COLORADO SUPREME COURT
ADVISORY COMMITTEE ON THE RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
Friday, January 15, 2021

A quorum being present, the Colorado Supreme Court's Advisory Committee on the Rules of Criminal Procedure was called to order by Judge John Dailey at 12:45 p.m. via videoconferencing software WebEx. Members present at or excused from the meeting were:

Name	Present	Excused
Judge John Dailey, Chair	X	
Sheryl Berry	X	
Jacob Edson	X	
Judge Shelley Gilman	X	
Judge Deborah Grohs	X	
Judge Morris Hoffman	X	
Matt Holman	X	
Abe Hutt	X	
Judge Chelsea Malone		X
Kevin McGreevy	X	
Judge Dana Nichols	X	
Robert Russel	X	
Karen Taylor	X	
Sheryl Uhlmann	X	
Non-Voting Participant		
Karen Yacuzzo	X	

I. Attachments & Handouts

- **A.** January 15, 2021 agenda
- **B.** October 16, 2020 minutes
- **C.** Crim. P. 24(d) memos
- **D.** Criminal Rules Committee Interim Report II
- **E.** Sealing/Expunging packet from Mr. Conner
- **F.** Rule Change 2020(34)

II. Approval of Minutes

- **A.** The October 16, 2020 minutes were approved as submitted by acclamation.
- **B.** Regarding Interim Report II, no one had any suggestions, corrections, or changes. Interim Report II was approved by acclamation.

III. Announcements from the Chair

- **A.** Chair Judge Dailey announced that David Vandenberg has resigned from the committee and that Eighteenth Judicial District Chief Deputy District Attorney Jacob Edson had been selected to serve on the committee. Judge Dailey also announced that this would be Judge Hoffman's last meeting. Judge Hoffman has

been a member of the committee for 24 years and has provided invaluable assistance and insight on many occasions.

IV. Old Business

A. Crim. P. 55.1—Public Access to Court Records in Criminal Cases

After some discussion, the committee agreed to see how the newly announced rule is working before considering possible revisions to it.

B. Crim. P. 24(d)— Combatting Racial Discrimination in the Exercise of Peremptory Challenges

Kevin McGreevy, chair of the subcommittee, said the proposed amendments to rule 24 are aimed at modifying some of the shortcomings of a *Batson* analysis; reducing the effect of unconscious racial bias in how a jury is selected; and increasing the number of individuals representing racial minorities on juries.

Mr. McGreevy noted (1) a supreme court statement from last summer could be interpreted as a call for action to promote racial justice; (2) a rule similar to that encompassed in the proposed amendments is in effect in Washington State, and (3) the Washington State judges, prosecutor, and defense counsel whom the subcommittee consulted, had said that its rule has had the effect of increasing the participation of more people of color in the judicial system. Mr. McGreevy and others noted that there's a social cost to jurors of color who are excluded and to minority defendants who do not feel like evidence and arguments are fairly evaluated by mostly white juries.

Others mentioned that people may not mean to be racially biased, but that bias nonetheless exists, and that this rule is one way to begin addressing this problem. The proposed rule might not be perfect, they said, but it's a good start.

Two members offered dissenting views. While noting the noble aims of the proposed amendments, they questioned whether the change effected would be worth it. One member noted, for instance, that the proposed presumptively invalid grounds for striking a juror would yield more people on juries who would be biased against the prosecution because they do not like police. One committee member stated that the proposed rule would not be effective at removing bias. His experience was that *Batson* has caused prosecutors not to excuse black and brown jurors when they would have done so if those jurors had been white. He questioned whether there is any recent data that finds black jurors are being disproportionally excused peremptorily and favored doing away with peremptory challenges altogether rather than adopt the proposed amendments to the rule.

A motion was made, seconded, and approved by a vote of 7-5, to recommend the adoption of the proposed rule by the supreme court. Mr. McGreevy noted that Judge Malone's vote in favor of the proposal had not been – but should be -- included in the final tally. (Judge Malone – who had to be absent from the meeting – had signaled her approval of the proposed rule in an email prior to the meeting). Citing committee precedent against accepting proxy votes, Judge Dailey did not include her vote in the final count.

Judge Dailey asked Mr. McGreevy and Mr. Russel to prepare majority and minority reports to submit to the supreme court along with the proposal.

The proposed amendments to rule 24, adopted by the committee, are as follows:

Rule 24. Trial Jurors

(a) - (c) [NO CHANGE]

(d) Peremptory Challenges.
(1) - (4) [NO CHANGE]
(5) **Improper Bias**: The unfair 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 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**. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection, 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;
(v) having a child outside of marriage;
(vi) receiving state benefits; and
(vii) not being a native English speaker.
(F) **Reliance on Conduct**. The following reasons for peremptory challenges 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; 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.

(e) - (g) [NO CHANGE]

COMMENTS [NO CHANGE]

C. Crim. P. 37/37.1—Prosecutorial Interlocutory Appeals of County Court Orders

Judge Hoffman shared that the subcommittee met and unanimously concluded that no changes needed to be made to any rule.

D. SB 20-100—Death Penalty Repealed

The subcommittee is looking at possible changes required to any criminal rules due to this legislation. They want to check for any unintended consequences before making any proposals to the committee.

Judge Dailey's internet stopped working, and Judge Hoffman took over momentarily as chair. Judge Dailey's internet reception returned a couple of minutes later.

V. New Business

A. Sealing or Expunging Records

Judge Dailey noted that a member of the community contacted him about bringing a proposal before the committee to adopt a procedure (much like one adopted by statute in California) for obtaining a "certificate of factual innocence" The citizen had suggested this measure because he had been continually plagued by a party in civil cases with groundless (and dismissed) accusations of criminal wrongdoing. Judge Grohs, Kevin McGreevy, and Jacob Edson agreed to form a subcommittee to consider this issue further. Judge Grohs will chair the subcommittee.

VI. Future Meetings

April 16, 2021
July 16, 2021
October 15, 2021

The committee adjourned at 2:36 PM.