendants a second bite at the apple for potential reversal, and that the trial court is in a better position to make these determinations from bearing witness to the proceeding compared to the appellate courts reviewing the transcripts.

One view of this appellate issue was: the purpose of the rule is to increase minority participation in jury service, and/or reduce the impact of racial and ethnic bias in the exercise of peremptory challenges. Consequences on appeal are, at best, secondary, so if a specific provision in the rule identifies the appellate standard in order to secure greater consensus in favor of the proposed rule, that could be a reasonable sacrifice.

Another view was: our criminal rules are not in the business of deciding appellate review standards, and we should not start now. One of the judges expressed that whether the rule as proposed would be reviewed *de novo* or for an abuse of discretion was the job of the appellate courts, not the Committee.

A third view was: *de novo* review is more reliable than limited remands that force attorneys and judges to try to recreate a record years after the fact before a final appellate decision is made. One trial judge specifically opined that anything is better than trying to recreate rationales and circumstances in remand hearings months or years after the fact. One of the prosecution members of our Committee believed that the trial judge's contemporaneous determination was preferable to appellate review on a cold record.

In the end, the majority declined to include a standard of appellate review. The prosecutors' minority proposal does include a standard of appellate review.

F. Presumptively Invalid Reasons. Proposed Crim. P. 24(d)(5)(E) lists seven presumptively invalid reasons. The majority of the Committee agreed with the list. We discussed two additions. First, it was proposed that a presumptively invalid reason be, "a sign of support for law enforcement" to balance out distrust of law enforcement. One member expressed the opinion that the point of the proposed rule was to address the historic exclusion of people of color from jury service, not to keep white people on juries – white people are already well represented in jury service and have not faced historic discrimination. We also discussed adding "crime victim, even if no charges were filed," as suggested by a prosecutor on the subcommittee. Several subcommittee members supported this compromise in order to promote consensus among the prosecutors on the Committee and the other Committee members. In the end, the prosecutor who proposed this withdrew it from consideration by the subcommittee because there was little data to show that its inclusion would further the proposed rule's goal, and it was not reintroduced into the Committee. The majority of our Committee approved and supported the list of presumptively invalid reasons as tendered.

Our Committee discussed the following presumptively invalid reasons in greater detail: **(ii)** expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling, and **(vi)**- receiving state benefits. The discussion over distrust of law enforcement as a presumptively invalid reason was more detailed, and below are some of those observations and comments.

One prosecutor was gravely concerned about not being able to exclude potential jurors who express a distrust of law enforcement because he feared it would prevent justly deserved convictions. This person reasoned that, because every prosecution has a law enforcement witness, not being able to exclude a prospective juror who expressed some degree of distrust of police officers was unfair to the prosecution.

One of the judicial members of our Committee described how his personal experiences growing up created a distrust of law enforcement, but noted that he is able to set those experiences aside and interact fairly with law enforcement all the time as a sitting judge. He remarked on the irony that his early life experiences, none of which were of his choosing or creation, would make him excludable (via a peremptory challenge) as a juror without our proposed rule, but as a judge

he presides over trials – including trials to the court – with the public's confidence in his ability to make fair and unbiased decisions.

Another member commented that our Committee's discussion on this point proved the need for the rule. That discussion highlights some members' inability to recognize that distrust of law enforcement is not race-neutral because negative experiences with law enforcement are the lived experiences of many people in minority communities, coupled with the assumption that distrust of law enforcement means a juror will not fairly consider evidence and testimony. That blind spot is at the very core of why this proposed rule is needed.

When we discussed GR 37 with the Washington State practitioners, Justice Gonzales of the Washington State Supreme Court identified including this presumptively invalid reason as particularly contentious in the formation of Washington's rule. Nonetheless, the Washington prosecutor we spoke with believed that this provision was tremendously helpful in confronting and dispelling long-held unconscious beliefs that race may be a proxy for how a juror will vote in jury deliberations. After GR 37 was adopted, Washington prosecutors became better both at voir dire and case presentation. Finally, despite the consternation when GR 37 was proposed, neither trial administration nor public safety has been negatively impacted by its adoption.

One of our judicial members raised the issue of eliminating "state benefits" as a presumptively invalid reason for a peremptory challenge. Her sentiment was that this does not really come up in jury selection, and she prefers no mention of state benefits in jury selection. Those in favor of inclusion of "state benefits" thought: (a) by having it as a prohibited justification, it would deter discussion in jury selection, which was the objective of the person advocating for elimination, and (b) it provided a useful example of the type of facially race-neutral, but presumptively invalid reasons for justifying the peremptory challenge.

V. CONCERNS WITH THE COUNTERPROPOSAL OF A MINORITY OF MEMBERS

The rule proposed by a minority of our Committee (discussed by separate memorandum to this Court) was endorsed solely by the prosecutors on our Committee. It was not supported by any of the judges or defense lawyers on our Committee. The following points of weakness with the minority proposal were identified in our discussion:

A. The purpose of our rule, and the motivation for starting this process, was to address racial bias in the exercise of peremptory challenges in criminal jury selection. The minority report's proposed rule expands the scope (gender, national origin, sexual orientation, religious affiliation, but not gender identity and not economic circumstance) and eliminates the factors and examples for implementing the rule. These changes effectively strip the rule of any guidance for practitioners and courts alike. The minority report's alternative rule undercuts our Committee's explicit purpose in proposing a rule in the first place: to curb peremptory challenges informed by purposeful or implicit racial prejudice. Race is different from a historical perspective than these other categories. Additionally, the practical implementation and guidance mechanisms in identifying and curbing racial biases at play in peremptory challenges do not logically transfer to

these other categories. Broadening the categories and stripping the rule of guidance that applies to racial bias nullifies the rule's impact and utility in combating racial prejudice.

B. The minority report's proposal seeks to eliminate the "objective observer" and use "was based" instead of "could be based" so that the judge is forced to label the attorney exercising the peremptory as improperly motivated in order to sustain an objection to the challenge. First, "was based" puts that standard close to, if not on top of, the *Batson*'s "purposeful discrimination" requirement. Second, this standard necessitates the finding against the individual lawyer that the judges on our Committee believe is important to avoid. In fact, the written justifications/explanations for this proposed language made explicit that the court's ruling on the objection to the exercise of the peremptory challenge should be based on "the judge's own knowledge of the lawyers and the community." Not only is such knowledge outside the record of a trial, but it would require judges to deliberately inject their personal views of the attorney's character when evaluating an objection to a peremptory challenge.

C. The minority proposal strips the rule of all presumptively invalid justifications for peremptory challenges, and leaves judges and practitioners without any guidance to navigate this tiny corner of the criminal judicial process. The primary purpose of a procedural rule, as reflected in our Committee's discussions of this and other proposals, is to help courts, lawyers, and *pro se* litigants better understand the process and rules of a criminal case.

D. The minority report's proposal identifies that "unconscious bias" is a valid rationale for sustaining an objection without defining "unconscious bias" or offering guidance to discern its existence.

E. This proposal would be the first and only place in the criminal rules that dictates a standard of appellate review (Rule 52 addresses only issue preservation). The minority's proposal expressly states that this aspect is intended to preserve conviction on appeal. It is not the purpose of any rule to preserve convictions on appeal.

VI. CONCLUSION

Adopting the majority proposal reduces the possibility that racial or ethnic bias will play a part in the criminal justice system. The proposed rule will increase jury diversity; lead to better and more reliable decision making; increase confidence in the criminal justice system by promoting the elimination of racial bias in jury selection; and promote increased juror turnout among under-represented racial and ethnic demographics.

The practitioners from Washington attested to these positive outcomes from their own experiences. But the prosecutor and trial judge from Washington also spoke of the rule's lack of negative impacts: while more people of color and people who expressed a distrust of law enforcement served on juries, community safety was not decreased as a result, and jury selection did not take appreciably longer. Rather, fewer peremptory challenges were exercised, and long-held beliefs about the demographics of a partisan side's "good juror" (or "bad juror") have been

debunked. The sky has not fallen, nor has it even clouded over. The Supreme Court of Washington simply adopted a rule that seeks to reduce the allowance of racial prejudice into an exceedingly narrow aspect of the criminal justice system. The success of that rule is a powerful reason for Colorado to do the same.

Finally, we offer some observations about consensus and the sausage-making behind the majority proposal. Some members in the majority are not happy with the concessions that resulted from trying to make the rule more amenable to the prosecutors, only to have all of them continue to vote against the proposal. The removal of language about the historical background that influenced the rule, the deletion of a discussion of "unconscious bias," and the insertion of "reasonably" into the standard, left the proposed rule far from the ideal some in the majority thought this Court should adopt. And so, this letter concludes with the suggestion that rather than trying to craft a rule that generates less opposition from prosecutors, this Court should pass a rule that assists the courts and practitioners to the fullest extent possible and effects the greatest possible eradication of racial bias from the criminal justice system. The target audience is not the prosecutors, but the public, especially those prospective jurors who do not currently serve because of their life experiences. Even though they generally have not chosen those experiences, biases and prejudices about those experiences lead others to deem them unqualified to serve on criminal court juries. Remedying that is vital to the integrity of Colorado's criminal courts and is what the proposed rule aspires to accomplish.

Sincerely,

Kevin M. McGreevy

KMM/paa

MINORITY REPORT
PROPOSED RULE 24(D)(5)

To: Justice Carlos A. Samour, Supreme Court Liaison
Justices of the Colorado Supreme Court
From: Robert M. Russel
Date: Proposed Rule of Criminal Procedure 24(d)
Re: October 3, 2022

The Rules of Criminal Procedure Committee has again recommended that Rule 24 be amended to include a new subsection (d)(5). The latest proposal, modeled on Washington's General Rule 37, is substantially similar to the committee's earlier efforts. Consequently, I need not detail all the arguments that I have previously made in opposition. See *Minority Report*, March 9, 2021 (Attachment 1). Suffice it to say that, given the absence of reliable evidence on the underlying problem, and given the flaws inherent in the majority's approach, it would be better for the court to do nothing than to adopt the latest proposal.

Nevertheless, I now suggest that the court may want to adopt *some version* of a rule that seeks to eliminate unfair discrimination in jury selection. I think a proactive effort by the court may now be warranted, if only to forestall further attempts to enact a procedural rule through legislation.

I have attached an alternative version of Rule 24(d)(5) (Attachment 3). I believe that this alternative version will advance the purposes underlying the majority's proposal, while avoiding that proposal's cumbersome procedures and distorting standards.

Although the alternative version differs from the majority's proposal in several ways, I will highlight three key points.

1. The alternative version focuses on reality.

Under the majority's rule, courts are not asked to determine whether a given peremptory challenge is actually motivated by conscious or unconscious bias. Instead, the question is whether a fictional "objective observer" could reasonably view race or ethnicity as a factor. That standard of decision is unrealistically broad because it focuses, not on reality, but on speculative possibility. *State v. Orozco*, 496 P.3d 1215, 1222 (Wash. App. 2021) (Pennell, C.J., concurring) (recognizing that GR 37 employs an "incredibly broad standard"); *State v. Lahman*, 488 P.3d 881, 886 (Wash. App. 2021) (recognizing that the standard focuses on "possibilities, not actualities").

The alternative version dispenses with the fictional observer and instead asks the trial judge to determine whether, in fact, the peremptory challenge was based, even in part, on conscious or unconscious bias. It elevates reality over speculation.

2. The alternative version employs a deferential standard of appellate review.

The majority's rule will require the appellate courts to conduct de novo reviews of trial court rulings on peremptory challenges. See *State v. Listoe*, 475 P.3d 534, 541 (Wash App. 2020) ("[W]hether an objective observer could view race or ethnicity as a factor in a peremptory challenge is subject to de novo review."). That standard of review will give rise to extended briefing and analysis in the appellate courts. And it will prove to be "difficult and problematic" to apply in practice, both because appellate courts lack the full range of information available to the trial courts, and because the underlying standard of decision "requires reversal when, based on pure speculation, an objective observer *could* view race or ethnicity as a factor." *Id.* at 545-47 (Melnick, J. concurring). The majority's proposal will inevitably result in an increased number of remands for new trials. *See, e.g.*, *Orozco*, 496 P.3d 1215 (reversing a murder conviction under GR 37 for a peremptory challenge exercised against a prospective juror whom the advocate had personally prosecuted).

The alternative version employs a deferential standard of review — namely, "abuse of discretion." (That standard is made possible by the fact that the alternative version focuses on what the trial court actually determined, instead of what a fictional observer could have conceivably determined.) The deferential standard of review will be easier to apply on appeal. It will allow the appellate courts to respect "the trial court's unique role and perspective in evaluating the demeanor and body language" of jurors and advocates. *People v. Clemens*, 401 P.3d 525, 528-29 (Colo. 2017). It will yield more consistent rulings and fewer unnecessary retrials.

3. The alternative version prohibits a broader range of improper bias.

The majority's proposal prohibits racial and ethnic bias only. The alternative version more broadly prohibits discrimination based on "race, ethnicity, gender, sexual orientation, national origin, or religious affiliation." That broader approach more accurately reflects the values of Colorado's bench and bar.

Could the majority's proposal be amended to prohibit other forms of improper bias? Despite an earlier attempt at such an effort (Attachment 2), I think the answer is no. The problem stems from the lists that the majority has borrowed from Washington's GR 37. Those lists — identifying circumstances that a court must consider and reasons that a court must discount as presumptively invalid — are aimed solely at racial and ethnic bias, and it is difficult to imagine the additional circumstances and reasons that one would add to effectively address other forms of discrimination.

I have previously expressed my disagreement with the list of presumptively invalid reasons. In particular, I believe that the second reason — "expressing a distrust of law enforcement" — can be a *valid* reason for exercising a peremptory challenge. (Attachment 1 at 4-5.) And I will not repeat those arguments here.

Instead, I will simply highlight the advantages of rejecting the majority's lists in favor of a simple totality-of-circumstances test:

- The alternative version dispenses with the list of "circumstances considered." That change does not limit the range of relevant circumstances that a trial court could consider in determining whether a particular peremptory challenge is based, even in part, on improper bias. But it does reduce the likelihood that a trial court's ruling would be reversed for its failure to expressly consider all the listed circumstances.

- The alternative version dispenses with the list of "reasons presumptively invalid." That change does not require the trial court to credit any of the listed circumstances. (Some of those reasons are admittedly odd.) It simply allows the court to consider the proffered reason, along with all other relevant circumstances, in determining whether the peremptory challenge was based, even in part, on conscious or unconscious bias.

- Although the majority proposal does not prohibit reliance on a prospective juror's demeanor or physical conduct, it discourages such reliance by requiring notice and corroboration. *Listoe*, 475 P.3d at 541. The alternative version dispenses with that procedural requirement — simplifying voir dire — while allowing the trial court to consider such evidence, along with all other relevant facts, in evaluating the peremptory challenge. Under the alternative version, a court would be free to discount an advocate's reliance on conduct that the court did not observe.

Overall, I believe that the alternative version is better than the majority's proposal. A significant minority of the committee thinks so too. We recommend the alternative version for the court's consideration.

MINORITY REPORT
PROPOSED RULE 24(D)(5)

To:	Justice Carlos A. Samour, Supreme Court Liaison Justices of the Colorado Supreme Court
From:	Hon. Morris B. Hoffman, Robert M. Russel
Re:	Proposed Rule of Criminal Procedure 24(d)
Date:	March 9, 2021

I. Minority Report

On January 15, 2021, the Rules of Criminal Procedure Committee voted 7-5 to recommend that Rule 24 be amended to include a new subjection (d)(5). We write to explain why the proposed rule should not be adopted, or at the very least should not be adopted in its present form.

A. Should the rule be adopted at all?

The rule purports to provide benefits both symbolic and practical, and the proponents believe those benefits will outweigh the rule's costs. We respectfully disagree with that assessment.

1. Symbolic benefits

We endorse the message that the rule is intended to send. Racial bias is unacceptable in any part of the law, and our juries (indeed, our bench and bar as well) would be improved by increasing their diversity in every way.

But that message is not best conveyed through a rule of criminal procedure. Court rules are meant to govern process; they are not appropriate vehicles for the statement of aspirations, goals, or values. A court rule means nothing more or less than its actual effect in practice.

For the reasons below, the proposed rule's intended message is garbled in its practical effect.

2. Practical benefits

The proponents predict that the proposed rule will increase the number of minority jurors in criminal cases. That prediction rests on two assumptions: (1) as interpreted in Colorado, the *Batson* framework does not prevent racial bias in jury selection; and (2) consequently, in Colorado, significant numbers of potential jurors are being excused on the basis of race.

Before adopting the proposed rule in any form, this court should critically examine those assumptions. We believe there are good reasons to doubt them.

Whatever the practice in previous generations, today's prosecutors do not routinely exercise peremptory challenges on the basis of race. If anything, they tend to be reluctant to challenge people of color. And though training and education have been important, the *Batson* mechanism has surely influenced prosecutors' behavior. No prosecutor wants to invite a *Batson* objection.[1]

Whether the *Batson* framework will be effective going forward depends, in part, on exactly what that framework is. And that framework is evolving.[2] Before uncritically accepting the view that *Batson* is inadequate, this Court should consider whether the framework can be modified to meet any perceived deficiency.

The proponents correctly note that *Batson* is designed to address conscious racial bias, whereas the proposed rule is designed to address implicit (or unconscious) bias. But to what extent is implicit bias actually resulting in the exclusion of people of color? For two reasons, we simply do not know.

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[1] During the committee meeting, Judge Hoffman noted that, in his experience, *Batson* is already chilling prosecutors from peremptorily challenging minority jurors, even when such challenges would be appropriate

[2] For example, in *People v. Ojeda*, 19SC763, this court will decide the standard that trial courts must employ in determining whether a particular peremptory challenge was impermissibly based on race.

First, we do not know the number of minority jurors who are actually excused from jury service through peremptory challenges. No one has presented any reliable evidence on that baseline point. (Instead of actual data, all committee members have relied on anecdotal recollections — evidence that almost certainly is infected by confirmation bias.[3])

Second, even if we knew the number of minority jurors excused, we could not confidently estimate the number excused through the influence of implicit bias. Contrary to the popular assumption, the explanatory value of implicit bias remains controversial within the scientific community. *See* B. Gawronski, Six Lessons for a Cogent Science of Implicit Bias, *Perspectives on Psychol. Sci.* 14(4): 574, 580 (2019). Meta-analyses tend to show only a tenuous link between measures of implicit bias and actual individual behavior. *Id.* (noting that "the obtained average correlations are certainly disappointing for researchers who aim to use implicit measures to improve the prediction of behavior at the individual level"). Among other things, the relationship between bias and behavior depends on the "processing conditions" under which a particular decision is made. *Id.* at 581 (noting that bias, measured on the basis of unintentional behavior resulting from low deliberation, would have less predictive effect on intentional behavior resulting from high deliberation). Consequently, one cannot reliably conclude that implicit bias is significantly influencing jury selection in Colorado.

In the absence of reliable evidence on the effect of implicit bias, the proposed rule should be rejected in its entirety.

B. Should the rule be modified?

If the Court believes the rule should be adopted in some form, it should make two specific changes: (1) remove the presumptive factor currently set forth in part (E)(ii); and (2) modify the standard of decision currently set forth in part (C).

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[3] *See* D. Kahneman, *Thinking Fast and Slow* (Farrar, Straus and Giroux, 2011) at 81 (noting that, contrary to the rules of philosophers of science, who advise testing hypotheses by trying to refute them, people tend to seek evidence that is compatible with the beliefs they already hold)

Those changes would not diminish the rule's symbolic value.[4] And they would enhance the rule's practical effect by reducing the unintended harm that the rule would cause in practice.

1. Remove factor (E)(ii)

Part (E) of the proposed rule identifies a set of "presumptively invalid reasons" for making a peremptory challenge. Here is the list:

i. having prior contact with law enforcement officers;
ii. expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
iii. having a close relationship with people who have been stopped by law enforcement, arrested, or convicted of a crime;
iv. living in a high-crime neighborhood;
v. having a child outside of marriage;
vi. receiving state benefits; and
vii. not being a native English speaker.

We do not quarrel with most of the reasons on the list. Indeed, we think in most cases it would be irrational to challenge a prospective juror for most of those reasons. But the same cannot be said of the reason set forth in part (E)(ii). Because they routinely rely on the testimony of police officers, prosecutors have a legitimate reason to seek the removal of potential jurors who express distrust of law enforcement.

One can easily understand the error that part (E)(ii) seeks to correct: It is wrong and unfair to presume that a person of color is likely to harbor bias against the police. But (E)(ii) makes the same error in the other direction: It is equally wrong

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[4] If the Court is inclined to adopt the rule, it should do so in tandem with a parallel provision in the rules of civil procedure. The rule's symbolic value would surely be increased if it applied in all jury trials (as it does in Washington state). And a parallel rule would soften an unfortunate message that the current rule sends — *i.e.*, that implicit racial bias is a problem that primarily afflicts prosecutors.

and unfair to presume that a person of color is *immune* from harboring such bias. The point is that, when the voir dire process identifies a prospective juror (of whatever race) whose bias may prevent a fair evaluation of police testimony, the prosecutor should be able to excuse that juror through a peremptory challenge. By effectively disallowing such a challenge, part (E)(ii) injects bias into the guilt-innocence determination.

But what about a challenge for cause? Won't that mechanism sufficiently ensure that biased individuals will be excluded from the jury? Not really. In the current system, which relies on the interplay between for-cause challenges and peremptories, trial judges tend to be reluctant to excuse prospective jurors for cause. And as long as peremptory challenges exist, a prosecutor should not have to rely on the court's assessment of a juror who says, "I don't trust cops, but I can be fair and decide this case on the evidence." (For the same reason, we wouldn't expect defense counsel to rely solely on the court's assessment of a prospective juror who says, "I believe sex assault victims, but I can be fair and decide this case on evidence.")

It is no answer to say that (E)(ii)'s proscription is only presumptive. As explained below, when combined with the standard of decision that the proposed rule currently employs, a presumptive proscription effectively becomes a categorical bar.[5]

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[5] If (E)(ii) were removed from the rule, it would still be relevant as a factor. That is, a trial court could still deny a peremptory challenge as racially motivated, even though that challenge was premised on a concern about the prospective juror's bias against police. Removing (E)(ii) would simply enable trial courts to make the determination on a by-case basis, based on the totality of circumstances.

2. Modify the standard of decision

Under Part C of the proposed rule, the trial court must deny a peremptory challenge if, under the totality of circumstances, "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge."

As written, that standard could be employed to nullify almost any peremptory challenge. When defense counsel excludes a white juror for whatever reason, could an objective observer conclude that the challenge was motivated — to an extent however slight — by unconscious racial bias? Probably so. The same can be said of a prosecutor who exercises a peremptory challenge against a person of color. And it is categorically true of a prosecutor who challenges a prospective juror for bias against law enforcement. Because that proffered reason is presumptively invalid under part (E)(ii), an objective observer could always view race as *a factor*.

Although facially objective, the proposed standard of decision invites uneven application in practice. And it would be problematic to review on appeal.[6]

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[6] Consider the practice under existing law. At step 3 of *Batson*, a trial court must consider all relevant circumstances in evaluating the non-discriminatory reasons that counsel has proffered for the peremptory challenge. *People v. Beauvais*, 2017 CO 34, ¶ 23, 393 P.3d 509, 517. Because the relevant circumstances include counsel's demeanor and credibility, the court's determination is reviewed for clear error. *Id.* at ¶ 22, 393 P.3d at 516-17. Under that deferential standard, the court's ruling can be set aside only if there is no record support for it. *Id.*

Now consider an appellate review of a trial court's ruling under the standard set forth in the proposed rule. On its face, that standard calls for a de novo determination: "[W]hether, on the record as a whole, an objective observer could conclude that the prospective juror's race or ethnicity played a role in counsel's decision to exercise a peremptory challenge." Instead of deference, the proposed standard invites intervention.

And what remedy will the appellate court employ if it concludes that the trial court erred in allowing a peremptory challenge to stand? Will it treat a violation of Rule 24(d) as structural error, triggering automatic reversal? Or will the complaining party have show prejudice (and, if so, how)?

Therefore, instead of adopting the rule as proposed, this Court should modify the standard of decision as follows:

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

That modification would improve the rule in two ways.

First, by identifying the trial court as the fact-finder, instead of a hypothetical "objective observer," the modified rule would more clearly enable the trial court to account for demeanor and credibility (which remain relevant considerations). That, in turn, would invite a more deferential standard of review on appeal (and reduce the risk of unwarranted appellate intervention on a cold record).

Second, by inserting the word "significant" into the standard, the modified rule would limit the cases in which peremptory challenges are denied (or trial court rulings are reversed) based on a vague, speculative, or imaginary sense that race or ethnicity played some role in the peremptory challenge.

Conclusion: The proposed rule should not be adopted in its present form.

II. Authors' Views

Having set forth the opponents' views about the proposed rule, the authors now add their own comment. Our views are not necessarily shared by the opponents generally, and they certainly do not reflect the views of most criminal practitioners.

The Court should consider these questions before adopting the rule as currently proposed.

But we think it significant that at least two members of the Criminal Rules Committee agree on the following.

We do not pretend that the jury selection is process is perfect. We recognize that it has significant flaws. But that selection process will not be improved by half-measures of the sort proposed here. If this Court really wants to make a practical improvement in jury selection — and if it really wants to eliminate the effect of bias — then it must go about the business of eliminating peremptory challenges. That step, which would require the cooperation of the legislature, is the only way to guarantee that jury selection serves its intended purpose.

Justice Thurgood Marshall, on whose opinion the proponents rely, argued that the only effective way to prevent racial discrimination in jury selection is to eliminate peremptory challenges entirely:

> The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.

Batson v. Kentucky, 476 U.S. 79, 102-103 (1986) (Marshall, J., concurring).

Justice Marshall's view has been taken up by Justice Breyer. See *Miller-El v. Dretke*, 545 U.S. 231, 266-73 (2005), *citing* Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 Temp. L. Rev. 369 (1992); Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge's Perspectiv*e, 64 U. Chi. L. Rev. 809 (1997); Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153, 199-211 (1989). And it is robustly endorsed by one of the proponents' witnesses — Chief Justice Gonzales of the Washington Supreme Court. See *State v. Saintcalle*, 309 P.3d 326, 347–48 (Wash. 2013).

We need not recount all the benefits of eliminating peremptory challenges. Those benefits are fully explained by the authorities above. At this point, we need only say that a such an action would be preferable to measures that will only make the selection process longer, more cumbersome, less even-handed, and no more likely to ensure either diversity or impartiality.

POTENTIAL COMPROMISE RULE 24(D)(5)

To: Criminal Rules Committee
From: Robert M. Russel
Date: April 16, 2021
Re: Proposal for Rule 24(d)

The following is my attempt to address the supreme court's questions and to perhaps reach agreement:

(5) **Improper Bias**: The unfair exclusion of potential jurors based on race, ~~or~~ ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation is prohibited.

Broadens the rule (as in California's statute). Makes conforming changes in parts (C), (D)(iv), and (D)(v).

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

(B) **Response**. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons for the peremptory challenge.

(C) **Determination**. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race, ~~or~~ ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation as a substantial factor in the use of the peremptory challenge, then the

Keeps both the objective observer and "could," but adds the qualifier "substantial."

peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

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

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

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

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

(iv) whether a reason given to explain the peremptory challenge is ~~might be~~ disproportionately associated with race, ~~or~~ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation; and

Replaces vague standard ("might be").

(v) whether the party's ~~has used~~ peremptory challenges disproportionately affect ~~against~~ a given race, ~~or~~ ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation ~~in the present case or in past cases~~.

Demotes past conduct from a factor that must be addressed in every case, to one that can be raised and addressed when appropriate.

(E) **Reasons Presumptively Invalid**. ~~Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection, t~~The following are presumptively invalid reasons for a peremptory challenge:

Removes the unnecessary introduction.

i. ~~(ii)~~ expressing a distrust of, or confidence in, law enforcement;

ii. ~~(i)~~ having prior contact with law enforcement officers ;

~~ii.~~iii. expressing a ~~or a~~ belief that law enforcement officers engage in racial profiling;

~~iii.~~iv. ~~(iii)~~ having a close relationship with people who have been stopped by law enforcement, arrested, or convicted of a crime;

~~iv.~~v. ~~(iv)~~ living in a high-crime neighborhood;

~~v.~~vi. having been a victim of a crime;

~~vi.~~vii. ~~(v)~~ having a child outside of marriage;

~~vii.~~viii. ~~(vi)~~ receiving ~~state~~ government benefits; and

~~viii.~~ix. ~~(vii)~~ not being a native English speaker.

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

#1. Recognizes racial associations of both distrust and confidence.

#2. Separates belief in racial profiling.

#3. Reorders factors.

Recognizes the racial and gender associations with prior victimization. (Follows Connecticut's proposed rule.)

Clarifies "state" benefits.

#1. Requires corroboration from the judge but allows flexibility in obtaining that.

#2. Removes unnecessary introduction.

#3. Removes "unintelligent or confused answers."

ALTERNATIVE RULE 24(D)(5)

To: Criminal Rules Committee
From: Robert M. Russel
Date: July 12, 2022
Re: Proposal for Rule 24(d)

I will sponsor this alternative to the current proposal:

(5) **Improper Bias**: The exclusion of potential jurors based on race, ethnicity, gender, sexual orientation, national origin, or religious affiliation is prohibited.

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

(B) **Response**. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons for that challenge.

(C) **Determination**. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. The court shall deny the peremptory challenge if the court finds that the challenge was based, even in part, on race, ethnicity, gender, sexual orientation, national origin, or religious affiliation. The court need not find purposeful discrimination to deny the peremptory challenge; unconscious bias is sufficient. The court should explain its ruling on the record.

(D) **Review.** If challenged on appeal, the court's determination is subject to review for abuse of discretion.

Explanation

I prefer this alternative version for several reasons:

1. It addresses a broader range of impermissible biases. (That change is made possible by eliminating the list of presumptively impermissible justifications.)

2. The fictional "objective observer" is replaced by the trial court. That formulation more clearly allows the judge to consider both demeanor evidence and the judge's own knowledge of the lawyers and the community.

3. The original proposal invites speculation by asking whether the objective observer "could view race or ethnicity as a factor." The alternative version reduces the risk of speculation by focusing on whether the challenge "was based, even in part" on one of the enumerated biases.

4. The original proposal invites de novo review on appeal. The alternative version expressly identifies abuse of discretion as the standard of review, thus reducing the likelihood of reversal on appeal.

5. The list of "circumstances considered" has been removed in favor of a general totality-of-circumstances test. This change does not limit the range of relevant circumstances that the trial court can consider. But it does reduce the risk that a given determination will be reversed on appeal for the court's failure to expressly consider any one of the listed circumstances, even though that circumstance may not have been highlighted by the parties' arguments.

6. The list of presumptively invalid justifications has been eliminated. Although the proposed rule is purportedly aimed at eliminating conscious and unconscious racial bias, it's far from clear that the list actually advances that purpose. Consider, for example, a prosecutor who challenges a prospective juror on the ground that the juror is "expressing a distrust of law enforcement." In practice,

that challenge may well be — indeed, is highly likely to be — motivated by a sincere desire to limit the risk of bias against prosecution witnesses. But instead of accommodating that legitimate aim, the rule treats "distrust of law enforcement" as a categorical pretext for "race." That's both unrealistic and unfair. And it's unclear how the presumption of invalidity would be overcome in practice. (Allow the challenge if the prospective juror is white and disallow it if the prospective juror is a person of color?)