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 challenge for cause 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.