Asian Pacific American
Bar Association of Colorado

An affiliate of the National Asian Pacific American Bar Association
www.apaba-colorado.org

January 20, 2023

The Honorable John Dailey
Chair of the Colorado Rules of Criminal Procedure Committee, and the Colorado Rules of Criminal Procedure Committee
2 East 14th Ave.
Third Floor
Denver, CO 80203

Re: Proposed Rule Crim. P. 24(d)(5)

Dear Judge Dailey and Members of the Colorado Rules of Criminal Procedure Committee:

We submit this letter on behalf of the Asian Pacific American Bar Association of Colorado ("APABA") **in support of the Colorado Rules of Criminal Procedure Committee's recommendation to adopt Crim. P. 24(d)(5).**

APABA's Board of Directors has reviewed: 1) the Majority Report for the Adoption of Crim. P. 24(d)(5) Addressing the Exercise of Peremptory Challenges During Jury Selection; 2) the Minority Report Proposed Rule 24(d)(5); 3) the Report of the Subcommittee re Crim. P. 24(d) from Kevin McGreevy dated January 11, 2021; and 4) the Washington State Case Excerpts.

APABA strongly supports the proposed Crim. P. 24(d)(5) language in its entirety. Criminal defendants have the right to a fair trial by a fair and impartial jury. U.S. Const. amend. VI; Colo. Const. art. II, §§ 16, 23. "The right to a jury trial entitles a defendant to a jury drawn from a *fair cross section of the members of his or her community*." *Medina v. People*, 114 P.3d 845, 855 (Colo. 2005) (emphasis added). Furthermore, "counsel may not discriminate based on race, gender, national origin, religion, age, economic status, or occupation when selecting jurors from the jury pool." *Id.*

Crim. P. 24(d)(5) furthers the constitutional goals of creating juries that are fair cross sections of the community. We recognize and acknowledge that all people hold implicit biases. And while attorneys (both prosecutors

and defense counsel) may not consciously be discriminating "based on race, gender, national origin, religion, age, economic status, or occupation when selecting jurors from the jury pool," implicit or unconscious bias manifests in voir dire and can deprive criminal defendants—or the State—of a jury that represents a fair cross section of the community. *See Medina*, 114 P.3d at 855. Furthermore, Crim P. 24(d)(5) applies to both prosecutors and defense attorneys, and prosecutors can similarly invoke Crim. P. 24(d)(5) if they believe their opposing counsel are using peremptory challenges in a biased manner.

We recognize that all prospective jurors have varied life backgrounds and perspectives. But prospective jurors from historically marginalized racial and ethnic groups bring different experiences than their White counterparts. And the legal community in Colorado is overwhelmingly made up of White attorneys, whose implicit biases unconsciously affect their jury selection. Crim. P. 24(d)(5)(D) & (E) will combat attorneys' unconscious biases which may lead to using peremptory challenges against prospective jurors from historically marginalized racial and ethnic backgrounds in a discriminatory manner. For example, it is well known that over-policing of Black and Brown communities occurs in the United States.[1] As a result, members of those communities are more likely to have distrust of law enforcement.[2] This should not be a reason, in and of itself, for an attorney to exercise a peremptory challenge on a prospective juror. Crim. P. 24(d)(5)(F) importantly addresses mannerisms attorneys may rely on for using a peremptory challenge, such as "failing to make eye contact" or "body language," or "demeanor." These all have potential cultural implications. In many Asian cultures, for example, maintaining eye contact with another person is considered disrespectful.[3]

In a June 11, 2020 letter from the Colorado Supreme Court to all Colorado Judicial Officers and employees of the judicial branch, the Justices of the Court wrote, "[b]y redoubling our efforts to ensure that our decisions are free of bias, we can help build a more universal faith in our courts and our system of justice. . . . And by collaborating with community organizations, we allow ourselves to see the world through the eyes of those who have felt ignored or marginalized."[4]

APABA appreciates the opportunity to provide input on this important proposed rule change and strongly supports Crim. P. 24(d)(5). We believe this proposed language is an important and

[1] https://news.harvard.edu/gazette/story/2021/02/solving-racial-disparities-in-policing/
[2] https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/
[3] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4340785/
[4] https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/6_11_20_Letter.pdf

necessary rule change to address implicit bias in jury selection, which will benefit all parties and participants in a criminal case.

Sincerely,

APABA Colorado

Comment regarding proposed Rule 24(d)

I support the goal of adopting a rule to reduce the influence of unconscious bias in jury selection. Given the body of evidence, it is sensible to assume that all litigants have some unconscious bias. Likewise, the court should attempt to adjust criminal procedure to mitigate the effects of that bias. I believe it is therefore appropriate to require litigants to articulate their reasons for excusing a juror of color and for an independent decisionmaker to review the decision at a more rigorous level than required by *Batson*.

I was, however, taken aback to see the first proposed draft of the rule, which provided that a strike based on a juror's stated bias against law enforcement is presumptively a pretext for racism. I note that the slightly amended proposal uses the more tactful language "presumptively invalid." The substance of the rule, however, remains the same: the rule encodes the notion that it is improper to excuse a juror who has admitted to having a sweeping bias against a category of witnesses who will testify at trial.

This proposal runs contrary to one of the most important (and legitimate) reasons for jury selection: removing jurors with explicit biases that could affect the outcome of the case.

This is squarely within the purpose of jury selection and no more pretextual or invalid than defense counsel striking jurors who have been victims of a crime on the theory that they will be more inclined to find a victim credible. Similarly, parties can legitimately strike jurors who admit to a bias against any other category of witnesses testifying in the case. For example, counsel would naturally strike a juror who believed all psychologists are "quacks" in a case that involves expert testimony on the defendant's mental condition. I am also quite confident that a defense attorney representing a police officer charged with a crime would seek to strike a juror who stated police officers tend to be dishonest. To suggest that this reasoning is a pretext for race would be absurd.

The primary argument for singling out bias against law enforcement witnesses as "invalid" appears to be that excluding jurors on this basis has disparate impact on people of color. The majority does not cite data to support this. But even accepting this as true, it would not justify adopting a rule that identifies this reason for exclusion as per se race-based, whether conscious or unconscious. And, if the court wishes to eliminate justifications for peremptory strikes because of their disparate impact, surely

this should include prior experience as a victim, a category that is also disproportionately represented by people of color. *See* FBI Crime Data Explorer, *available at* https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/crime-trend (indicating that black people account for 53% of homicide victims and 35% of violent crime victims, generally).

The stated purpose of the rule is to address the influence of litigants' unconscious bias in jury selection. That is a laudable goal, but it is not well-served by a rule that authorizes jurors' conscious bias towards witnesses during trial. The real question is whether there is sufficient evidence that the juror genuinely has a bias—or whether the litigant's impression could be influenced by their own unconscious bias. There is a world of difference between a potential juror who says they were racially profiled during a traffic stop and one who asserts a categorical belief that police tend to be dishonest. A trial judge can scrutinize the juror's statements and conduct to determine if there is sufficient evidence of actual bias without the distorting effect of a (apparently unrebuttable) "presumption."

I have no reason to think this subsection was adopted to create a significant strategic advantage for the criminal defense bar. But it is undeniable that, in many cases, this will be the outcome. There is a large category of cases in which the primary (or only) witnesses for the prosecution will be law enforcement officers. If the jury includes individuals who believe, before ever entering the courtroom, that police are inherently less credible than other witnesses, this explicit bias will likely impact the outcome of the case. That outcome should not be condoned—let alone endorsed—by the rules of criminal procedure.

I therefore ask that the court delete proposed Rule 24(d)(5)(E)(ii)'s reference to "a distrust of law enforcement."

As a separate matter, I also have concerns about the standard laid out in 24(d)(5)(C). This language is unnecessarily confusing and will certainly lead to inconsistent application and reversals on appeal. I would ask the court to review the following Washington cases in which otherwise valid convictions were reversed on appeal. These cases indicate both that trial judges struggle to apply the standard consistently and that appellate judges are often split.

State v. Tesfasilasye, 518 P.3d 193 (Wash. 2022) (reversing a conviction for sexual assault);
State v. Orozco, 496 P.3d 1215 (Wash. Ct. App. 2021) (reversing a conviction for second degree murder);

State v. Lahman, 488 P.3d 881 (Wash. Ct. App. 2021) (reversing a conviction for kidnapping and assault);
State v. Listoe, 475 P.3d 534 (Wash. Ct. App. 2020) (reversing a conviction for possession of methamphetamine with intent to deliver);
State v. Pierce & Bienhoff, 455 P.3d 647 (Wash. 2020) (reversing convictions against two co-defendants for first degree murder);
State v. Jefferson, 429 P.3d 467 (Wash. 2018) (reversing a conviction for attempted first-degree murder);
State v. Eaton, 21 Wash. App. 2d 1050 (Wash. Ct. App. 2022) (unpublished) (reversing a conviction for theft).

I suggest that the court instead use a familiar evidentiary standard (such a preponderance of the evidence) to determine if the juror's statements and conduct and all attendant circumstances (the charges, the likely witnesses, the type of evidence, the makeup of the venire, etc.) support the strike. For example, if counsel seeks to strike because the juror has expressed a bias against law enforcement witnesses, the court might find that, while the juror did recount a bad experience with a law enforcement officer, they stated they did not have any categorical belief that law enforcement officers tend to be dishonest, and therefore that there was insufficient evidence of bias. Alternatively, the court might find that the juror's statements do indicate a broad belief that law enforcement officers tend to be less credible, but that this bias is not relevant to the case at hand, where the credibility of law enforcement officers is not significant.

This will incentivize attorneys to develop a record rather than to rely on superficial signals and hunches, and it will give the court an opportunity to independently screen decision making. It also has the advantage of eliminating the need for the court to find that a strike is or could be race-based, a finding that may be difficult in the moment.

Thank you for your consideration.

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January 25, 2023

Colorado Supreme Court
2 E. 14th Avenue
Denver, CO 80202

Re: Proposed amendment to Crim. P. 24

Chief Justice Boatright and Justices of the Colorado Supreme Court:

I share the majority's concern about implicit bias in jury selection (and in other stages of the criminal and civil justice system, as well). I believe combatting that problem is a worthy project and one that this Court should take on. Unfortunately, I believe that certain aspects of proposed Crim. P. 24(d) are flawed, and I write to address a problem with subsection (5)(ii) that has not yet been discussed.

The problem has to do with the relationship between peremptory and for-cause challenges. Even under the majority's proposal, it appears undisputed that a trial court must generally dismiss a juror for cause if she demonstrates actual bias against law enforcement. The question is: what can a prosecutor do if the trial court denies her for-cause challenge? Under current law, the answer is simple: the prosecutor may excuse the juror using a peremptory challenge.

Proposed Crim. P. 24(d)(5)(ii) would largely abolish that practice. It would presumptively invalidate any peremptory challenge based on a juror's expressed "distrust of law enforcement." In that case, the prosecutor would have no remedy if the trial court denied her for-cause challenge.

The majority isn't bothered by that outcome. They reason that "distrust of law enforcement" doesn't always amount to actual bias that could support dismissal for cause. *See* Maj. Rep. at 9-10. The proposed rule, however, provides no standard to differentiate between "distrust" and "bias" — and those terms are often used synonymously. *Cf. People v. Johnson*, 2022 COA 118, ¶ 49 (Berger, J., concurring in part and dissenting in part) (referring interchangeably to "a juror's possible distrust or bias against the police" as a proper ground for a peremptory challenge).

More broadly, the majority's logic contradicts the very purpose of peremptory challenges. "The function of peremptory challenges … is to allow both the prosecution and the defense to secure a more fair and impartial jury by enabling them to remove jurors whom they perceive as biased*, even if the jurors are not subject to a challenge for cause*." *Vigil v. People*, 2019 CO 105, ¶ 19 (emphasis added; quotation marks and citations omitted). Here, the proposed rule turns that principle on its head: unless a juror's distrust of law enforcement is so acute that it necessitates dismissal for cause, the rule would prohibit a peremptory challenge on that ground.

That approach is problematic both in theory and in practice. Because bias is an imprecise concept, reasonable minds can disagree on whether to dismiss a particular juror for cause. *See Morrison v. People*, 19 P.3d 668, 672 (Colo. 2000) (noting that for-cause challenges turn on "the juror's credibility, demeanor, and sincerity in explaining her state of mind"). In that case, peremptory challenges provide a critical backstop when a trial judge may not perceive the same bias.

Of course, with discretion comes responsibility, and there is a risk that peremptory challenges could be used for a discriminatory purpose. As the United States Supreme Court has recognized, that risk applies not only to prosecution challenges, but to defense challenges, as well. *See Georgia v. McCollum*, 505 U.S. 42, 49 (1992) ("Regardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same—in all cases, the juror is subjected to open and public racial discrimination."). Here, however, the proposed rule primarily burdens the prosecution, without placing counterbalancing limits on the defense.[1]

The majority discounts these concerns, in part by minimizing the effect that a juror's distrust of law enforcement has on the fairness of criminal proceedings. That's striking. No one would say the same about a juror's distrust of criminal defendants. Contrary to the Majority Report, distrust of law enforcement is no less problematic to a system of impartial justice. *See Georgia v. McCollum*, 505 U.S. 42, 47 n.4 (1992) ("[O]ur criminal justice system requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." (Quotation marks and citations omitted)). "Police officers play a critical

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[1] Most troubling, the proposed rule doesn't address defense challenges based on a juror's experience as a crime victim. *See* FBI Crime Data Explorer, *available at* https://cde.ucr.cjis.gov/LATEST/webapp/#/https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/crime-trend (reporting that, between 2011 and 2021, 53% of homicide victims and 35% of violent crime victims nationwide were black).

role in virtually every criminal prosecution, and it is the rare criminal case in which one or more police officers do not testify." *Johnson*, 2022 COA 118, ¶ 44. While some jurors may be able to set aside their distrust of those officers, others may not. It would be a mistake to assume otherwise.

Finally, I worry that subsection (5)(ii) could lead to absurd results in a couple different scenarios.

- The first occurs when a trial court denies a prosecutor's for-cause challenge based on a juror's apparent bias against law enforcement, but ultimately allows a peremptory challenge on the same grounds. If the defendant appeals, an appellate court applying the proposed rule could conclude that *both* of those actions were erroneous. In that case, it's unclear whether the trial court's errors should cancel out, or whether the prosecutor's presumed prejudice should require reversal of any conviction.

- Next, consider a case in which a *white* juror expresses distrust of law enforcement. Does it make sense to presumptively invalidate a peremptory challenge in that scenario? I believe the answer is "no," but the proposed rule would apparently require otherwise.

For all these reasons, I oppose the rule in its current form. It may well be that the risk of implicit bias outweighs the benefits of peremptory challenges in criminal cases. But if so, the solution is to eliminate peremptory challenges altogether, not to adopt a half-measure that burdens one side more than the other. The Court should reject the rule or, alternatively, strike the phrase "expressing distrust of law enforcement" from subsection (5)(ii).

Respectfully submitted,

Richard Lee

OFFICE OF THE DISTRICT ATTORNEY
JOHN KELLNER, DISTRICT ATTORNEY
18TH JUDICIAL DISTRICT
SERVING ARAPAHOE, DOUGLAS, ELBERT AND LINCOLN COUNTIES

January 25, 2023

Chief Justice Boatright and Members of the Court,

The first twelve words in proposed Rule of Criminal Procedure 24(d)(5) express a sentiment in which we all likely agree: "The exclusion of potential jurors based on race or ethnicity is prohibited." Those twelve words capture the essence of the constitutional rule announced in *Batson v. Kentucky*, 476 U.S. 79 (1991), and subsequent U.S. Supreme Court decisions.

But the remaining provisions of the proposed rule would have highly problematic consequences for criminal jury trials. This letter will outline the principal concerns.

To function properly, a peremptory strike procedure must be fair to both sides.

Peremptory strikes are designed to help seat a jury that, for both parties, will be fair. The views of a few potential jurors are so extreme, at one end or the other on a given spectrum of thought, that they can be successfully removed from a jury panel through a challenge for cause. But most prospective jurors instead fall within a broad range of opinions and viewpoints between the extremes. When both parties have equal use of peremptory challenges, each party can remove those prospective jurors whose views fall closest to one end or the other of the spectrum, which results in a seated jury of those middle-of-the-road members who are the most likely to be fair.

In criminal cases, Colorado's judiciary routinely distributes to all potential jurors a written jury questionnaire, an example of which can be found on the state judicial website. The standard jury questionnaire asks potential jurors, in criminal cases, whether they have any friends or relatives in law enforcement, whether they or any of their friends or relatives have ever had a particularly good or bad experience with a law enforcement officer, and whether they, a friend, or a relative has ever been the victim of a crime, or accused of a crime. These questions are routinely asked because they provide the attorneys on both sides with useful information about whether a prospective juror, if not challengeable for cause, is someone who should be removed through a peremptory strike—because their answers suggest that they would be more favorable to the prosecution, or more favorable to the defense.

Under existing law, the jury selection process functions as it was intended: allowing each party to remove not only the impermissibly extreme jurors, who are removable for cause, but also those who—based on their answers to questions—have revealed themselves to be either strongly pro-prosecution, or strongly pro-defense. Using peremptory strikes, the prosecutor removes those deemed strongly pro-defense, and the defense attorney removes those deemed strongly pro-prosecution. The process is successful in seating a middle-of-the-road jury because each side has an opportunity to remove those prospective jurors who are thought to be the most predisposed to favor the opposing side.

The proposed rule allows strikes of pro-prosecution jurors, but prohibits strikes of pro-defense jurors.

Although the proposed rule's proponents describe their objective as the laudable goal of promoting racial and ethnic diversity on juries, the proposed rule would have a very different result: tilting the jury's composition to include more jurors whose personal views are more favorable to the defense.

No racial or ethnic group is a monolith of thought. Within any such group, there is a broad range of viewpoints: each such group includes individuals who are strongly pro-prosecution, individuals who are strongly pro-defense, and individuals who are comfortably in the middle. Under our current procedure, prosecutors exercise peremptory strikes against individuals, regardless of race and ethnicity, who by their answers seem pro-defense. And defense attorneys exercise peremptory strikes against those, regardless of race and ethnicity, who by their answers seem pro-prosecution.

The proposed rule would fundamentally alter that process by treating certain reasons for exercising a peremptory strike as presumptively invalid. Under subsection (5)(E), those presumptively invalid reasons include that a prospective juror is "expressing a distrust of law enforcement," or has had a "close relationship with people who have been stopped by law enforcement, arrested, or convicted of a crime." Generally speaking, criminal defense attorneys are happy to have such individuals on the jury because someone who expresses distrust of law enforcement is more likely to be skeptical of the testimony of law enforcement officers who investigated the crime, and individuals who have had a close relationship with a person who has been arrested or convicted of a crime are often more likely to be sympathetic to the plight of the criminal defendant. By contrast, prosecutors are more inclined to exercise peremptory strikes against such individuals for the very reason that defense attorneys would like to see these individuals remain on the jury—these prospective jurors seem favorable to the defense.

The proposed rule would alter the composition of juries in problematic ways.

Precluding prosecutors from exercising peremptory strikes against strongly pro-defense jurors would alter the composition of Colorado juries in several problematic ways.

First, it can be assumed that criminal defense attorneys—acting, as they should, in their client's interest—will strike any prospective juror, regardless of race or ethnicity, if the prospective juror's answers show them to be too favorable to the prosecution. But the prosecutor will be precluded from striking prospective jurors, regardless of race or ethnicity, whose answers to certain questions show them to be favorable to the defense. In other words, defense attorneys will strike white and non-white jurors who are strongly pro-prosecution, but the plain language of the rule would effectively prevent prosecutors from striking any juror, white or non-white, who gives pro-defense answers reflecting distrust in law enforcement. The resulting jury, instead of having solely middle-of-the-road jurors, will also include jurors who are strongly pro-defense, but will include none who are strongly pro-prosecution. In short, the views of the jury as a whole will be skewed.

Second, skewing of the collective jury's views will occur even if the prospective rule is understood by trial judges to only preclude peremptory strikes against racial and ethnic minorities. All racial and ethnic groups include both pro-prosecution and pro-defense individuals, and a rule that effectively allows the defense to strike both white and non-white prospective jurors who are pro-prosecution, but allows the prosecution to only strike pro-defense whites and disallows prosecution strikes of pro-defense non-whites, will still weight the jury in a way that includes more pro-defense jurors than would serve on the

jury under the existing rule. The skewing of viewpoint would occur not because of changes in the racial and ethnic composition of the ultimate jury, but because of changes in the set of collective viewpoints held by individuals who serve.

Third, the effect of the rule would be to underrepresent the broad range of viewpoints represented within each of Colorado's many racial and ethnic groups. All racial and ethnic groups include members who generally trust police officers, and members who instead view the police with distrust. The proposed rule would operate to allow defense attorneys to strike both white and non-white jurors who generally trust the police, but preclude the prosecution from striking those individuals who instead view the police with distrust. Any notion that non-white jurors are inherently skeptical of the police is a crude, false stereotype—but the proposed rule would bizarrely turn that false stereotype into a reality with regard to those non-white jurors who served. Pro-prosecution non-whites would be removed through peremptory strikes by the defense, but the corresponding pro-defense jurors would remain on the jury, because the prosecution could not strike them.

Fourth, in some criminal cases, the proposed rule's general tendency to favor the defense and disfavor the prosecution would be flipped. For example, in cases where police officers are themselves charged with having committed a crime, defense attorneys would likely be seeking to seat jurors who express trust in law enforcement, and prosecutors by contrast would likely wish to seat jurors who would be skeptical of the charged officers' version of events. In those cases, the proposed rule would work to the defense team's disadvantage. As important as it is to hold accountable those police officers who have committed crimes, it would be wrong to enact a rule that could inadvertently undermine their right to a fair trial.

The proposed rule would radically expand the safeguards of Batson v. Kentucky.

Under *Baston v. Kentucky* and subsequent U.S. Supreme Court decisions, there is a three-step process for ensuring that peremptory strikes of prospective jurors are not motivated by purposeful discrimination based on race, ethnicity, or gender. First, the party objecting to a peremptory strike articulates a prima facie claim that the strike is motivated by purposeful discrimination. Second, the party exercising the peremptory strike must articulate a non-discriminatory reason (i.e., a race-neutral, ethnicity neutral, or gender-neutral reason) for the strike. Third, the party objecting to the peremptory strike has a chance to rebut the articulated non-discriminatory reason and the trial court decides the ultimate question of whether the party exercising the strike was motivated by purposeful discrimination. In other words, the court determines whether the party exercising the peremptory strike was being truthful when articulating the non-discriminatory reason. If the trial court determines that the party exercising the strike was being truthful, the peremptory strike is allowed and the juror is excused. If the trial court determines instead that the peremptory strike was motivated by purposeful discrimination, the strike is disallowed and the juror remains on the panel.

Subsection (5)(C) ("The court shall evaluate …") radically expands *Batson* by disallowing the strike at step one. Under subsection (5)(C), the peremptory strike is disallowed if the court determines that "an objective observer *could* reasonably view the prospective juror's race or ethnicity as a factor in the use of the peremptory challenge." It is very easy to establish a prima facie case under *Batson*, and likewise it typically would be very easy to establish that an objective observer "could" reasonably view race or ethnicity as a factor. Like *Batson* itself, the proposed rule applies regardless of the race or ethnicity of the prospective juror or the criminal defendant, and it applies to the defense as well as the prosecution. (For example, under *Batson* and under this proposed rule, criminal defense attorneys

cannot strike white jurors if motivated by the thought that their client would be better served by having more non-whites on the jury.) Like *Batson*, the proposed rule does not require the strike to form any sort of pattern, and a prima facie case can be premised on the idea that a prospective juror merely appears to belong to a particular group. But unlike *Batson*, the proposed rule could be weaponized by attorneys seeking to prevent the opposing party from exercising peremptory strikes—because the draft rule ends the analysis at *Batson's* first step.

And under the proposed rule, an attorney almost inevitably will engage in behavior that "could" be deemed suspect. Under subsection (5)(D)(i) & (ii), an attorney exercising a peremptory strike can be faulted for either *asking too many* questions of a prospective juror, or *asking too few.* Subsection (5)(D)(ii) even faults an attorney for asking "different" questions of a prospective juror, despite the fact that voir dire consists of conversations with prospective jurors who sometimes say something that prompts questions unique to that individual. Voir dire is always limited in time, and attorneys necessarily must choose a small handful of prospective jurors to direct questions to, and then follow up by asking the panel as a whole whether anyone has anything to share that is prompted by the answers of the juror who has spoken. Often an attorney's decision about which prospective juror to question is driven by which juror raises a hand in response to a question asked of the entire panel. Follow-up questioning of a particular juror often occurs precisely because an initial answer suggested the juror might be unfair: a party should not then be faulted for asking the juror additional questions to get a clearer understanding of the juror's views.

Also, subsection (5)(E) lists "presumptively" invalid reasons for peremptory strikes, but gives no indication how the party seeking to exercise the strike could possibly rebut that presumption, on the ultimate issue under (5)(C) of whether an objective observer "could" view race or ethnicity as a factor in exercising the challenge. If these reasons listed in subsection (5)(E) are presumptively invalid, then presumably an objective observer always "could" view them as being invalid. It is unclear how the presumption would operate, other than as an outright prohibition.

The proposed rule, therefore, radically expands the guardrails of *Batson* in ways that effectively could preclude an attorney from exercising any peremptory strike.

Although the rule purportedly addresses implicit bias, it actually focuses on disparate impact.

The rule's proponents assert that it would address implicit bias in jury selection, but it really does not do this at all. Properly understood, "implicit bias" refers to *unconscious* favoritism or prejudice about people of a particular group. But under the proposed rule, even when an attorney demonstrates that a decision to exercise a peremptory strike was not based on unconscious prejudice against a group, but instead was based on an individual juror's stated views concerning distrust of the police, the attorney is precluded from exercising the strike. How can an attorney's *conscious* reasoning about an individual's expressed views be considered an *unconscious* assumption about the individual based on stereotypes?

Instead of addressing implicit bias, what the proposed rule really addresses is disparate impact. Under subsection (5)(D)(iv), the trial court must assess whether the striking party's stated reason for exercising a strike "might be disproportionately associated with race and ethnicity." And of course, there are an endless number of personal characteristics that "might" be disproportionately associated with race and ethnicity. Age, for example: census statistics reveal markedly different median ages for different racial and ethnic groups. In various criminal cases, an attorney might prefer either older jurors for their greater life experience, or instead prefer younger jurors for their familiarity with the nuances of the

current social scene. A preference for older or younger jurors seems wholly race neutral, but the reality of different median ages for different racial and ethnic groups means that an age-related rationale for exercising a peremptory strike "might be disproportionately associated with race and ethnicity."

Combined with the proposed rule's overarching test of whether an objective observer "could" reasonably view race or ethnicity as a factor in the use of a peremptory strike, subsection (5)(D)(iv) would undermine the ability of attorneys to strike prospective jurors based on race-neutral criteria, such as age, simply because that criteria, if applied broadly, could have a disparate impact.

A better way to increase racial and ethnic diversity in criminal juries would be for the judiciary to ensure that jury summonses are reaching individuals in all parts of our communities, and ensure that the recently-adopted equity, diversity, and inclusion Continuing Legal Education requirement—which includes training to help attorneys guard against acting on unconscious biases—is a success. Initiatives such as those can promote inclusiveness in jury participation without unfairly tilting the collective outlook of our empaneled juries in the direction of the defense.

The proposed rule would involve trial judges in race-based decision making.

As has been discussed, the proposed rule favors the defense by allowing defense attorneys to use peremptory strikes to remove prospective jurors for expressing trust in law enforcement, while precluding prosecutors from removing prospective jurors for expressing distrust of law enforcement. The resulting tilt in the jury's viewpoint is especially pronounced given that the rule appears to apply its presumptions to members of all races and ethnicities. In other words, the proposed rule doesn't just preclude peremptory strikes against racial and ethnic minorities who are distrustful of law enforcement, it precludes peremptory strikes against distrustful white prospective jurors as well.

If the rule is instead understood to have a more limited scope, generally precluding only strikes against non-white prospective jurors, then the rule is almost certain to require trial judges to themselves engage in problematic, race-based decision making.

Suppose a prosecutor seeks to use peremptory strikes against two prospective jurors, one of whom is white and the other non-white, for precisely the same reason: they each have expressed a distrust of law enforcement. If the trial judge allows the peremptory strike of the white individual, but disallows the strike of the non-white juror, hasn't the trial judge herself engaged in race-based decision making, by allowing the removal of one person, and disallowing the removal of the other, solely based on race?

The U.S. Supreme Court long ago recognized that, although private individuals are not state actors, private individuals cannot, either as civil litigants or as defendants in a criminal case, engage in purposeful discrimination in jury selection. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Georgia v. McCollum*, 505 U.S. 42 (1992). There is still "state action" in such discriminatory strikes because of the trial court's role in allowing the strikes to occur.

Under the proposed rule, where the prosecutor seeks to even-handedly use peremptory strikes against two prospective jurors of differing races, for giving identical expressions of distrust in law enforcement, and the trial court makes a race-based decision to allow one of the strikes but not the other, there would seem to be an even greater involvement by the court in an impermissible process than existed in *Edmonson* and *McCollum*. Our trial judges should not be making race-based decisions about who gets to serve on Colorado's juries.

Conclusion

The proposed rule is not in any way constitutionally required, but it is constitutionally suspect. This Court should reject the rule.

John Kellner

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OFFICE OF THE DISTRICT ATTORNEY

TWENTIETH JUDICIAL DISTRICT

Michael T. Dougherty, District Attorney

TO: Colorado Supreme Court
FROM: Michael T. Dougherty, District Attorney for the 20th Judicial District
DATE: January 24, 2023
RE: Proposed Colorado Rule of Criminal Procedure 24(d)(5) – Implicit Bias

The proposed rule change to Crim. P. 24 is too broad, will have a chilling effect on the justice system, and does not meet the goals it is intended to serve. The intentions of the proposed rule change are good. There is no place for improper bias of any kind in the criminal justice system. However, there is no evidence or practical basis that supports the proposed rule change as written. In trying to reduce bias in jury selection, the unsupported changes proposed will lessen the integrity of jury selection, increase bias in choosing jury panels, and negatively impact the justice system. Thus, the 20th Judicial District Attorney's Office strongly objects to the proposed rule of Criminal Procedure 24(d)(5) as currently written.

This office's objections are based on the following:

- **No evidence that peremptory challenges are improperly used**. There is no research or data that suggests that peremptory challenges, made by any party, are currently being used in an improper way that would necessitate a rule of this nature. A change of this magnitude should be driven by data and evidence-based research, not assumptions and stereotypes.

- **Factors for Court's consideration of bias are unproven**. In an effort to lessen bias, the proposed rule suggests that certain factors are appropriate for the trial court's consideration when assessing a party's bias in excusing a juror. There has been no showing that these factors are correlated with bias due to race or ethnicity. As a result, this process and the limitations on voir dire lack support and may not produce the intended goals.

- **U.S. Supreme Court has already instituted protections against bias in jury selection**. There are already protections in place from *Batson v. Kentucky*, 476 U.S. 79 (1986) that prohibit a prospective juror from being excused by the prosecution based on actual or perceived bias involving race or ethnicity. In Colorado, the trial and appellate courts have actively engaged in this analysis and addressed issues that warrant correction.

- **Prosecutors have an ethical duty to perform unbiased jury selection**. Prosecutors comply with their obligations under the law. Prosecutors throughout Colorado are trained on implicit bias and apply those teachings in their practice. It is now a requirement that every lawyer have two ethics credits in equity, diversity, and inclusivity. The Colorado District Attorneys' Council trains prosecutors on jury selection, Batson, and implicit bias. Our office provides additional trainings on these important topics. This proposed rule presumes that prosecutor's offices and their attorneys fail to comply with ethical requirements, without any evidence or data in support of such a conclusion.

- **Chilling effect on prosecutors' jury selection will result in biased juries**. Adopting this rule will have a chilling effect on prosecutors and trial courts. A prosecutor's role during voir dire is to ask the venire questions to determine if they can listen to the facts in a fair and impartial manner and follow the law provided by the court; and then exercise challenges against jurors accordingly. The proposed rule change sets forth several considerations for the trial judge in assessing whether a peremptory challenge is made based on race or ethnicity. For example, the court may consider the number of questions asked of a prospective juror. Prosecutors will be wary of asking too many questions of a potentially problematic juror for fear of a challenge, even when the reason for the questioning is otherwise valid. As a result, jurors who may be biased against either party will be empaneled.

- **Punishing prosecutors for conducting thorough voir dire will result in biased juries.** The trial court can, also, consider peremptory challenges made in past cases. This proposed rule will result in the defense community keeping records on prosecutors and their peremptory challenges. As a result, prosecutors will be fearful of engaging in necessary questioning and the exercise of legitimate peremptory challenges for fear they will be questioned and accused under this rule – not only in a current case, but also in the future. Similarly, a prosecutor who has a legal, non-biased reason for excusing a juror may not do so for fear of running afoul of this rule and having their professional judgement criticized.

- **The proposed rule states that prior contact with law enforcement is an invalid reason for a peremptory challenge.** The term "prior contact with law enforcement officers" is far too broad. Citizens of all races and ethnicities have contact with law enforcement for a myriad of reasons that have nothing to do with race or ethnicity. They have contact with law enforcement for reasons not related to criminal investigations. In criminal cases, attorneys for both sides have long relied on the ability to use a peremptory challenge to excuse jurors who have preconceived beliefs and biases about law enforcement. This practice is consistent with fundamental principles of jury selection that have nothing to do with race or ethnicity.

- **The proposed rule states it is presumptively invalid for a lawyer to excuse a person who distrusts law enforcement.** To declare excusal on this basis as presumptively invalid renders the prosecution unable to explore the impact of one's beliefs on their ability to be fair and impartial jurors. In these scenarios, some jurors will not be able to set their beliefs aside and follow the law. Therefore, it is essential for lawyers to be able

to inquire as to the impact of the juror's beliefs about law enforcement as it relates to their ability to be objective, fair, and impartial

- **The proposed rule also states it is presumptively invalid for a lawyer to excuse a person who has a close relationship with persons who have been stopped, arrested, or convicted of a crime.** To have excusal on this basis be presumptively invalid renders the prosecution unable to explore the impact of these relationships on their ability to be fair and impartial jurors. A person with a close family member who has been convicted of similar crime may not be able to be fair and impartial in deciding the prosecution's case, especially if they believe that person was wrongly convicted. However, as experienced trial attorneys are aware, family members of individuals who have been prosecuted are often supportive of prosecutors and the justice system. Rather than make baseless assumptions about whole groups of people, whether they are associated with people who have been convicted and/or with victims of crimes, it is essential for lawyers to be able to inquire as to the impact of the juror's associations as it relates to their ability to be objective.

- **For certain behaviors observed during voir dire, i.e., falling asleep, not making eye contact, demeanor, there is a requirement that the judge or opposing counsel verify the behavior**. Lawyers are officers of the court, and this rule assumes that lawyers are lying about their observations to excuse a person based on an improper basis. There is no evidence or support for such a conclusion. Throughout criminal trials, attorneys are expected and required to bring issues to the attention of the trial judge without a requirement for an eyewitness or corroboration from opposing counsel. This proposed rule change is inconsistent with general trial practice – without any data or evidence to support it.

- **The rule requires that an objection be made before the juror is excused but, also, permits an objection if new information is discovered.** The rule allows an objection based on new information – it could be after a jury has been empaneled, thereby causing a mistrial or even after a verdict in the form of a motion for a new trial. Given the fundamental flaws with the rule as outlined in this memo, to permit non-contemporaneous objections could result in mistrials and new trials that do a disservice to the criminal justice system, including the parties, the jurors, victims, and witnesses.

- **This proposed rule will require the trial judge to make a record about the racial and ethnic composition of the jury panel.** Without asking the individual jurors their specific race or ethnicity, the court and the parties could be making improper assumptions about an individual juror in their evaluation of the panel and a particular objection. Such questioning could be awkward and offensive to the jury panel and its members.

- **Despite best intentions, the proposed rule will result in biased jurors and an increase in mistrials.** For all the reasons outlined above, this rule would effectively cripple jury selection by limiting the ability of prosecutors and trial judges to identify and exclude jurors who demonstrate a clear bias. By allowing such individuals to sit as jurors, this rule would result in jurors who cannot be fair and impartial, thus making it

difficult for them to reach consensus with their fellow jurors.

- **These rule changes would cause lengthy delays for prospective jurors and for the courts.** In addition to the associated delays and costs, this process would be inherently unfair. Make no mistake about it – this rule would make the role of the trial judge more difficult, cumbersome, and lengthy. In terms of the impact, I request that this committee evaluate and include the fiscal analysis from the legislation introduced in 2022.

In sum, the purpose of jury selection is to excuse jurors who cannot be fair and impartial, listen to the facts with an open mind, and apply the law in the present case. The assumptions underlying this proposed rule, the broad nature of its prohibitions, and the chilling effect it will have on prosecutors will not further the purposes of jury selection and thus should not be adopted by the Court. I recognize that this effort comes with best intentions. However, the proposed rule lacks the data, evidence, and process required to produce a better result than what is already provided for under current law.

11/10/2022
Cory Gaines
809 Park St
Sterling, CO 80751

An Open Letter to the Colorado Supreme Court

To Justices Boatright, Marquez, Hood, Gabriel, Hart, Samour, and Berkenkotter,

My name is Cory Gaines. I am a resident of Logan County.

I am writing you after having read George Brauchler's opinion column of 10/18/22 entitled "A Troubling Turn In Colorado's Jury Selection". Not long after finishing Mr. Brauchler's column, I went online and found a copy of the submission documents for Criminal Rule #24. If I have gathered correctly, it will be up to the Colorado Supreme Court to decide on implementing this rule (or you all at the least have the power to change it if it has been implemented). That's why I write; I have some concerns over the proposed changes to the rule.

Having read the proposed changes and arguments for and against, I find myself most persuaded most by the arguments made in the minority report by Russel and Hoffman on page 22 of the PDF version of the submission documents. You'll find a lot of what I write will echo their thoughts.

Having our judiciary, juries, and trials reflect the diversity and values of the community it serves is important. I therefore join everyone that wrote anything in the submission documents in stating that the intent of the rule change is a worthy one. I do not wish anyone excluded from jury service based on their immutable characteristics, particularly in how it has the potential to make the phrase "a jury of one's peers" not accurate. Problems creep into things, however, when we transition from ideals to tangible policy and I think that is the case here.

First, has anyone given any thought or study to see if such a problem exists? Is there, in fact, a disparity in the number of minority jurors? If so, is there a certainty as to the cause of that disparity? These questions, if they haven't already enjoyed it, should have primacy beyond any proposed solution because, no matter how well intentioned, any change to a system is bound to bring with it unintended consequences. Unintended consequences which may or may not be foreseeable. We should be wary in seeking out solutions to things which may not be a problem, lest we solve nothing while creating other problems for ourselves.

Beyond the foundational issue above, I have major concerns with the standard defined and set forth in Parts (C) and (D) concerning how to determine if bias was used, and the proposed changes in Part (E) (ii).

As written in the proposed rule change Part (C), the standard for detecting bias in dismissing a juror is that "an objective observer could viewrace or ethnicity as a factor in the use of the peremptory challenge." My goodness. If a judge were to step in on jury selection and put his or her hand on the

scale (while at the same time impugning the character of the lawyer before the court), shouldn't we seek something stronger than this? I understand how textbook cases are supposed to look and this rule sounds fine in theory. After all, we have seen enough TV and movie courtroom dramas to know these things are plain and simple to detect: a snide suit-wearing white lawyer sneers with disgust at a black juror before summarily dismissing her (usually with a Southern drawl to really drive the point home).

But we, again, run into a problem of ideals vs. implementation here. Such a nebulous standard as "an objective observer could view" something is nowhere near specific enough to avoid a whole host of guesses by one individual. A judgement call made by one individual which, if you believe the theories underpinning this proposed rule, is staggering under the weight of his or her own hidden and revealed biases. Even adding in the guidance provided in Part (D) (i - v), I remain unconvinced. For each criterion listed, I could, given enough time, give you two or three reasons which have nothing to do with racism or bias to explain it.

No, these rules are not bedrock certainty. They are shifting sand which could have a direct effect on the outcome of a criminal trial. This is not good. This is not what we demand of a proceeding which can take away a citizen's freedom. It might be more tolerable if any judge's decision could be subject to review by another via a fair appeal. If I have understood correctly, however, there is no mechanism to appeal this determination, and even if there were, how could it be trusted? Appeals go back to review things that have happened and do not do so firsthand. Absent even the prospect of a fair appeal, I say this standard is so fraught with problems as to negate serious consideration.

Moving on to the proposed change listed in Part (E) (ii), I, along with Russel and Hoffman and for the same reasons, object to the proposed rule that would prohibit excluding a juror because he or she "express[s] a distrust of law enforcement or a belief that lawenforcement officers engage in racial profiling." Let me illustrate why with a story. My father was told once by the defense attorney who had dismissed him as a potential juror (this was a small town so everyone knew everyone) that engineers don't make good jurors for the defense because they're too fact oriented; i.e. that they don't ever consider mitigating factors, only "did the guy do it or not". I know my father well enough to believe that he would have been, despite what this lawyer said, fair. At first blush, it might seem that automatically excluding someone for a distrust of police would be as thoughtless as excluding someone because he or she was an engineer. And it would seem that way for the same reason: it is still possible to be fair despite either condition.

The thing is, if we're to allow either side in a criminal proceeding to have peremptory challenges, then they should be able to weigh what they feel are relevant attitudes or orientations that would put their client at a disadvantage, *provided they do so without respect to race or some other immutable characteristic*. I am just as okay with the dismissal of a potential juror who believes police use racial profiling (and happens to be black) as I am in the dismissal of an engineer (who happens to be white) or vice versa.

That brings me to my final thoughts. If there is enough concern about peremptory challenges to warrant such a rule, why not get rid of them entirely? I am not in agreement, absent seeing evidence of racism and not just statistical associations, that a problem exists, but if the urge to do something is

eating at the members of our judiciary, please abolish the rule rather than trying to patch it up with what I read in the report. I believe it would be best for all to either leave the rule as is pending research into the question of racial exclusion from jury service or to eliminate peremptory challenges altogether.

Thank you for your time and consideration.

Cory

stevens, cheryl

From: Morris Hoffman <[redacted]>
Sent: Monday, January 16, 2023 5:47 PM
To: supremecourtrules
Subject: [External] Comments on Proposed Changes to Crim. P. 24

To the Justices of the Colorado Supreme Court

Dear Justices:

I write to express my opposition to the changes being proposed to Crim. P. 24 regarding Batson-type challenges to the peremptory striking of prospective jurors. I was a member of the Advisory Committee on the Rules of Criminal Procedure when these rule changes were first proposed, voted against the proposed changes, and co-authored the minority report. I continue to hold the positions taken in that minority report, and will not repeat all of them here. But since I retired shortly after that report was delivered to the Court, I now feel a little freer to emphasize some of those objections in less restrained language.

First, and perhaps most important, these proposed changes are solutions in search of a problem. I was a district judge for 30 years, during which I tried 426 jury trials. I can recall just 2 Batson challenges. The fact is, at least in my experience, people of color are not being excused by racist prosecutors. In fact, the opposite is true. Prosecutors in my courtroom seemed so fearful of being branded racists--which, of course, is what a Batson challenge amounts to--that I can't tell you how many times they refrained from peremptorily challenging people of color when it seemed to me they should have been challenged. Indeed, I have even seen prosecutors fail to challenge people of color for cause, presumably feeling this same chill.

Admittedly, my experience is just one small slice of data, but it is the proponents of this rule, not opponents, who must bear the burden of showing there is a problem that needs fixing, and they have utterly failed to do so. The proponents fail to cite a single empirical study that even suggests let alone shows that people of color are being peremptorily excused in Colorado disproportionately. I am quite familiar with the national literature and with the sorry racist history of peremptory challenges; indeed, I wrote a law review article on this very topic way back in 1997. Peremptory Challenges Should be Abolished: A Trial Judge's Perspective, 64 U. Chi. L. Rev. (1997). The peremptory challenge as originally formulated in England wasn't peremptory at all, but rather was a challenge for cause made by an infallible king's infallible prosecutors. It achieved its popularity in the United States during Jim Crow, as an incredibly effective way to keep blacks off juries. It seems from the scant literature I've managed to find that peremptory challenges may still be accomplishing their racist goal in a handful of jurisdictions around the country. But not in most places, and not here. There is not a scintilla of evidence that this is a problem in Colorado.

There are some legitimate race-based problems in our jury selection processes--including underrepresentation in the venire as a whole--but there is no evidence that black or brown people are being disproportionately excused during voir dire, either peremptorily or for cause. Indeed, the proponents seem to admit as much when they say the real target of this reform is the perception of bias, not bias itself. Top of p.5, Majority Report.

They also rely on the wildly popular but largely discredited phenomenon of "implicit bias" to argue that Batson is not getting at the whole problem of racial bias during jury selection. But of course if implicit bias were a real problem, then it would show up in the real results, just like explicit bias would. That is, there would be data that people of color are being disproportionately challenged. But there is no such data.

This empirical failure repeats the central failing of the whole "implicit bias" cottage industry: not a single study, not one, has ever correlated IAT scores (the usual metric for measuring implicit bias) with actual biased behaviors. That is, even apart from its troubling methodological failings, the whole implicit bias inquiry seems to have nothing to do with how people actually act. It is an immature science that has been hijacked by politics. Here's a recent and accessible summary of its methodological and conceptual failings, along with a good description of how people are using it (as the proponents here are) in ways that it should not be used: L.

So, there seems to be no reason for these proposed changes, other than, perhaps, to make proponents feel better about themselves by signaling their non-racism, and the misplaced hope that such virtue signaling will increase the public's perception about the fairness of our processes. But the cost of these unnecessary changes will be steep, and in the end they will suffer from all the irreducible imperfections of Batson itself.

I will not detail every technical problem I see with the new proposed process, but will instead focus on one that I think best symbolizes the misguided nature of this effort. Section 5(E)(ii) of the new rule includes in its laundry list of presumptively invalid reasons to peremptorily exclude jurors the reason that the juror has expressed "a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling." So, a juror who says she trusts police or doesn't believe they engage in racial profiling may be peremptorily excused by the defense, but a juror who says the opposite may not, presumptively, be excused by the prosecution. How could the Court possibly entertain such a palpable asymmetry? The proponents will say the latter hides some "implicit bias" but of course we know there is no connection between implicit bias and behavior.

I am afraid that many of these presumptively invalid reasons are simply the wolves of racism dressed in the shiny new sheep's clothing of social justice. In the name of fighting terrible stereotypes the proponents engage in the worst kind of stereotyping. Most black and brown people, don't you see, distrust police, and most white people trust them. Most black and brown people live in crime-ridden neighborhoods, and most white people don't. (Living in such neighborhoods is another presumptively invalid reason for striking a prospective juror.) That's why, so the argument goes, that presumptively taking these reasons off the table will increase the number of black and brown citizens on our jurors.

The proponents would be better off with a rule that said simply "Black and brown people cannot be peremptorily excused." At least that would be honest. (And, indeed, some wacky academics have actually proposed that there be a kind of reverse peremptory challenge--where each side could designate prospective jurors whom the other side could not peremptorily challenge.)

Perhaps the most telling aspect of this proposal is how its first iteration fared before the committee. The vote was divided exactly along professional lines. Every defense lawyer voted in favor of it, every prosecutor voted against it, and a couple of my judicial colleagues made the difference. The final vote was 7-5. I suggest there is probably something terribly wrong with any rule supported by only one segment of the bar and opposed by their professional opponents. I was on the committee when we hammered out the new death penalty rules, and even then we were able to find more common ground than this proposal managed to garner.

One final point. The real culprit behind any racial discrimination in the use of peremptory challenges is not the irreducible ineffectiveness of Batson, but peremptory challenges themselves. Yes, Batson is not perfect, and its whole construct--of identifying a few types of prospective jurors who sometimes cannot be peremptorily challenged without the challenging lawyer giving a race-neutral reason--suffers from the problem many lawyers and judges have seen: it simply drives challengers to come up with more creative, permitted, reasons. This proposal will do exactly the same, at the additional price of being racist itself and patently biased against prosecutors.

If lawyers really cared about racial bias during jury selection, they would support the abolition of peremptory challenges, as the state of Arizona has done recently. But lawyers don't really want unbiased jurors; they want jurors secretly biased in their favor. The only reason I can fathom why every defense lawyer on the committee was in favor of this proposal and every prosecutor against it, is not that defense lawyers care more about participatory democracy than prosecutors do, but that both sets of lawyers think more jurors of color will result in more acquittals and hung juries--which of course is itself the epitome of racist stereotyping. This also explains, by the way, why the proponents don't seem to care about gender bias: they don't have universal stereotypes about whether women jurors are good for their side or not.

I am saddened and angered about this proposal. I thought this profession that I practiced for 30 years was about finding truth, about justice for individuals. I used to tell defendants that the courtroom was a kind of altar of individual responsibility. Here, it didn't matter who you were, how far you went in school, who you knew, or what color you were. I thought the courtroom was to be color-blind, not color obsessed. This ideal applies to jurors every bit as much as it applies to defendants. I will never forget the elderly black man who cried during voir dire when asked about how many times he'd been stopped by police for no reason, and who then proceeded to be the foreperson who convicted a young black man of homicide in a very close ID-type case. But I suppose we don't care about that "outlier" juror anymore, because he doesn't fit the color-obsessed narrative in which all group members believe the same and behave the same.

Peremptory challenges have turned jury selection into a kabuki theater of trying to learn just enough about a juror to decide whether she'll be biased in favor of your client, without tipping off the other side. This is gamesmanship, not justice. And this proposal inflames the game with more race-consciousness, not less. It is supposed to make us all feel a little bit better about the game by signaling our racial sensitivities. But those racial sensitivities are themselves crass racial stereotypes. If we really believed there was still massive race bias in the exercise of peremptory challenges, we would, as Justice Thurgood Marshall said so long ago in his Batson concurrence, end peremptory challenges themselves. They are the problem, if there even is one; the rest of this is woke window dressing.

For all these reasons, I respectfully request that the Court reject this proposal to amend Crim. P. 24. And while I'm at it, at the risk of going beyond this remit, I respectfully request that the Court consider abolishing (or severely reducing the number of) peremptory challenges.

Very truly yours,

Morris B. Hoffman
District Judge (ret.), Second Judicial District
[redacted]

OFFICE OF THE STATE PUBLIC DEFENDER

MEGAN A. RING
STATE PUBLIC DEFENDER

January 25, 2023

January 25, 2023

Colorado Supreme Court
Ralph L. Carr Judicial Center
2 E. 14th Street
Denver, Colorado 80203

To the Justices of the Colorado Supreme Court,

As Colorado State Public Defender, I write to urge the Supreme Court to adopt the Criminal Rules Committee's majority recommendation that Crim.P. 24 be amended to address implicit bias in jury selection.

The mission of the Colorado State Public Defender is to defend and protect the rights, liberties, and dignity of those accused of crimes who cannot afford to retain counsel. Many of those accused are people of color. Our office, the courts, and the legal profession as a whole aspire to create a fair system for all. We have formed task forces and subcommittees, offered trainings on implicit bias, and created new positions emphasizing diversity, equity, and inclusion. Yet with all of these efforts minoritized communities continue to be underrepresented on jury panels. Their diverse voices remain silenced in making crucial and life-changing decisions in jury rooms. We, as a system, must do more.

Some opponents of the proposed changes to Crim.P. 24 argue that our courts should continue to allow peremptory challenges to jurors from minoritized communities who express a distrust of law enforcement. Yet our judiciary includes many judges whose lived experiences echo those of the jurors being excluded. Just as the lived experiences of these judges do

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not disqualify them from service, or mean that they will be unfair to prosecutors or law enforcement, a prospective juror's distrust of or negative experiences with law enforcement alone cannot continue to be a basis for disqualification from jury service.

Batson v. Kentucky was decided nearly thirty-seven years ago, in April of 1986, against a background of growing awareness of racial injustice. *Batson* was not the first case to recognize that jurors must not be excluded from service based on race or ethnicity.[1] Nor was it the last word on the subject. The law continues to evolve and must now, in the context of today's culture, recognize and directly address the very real impacts of implicit bias in jury selection.

This proposed rule change recognizes that racial bias exists even when it is not loudly spoken. It recognizes the difficulty inherent in *Batson*'s purposeful discrimination requirement – that judges, prosecutors and defenders may be reluctant to call out fellow practitioners based on racial and ethnic bias. By laying out a workable and effective framework to combat implicit bias, the proposed rule acknowledges that unspoken but real discrimination undermines our system's promises of fundamental fairness and equal protection.

By adopting the proposed changes to Crim.P. 24, this Court has the unique opportunity to advance fairness and equality in the justice system. I urge the Court to make this change.

Sincerely,

Megan A. Ring
Colorado State Public Defender

[1] *See Strauder v. West Virginia*, 100 U.S. 303, 1879.; *Swain v. Alabama*, 380 U.S. 202, 1965.

January 23, 2023

The Colorado Supreme Court
2 E. 14th Street
Denver, CO 80203
via email: supremecourtrules@judicial.state.co.us

Re: Crim.P. 24 proposed rule change

Honorable Justices:

I write in support of the proposed rule change to Crim.P. 24. In the last legislative session, I testified at the Senate Judiciary Committee hearing on SB22-128. That statute's language was substantially similar to the proposed rule change currently before the Court. The Colorado District Attorneys Council (CDAC) unanimously opposed the bill, both at the hearing and in the stakeholder conversations that preceded it. That opposition centered on two arguments: that more prosecutor training alone will solve the problem of illegal peremptory challenges, and that making a prospective juror's distrust of law enforcement a presumptively invalid justification for a peremptory challenge is unfair and unnecessary. I will address both those arguments in this letter.

Training alone will not prevent excluding people of color from jury service.
After George Floyd's murder, calls for training on diversity, equity, and inclusion (DEI) as a universal panacea to racial inequities have become ubiquitous. In 2020 alone, the American market for EDI training grew to $3.4 billion, and is projected to reach $17.2 billion globally by 2027.[1] I was the State Training Director for the Colorado Public Defender from 2004-2017. In that position, I both taught and designed training opportunities for lawyers, investigators, social workers, and administrative staff. And I learned that teaching specific skills and information (e.g., how to cross-examine a witness; how to pick a jury; how to use a database; what new statutes and opinions signify) is an achievable and measurable goal, but trainings focused on changing hearts and minds is not.

[1]Singal, "Diversity Trainings Don't Work. Here's What Could" *New York Times* (Jan. 17, 2023).

There is little data to support CDAC's insistence that lawyers can be trained out of letting bias inform peremptory challenges. The authors of a 2021 article that reviewed DEI training data from 2007-2019 concluded that "we did not find a broad evidence base on which to draw conclusions about the efficacy of diversity training."[2] The disconnect between DEI training and measurable outcomes strongly suggests it is little more than window dressing, and casts doubt on CDAC's faith that such training (which it presumably already provides) will eradicate racial bias in criminal jury selection.

Attitudes about law enforcement are often tied to a prospective juror's race.
Under the proposed rule, a prospective juror's prior contact with law enforcement; expressing distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; or having a close relationship with people who have been stopped by police, arrested, or convicted of a crime are presumptively invalid reasons for a peremptory challenge. This language simply reflects the reality that minority community members often experience harsher and more frequent interactions with law enforcement and the criminal justice system than their white counterparts. For example, the Denver Police Department just released data on police shootings for 2015-2022. Those numbers show that 48% of people shot by Denver Police were Latino; 23% were Black; and 26% were white.[3] Latinos account for roughly 30% of the City's population; Blacks account for 9.9%; and whites account for 80%. Statewide, the 2019 CLEAR report shows similar racial disparities in criminal arrests and charges.[4]

Of course, if a prospective juror's mistrust of law enforcement is not tied to that person's race, the peremptory challenge would not fall within the proposed rule's purview, which is to prohibit excluding potential jurors based on race or ethnicity. And nothing in the proposed rule prevents a party from questioning a prospective juror to develop the basis for a challenge for cause if the juror is unable to follow the court's instructions based on perceptions about the police that cannot be set aside for purposes of trial.

During stakeholder work and testimony on SB22-128, opponents complained that failing to make a peremptory challenge based on a prospective juror's trust and support of law enforcement presumptively invalid is unfair. That argument ignores

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[2] Paluck, Porat, Clark and Green, *Prejudice Reduction: Progress and Challenges*, Annu. Rev. Psychol. 2021 72:533 at 542.
[3] https://kdvr.com/news/data/black-hispanic-people-disproportionately-shot-by-denver-police/
[4] https://cdpsdocs.state.co.us/ors/docs/reports/2020-SB15-185-Rpt.pdf

both the reality of race and policing in Colorado and the rest of the country, and the historic evil *Batson* addressed: excluding *minority* community members from jury service based on their race. "Trust in police officers and the institution of policing is invariably tied to multiple factors, such as satisfaction and experiences with police."[5] As a result, "race and personal experience with police [are] two of the strongest predictors of attitudes toward police[.]"[6]

Allowing either of these two arguments to derail the proposed rule change would be a real loss for criminal justice in Colorado. "Representative juries are indispensable to reliable, fair and accurate trials, especially in serious criminal cases. "The absence of racial diversity on juries leads to outcomes that are less reliable, inflicts injury on people of color who are excluded, and undermines the integrity of the entire criminal legal system."[7] As Washington State has shown, adopting the proposed rule change in Colorado will neither consume more trial time nor be difficult for trial courts to implement (especially given that less than 1.5% of Colorado criminal cases proceed to trial). But it will likely increase the number of minority community members who sit on Colorado juries, as it did in Washington, and that will strengthen public confidence that access to our state courts is not influenced by race. In *Pena-Rodriguez v. Colorado*, eight members of the Supreme Court reaffirmed that "[p]ermitting racial prejudice in the jury system damages both the fact and the perception of the jury's role as a vital check against the wrongful exercise of power by the State." 580 U.S. 206, 223 (2017).

The Criminal Rules Committee has worked diligently to present this proposed rule change. I respectfully urge this Court to adopt it.

Sincerely,

Ann M. Roan

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[5] Pryce and Gainey, *Race Differences in Public Satisfaction With and Trust in the Local Police in the Context of the George Floyd Protests: An Analysis of Residents' Experiences and Attitudes*, 35 Crim. Just. Stud. 74, 76 (2022).
[6] *Id.* at 79.
[7] Sommers, *On Racial diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, Jour. Pers. & Soc. Psych. 90, no. 4 (2006): 606-08; Peter-Hagene, *Jurors' Cognitive Depletion and Performance During Jury Deliberations as a Function of Jury Diversity and Defendant Race*, Jour. L. Hum. Beh. 43, no. 3 (2019): 247.

SAM CARY BAR ASSOCIATION

The Honorable John Dailey
Chair, Colorado Criminal Rules Committee
Colorado Court of Appeals
2 East 14th Avenue
Denver, CO 80203

Re: Proposed amendments to Rule 24

Dear Judge Dailey and members of the Criminal Rules Committee:

I am writing on behalf of the Sam Cary Bar Association to support the proposed amendments to Rule 24 advanced by the Criminal Rules subcommittee. The Sam Cary Bar Association was founded in 1971, when there were less than 15 Black lawyers practicing in Colorado, with the goal of instilling professionalism and facilitating the exchange of ideas among Colorado's Black lawyers. Currently, we have over 150 members.

In particular, there are two provisions of the proposed amendment without which peremptory challenges motivated by racial bias (whether consciously or unconsciously held) will continue to prevent full participation by all community members in Colorado's criminal courts. The Sam Cary Bar Association believes that any amendment that does not include these provisions will represent a missed opportunity both to address a real problem and to increase the confidence people of color currently have in Colorado's criminal courts. Further, it will continue to hinder the ability of segments of our society from being able to participate in the judicial process.

Section (5)(C)
This section provides that the standard for sustaining an objection to a peremptory challenge is whether "an objective observer could view race or ethnicity as a factor." This change solves the problem created by *Batson* that a trial court find explicit racist intent by the challenging party in order to deny a peremptory challenge. This section's language reflects the truth that implicit racism, by its very nature, is never a conscious choice.

Batson's greatest flaw is the assumption that courts can "confront and overcome their own racism on all levels—a most difficult challenge to meet[,]" in order to recognize when a peremptory strike is race-based. *Wilkerson v. Texas,* 492 U.S. 924, 928 (1989) (Marshall, J., dissenting from denial of certiorari). The minority report's suggested language ("*was* a *significant* factor") continues to require trial courts to make a finding that the challenging party acted with racist intent. Additionally, it would actually increase the barrier to denying a peremptory challenge beyond *Batson* itself: under the

minority report's formulation, even if the trial court concluded a peremptory challenge was motivated by the prospective juror's race it would be unassailable as long as that motivation was not "significant," which is an inherently ambiguous term. We strongly disagree that language protecting peremptory challenges that are motivated by racial bias *in any way* should have a place in Colorado's procedural rules.

Section (5)(E)(ii)

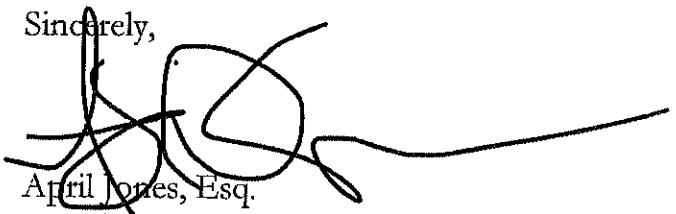
"Race cannot be a proxy for determining jury bias or competence.... We may not accept as a defense to racial discrimination the very stereotype the law condemns." *Powers v. Ohio,* 499 U.S. 400, 410 (1991). Section (5)(E) lists precisely those kinds of stereotypes as presumptively invalid justifications for a peremptory challenge on objection. We understand that there is disagreement in particular with section (5)(E)(ii), which presumptively invalidates a peremptory challenge explained by a prospective juror's expressed distrust of law enforcement or belief that law enforcement officers engage in racial profiling. Removing that from the proposed amended rule would mean that peremptory challenges of prospective jurors whose lived experiences have fostered these perspectives will likely continue to survive objections by the opposing party.

Data supports the conclusion that minority community members more often have negative interactions with law enforcement than do white community members. For example, 2019 data from the Aurora police department established that 50% of the people police struck, tackled, pepper sprayed, Tased or shot were Black, although just 16% of the city's population is Black. And 2019 data from the Denver police department shows that 27% of the people police used force against were Black, although just 10% of Denver's population is Black.

Removing (5)(E)(ii) from the proposed amended rule fosters the stereotype that people of color who distrust the police or believe that law enforcement engages in racial profiling are properly disqualified from jury service. If a prospective juror's voir dire responses established both that he or she held one or both of those beliefs *and* that as a result there was an inability to follow the applicable law, a challenge for cause is the proper vehicle to be removed from service. If the trial court refused to grant the challenge for cause, a peremptory challenge would be proper, based on the juror's statement that he or she would not follow the applicable law. By removing (5)(E)(ii) from the list of presumptively invalid reasons, any prospective juror who articulated one or both of those beliefs based on their lived experience as a member of a minority community historically subjected to police excesses could be excluded from jury service based on only the stereotypical belief that they would always vote for acquittal in a criminal case, regardless of whether the truth of that stereotype applies.

We would like to thank the members of the Criminal Rules Committee for considering the position of the Sam Cary Bar Association on the proposed amendments to Crim.P. 24 and we hope that you will fully support the proposed amendments to Rule 24.

Sincerely,



April Jones, Esq.
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January 25, 2023

To: Colorado Supreme Court
2 E. 14th Avenue,
Denver, CO 80202
supremecourtrules@judicial.state.co.us *via electronic delivery*

Re: Proposed changes to Colorado Rule of Criminal Procedure Rule 24

Greetings:

I write regarding the proposed changes to Colorado Rule of Criminal Procedure Rule 24. By way of introduction, I am the elected District Attorney for the Sixth Judicial District, and a member of the Colorado Supreme Court Advisory Committee on Rules of Criminal Procedure. I participated on the subcommittee that considered changes to this rule, and voted against the proposal currently before the Court.

Let me begin my remarks by stating unequivocally that discrimination of any kind has no place in our justice system. We have seen American jurisprudence march toward the elimination of discrimination and bias on many fronts, with the trend escalating dramatically in the last 75 years. While we can take it as a positive that the American system of justice has made significant progress in eradicating discrimination and bias, it is also a sign that there is significant work yet to be done, and that discrimination, based on a whole host of reasons, remains endemic in our great nation.

The Colorado Supreme Court now has before it the difficult task of trying to eradicate unconscious bias in the jury selection process. The Colorado Supreme Court Advisory Committee on Rules of Criminal Procedure has advanced a proposal to change Crim.P. Rule 24 (d) which purports to address this issue. However, the proposal has major flaws should either be rejected outright or undergo major modifications by this court prior to its adoption.

Should the Court Adopt any Rule?

As an initial matter, the Court should carefully consider whether to adopt a rule on this topic. Conceptually, the idea behind the rule is problematic; how can we create a rule designed to prohibit *unconscious* influences on our decisions? Rules require conscious, deliberate actions. They guide our behavior by telling us what we can and cannot do when we make choices and decisions. This proposal asks the Court to adopt a rule designed to prohibit certain *unconscious* mental processes from impacting a lawyer's decision to use a peremptory challenge. By definition, the lawyer does not realize they that are being influenced by their unconscious mind, so this rule will neither eliminate the issue nor modify the behavior of the attorneys involved.

The Court should remove or modify the list of presumptively invalid reasons in subsection (E)

This begs the next question presented by this proposed rule – *how* does a court go about determining whether a litigant is being influenced by a prohibited unconscious bias?

Under the current state of the law, when a court goes about determining if a person is being unduly influenced by bias or prejudice during jury selection, the trial court is directed to examine the person's statements, as well as their demeanor, behavior, credibility, sincerity, and other factors that reveal their intent. [1] However, when a person is being influenced by unconscious bias, the tell-tale signs that reflect a person's conscious intent or actual bias are less obvious to an outside observer.

It is for this reason that the drafters of the proposed rule instead turn to proxy indicators to determine whether a peremptory challenge is being used based on improper unconscious bias. The reasons listed in subsection (E) of the proposed rule are those proxy indicators of unconscious racial bias, which include:

> (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.

The proponents of the rule argue that prohibiting these reasons as the basis for a peremptory challenge will increase representation of people of color on juries, and that this will act as a sort of counter-balance against the influence of unconscious bias, which, they argue, is a the reason behind disproportionately low numbers of people of color on juries.

I have several thoughts on this.

It is not a given that unconscious bias the leading reason behind disproportionately low numbers of people of color being on juries. Low turnout is based on a whole host of reasons, including ineffective or defective summons techniques for prospective jurors of color,[2] inability to

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[1] *See Carillo v. People*, 974 P.2d 478, 486 (Colo. 1999).

[2] *See* Task Force on Race and the Criminal Justice System, *Preliminary Report of Race and Washington's Criminal Justice System*, at 29 (2012) ("African Americans, Native Americans and Latinos are more likely to be economically disadvantaged, have unstable employment, experience more family disruptions, and have more residential mobility.")

attend jury service due to familial, work, or other obligations or priorities,[3] and negative experiences or cynicism regarding the legal system, among others. These issues are not fixed or even addressed by this proposed rule.

Nor is it a given that banning these reasons for peremptory challenges will increase the number of people of color on juries. As lawyers become accustomed to the rule and avoid (consciously or unconsciously) these reasons to justify a peremptory, but still have significant unconscious biases against people of color, they will simply find other reasons to dismiss these jurors. Instead, the Court must find a way to address the root cause of the behavior. Addressing unconscious bias requires training and education that bring the unconscious predilections of the person forward and the makes the mind conscious of them, allowing the person to understand their biases and mitigate their impact. A rule requiring annual training on this topic for attorneys in Colorado would be a *much* more effective tool for eliminating unconscious bias that simply banning a list of reasons for peremptory challenges.

Most importantly, the list of proxy reasons listed in subsection (E) is inherently flawed. The first three reasons listed in subsection (E) are extremely concerning, culminating with (E) (ii): "expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling." One of the main roles of a juror is to consider the credibility of the witnesses who testify, and both sides to the lawsuit deserve jurors who are fair and impartial.[4] Trial courts must "ensure that the jury is impartial and indifferent," and voir dire protects the litigants' rights to an impartial jury by providing them with the ability to discover juror biases and prejudices. [5] Instead, these three prohibitions will substantially limit the prosecution's ability to get a fair jury by preventing the use of peremptory challenges for jurors who have pre-existing biases, whether conscious or unconscious, against the state's law enforcement witnesses.[6] [7] Having a distrust of law enforcement or having had a bad experience with police are entirely legitimate reasons for the prosecution to use a peremptory challenge, and prohibiting peremptory challenges for these reasons will lead to juries who are unable

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[3] Alexander E. Preller, *Jury Duty is a Poll Tax: The Case for Severing the Link Between Voter Registration and Jury Service*, 46 Colum. J.L. 1, 1–2 (Fall 2012) ("For many, [the] inadequate compensation [afforded to jurors] is simply inconvenient, but for those who are self-employed, hold multiple part-time jobs, or are dependent on tips as part of their compensation, potential loss of income is critical and they do whatever they can to avoid [jury duty]."

[4] It is axiomatic that jury selection is designed to ensure that the litigants receive a fair trial by fair and impartial jurors. *See* §16-10-103, C.R.S.; *People v. Mackey,* P.2d 910 (Colo. 1974) (Voir dire examination is conducted in order to enable counsel to determine whether any prospective jurors possess beliefs that would cause them to be biased in such a manner as to prevent a party from obtaining a fair and impartial trial.); *see also Blades v. DaFoe,* 704 P.2d 317, 320 (Colo. 1985) (All litigants who are entitled to a jury trial in a proceeding, whether civil or criminal, are entitled to fair and impartial jurors.) The touchstone of a fair trial is an impartial trier of fact, "a jury capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips,* 455 U.S. 209, 217 (1982). A biased juror may not serve because he or she could poison the defendant's right to a fair trial. *See People v. Drake,* 748 P.2d 1237, 1243 (Colo.1988).

[5] *Morgan v. Illinois*, 504 U.S. 719, 727 (1992); *see also United States v. Mitchell*, 690 F.3d 137, 141 (3d Cir. 2012); *Dingle v. State*, 759 A.2d 819, 823 (Md. 2000); *State v. Allen*, 800 So. 2d 378, 386 (La. Ct. App. 2001).

[6] One may argue that such jurors will be excused for cause, however, it is well documented that unfair jurors often pass challenges for cause via rehabilitation or claiming that they will follow the law despite their biases. *See Morgan*, 504 U.S. at 735; *People v. Harlan*, 8 P.3d 448, 463 (Colo. 2000); *People v. Merrow*, 181 P.3d 319, 321 (Colo. App. 2007); *Leick v. People*, 322 P.2d 674, 693 (1958).

[7] Is it not obviously contradictory to the message of eradicating bias to prohibit removal via peremptory challenge of jurors who have a bias that prevents them from being fair?

to be fair and objective regarding prosecution witnesses. Furthermore, prohibiting use of peremptory challenges for the reasons listed in (E) (i), (ii), and (iii) does not guarantee an increase in racial diversity on juries. In my jurisdiction, as in many jurisdictions in rural Colorado, the vast majority of people who met the criteria listed in those three subsections are Caucasian/White, and people of all races and ethnicities may have those perspectives. Thus the reasons listed (E) (i), (ii), and (iii) are too attenuated from race and ethnicity to meet the promise of increased racial diversity for juries. Prohibiting use of peremptory challenges for these reasons does not guarantee an increase in racial diverse jurors, but it does guarantee an increase in unfair jurors. In essence, this portion of the rule asks the Court to trade away the fairness of the jury for the promise of increased racial diversity; this type of Faustian bargain is dangerous and inadvisable.

The list also unfairly excludes other categories of historically marginalized people. Bias and discrimination in jury selection clearly exists for other reasons beyond race and unfairly impacts many other categories and classes of people than people of color. Gender bias in jury selection has been identified and addressed by the Supreme Court in an important line of cases. [8] More recently, litigants in federal courts are raising the issue of religious discrimination during jury selection. [9] Encouragingly, federal courts are addressing the issue of discrimination based on sexual orientation in jury selection. [10] Why then does this proposed rule focus on only one specific group who suffers from discrimination?

In part, the rule focuses on race and ethnicity because it becomes a practical impossibility to extend the concept behind the rule to other groups. Subsection (E) is based on a colloquial list of reasons given to justify use of peremptory challenges on people of color. [11] Conceptually, the idea of creating a list of prohibited reasons for use of a peremptory is flawed for the reasons stated in the preceding paragraphs. It is even more flawed when one tries to extend the concept to include other marginalized groups. How does one go about creating a similar list addressing gender? What about sexual orientation? What about religion? People with disabilities? Gender orientation? People who suffer from poverty? How long does the list get? At some point, the practical utility of such an

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[8] *See Taylor v. Louisiana*, 419, U.S. 522 (1975) (holding that women cannot be systematically excluded from jury panels from which petit juries are drawn), *Duren v. Missouri*, 439 U.S. 357 (1979) (holding that automatic exemption from jury duty based on gender violated the Sixth Amendment), and *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994) (holding that discrimination on the basis of gender in use of peremptory strikes during jury selection violates equal protection clause.)

[9] S*ee Bronshtein v. Horn,* 404 F.3d 700 (3d Cir. 2005) (suggesting that religious affiliation-based peremptory challenges are unconstitutional); *United States v. Dejesus*, 347 F.3d 500 (3rd Cir. 2003) (arguing in favor of extending *Batson* protections to religion-based peremptory challenges); *United States v. Stafford*, 136 F.3d 1109 (7th Cir. 1998) (same); *State v. Davis*, 504 N.W.2d 767 (Minn. 1993) (noting that lawyer argued to extend *Batson* protections to religion-based peremptory challenges, but court declined to do so).

[10] *See SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014) (holding that discrimination based on sexual orientation in use of peremptory strikes during jury selection violates equal protection clause).

[11] Significantly, there appears to be no data, statistical, or actuarial support before the court for the inclusion of the factors in subsection (E).

approach expires and the rule becomes unworkable as it becomes longer, more complex, and more confusing.[12]

Thus, I believe that if the Court is going to adopt a rule designed to address unconscious bias, the rule should be broad enough to address *all* types of unconscious bias, not just one specific type of bias. This is the proper message the Court should send to society, i.e. that the Court sees and recognizes *all* groups who have been historically marginalized and subject to unconscious bias in the justice system. The Supreme Court has the chance to craft a rule that addresses all those who suffer from unconscious bias in jury selection, and it would be yet another injustice to these historically marginalized groups to exclude them from the process again.

It is for these reasons that I believe that the entirety of subsection (E) should be stricken from the rule. This would refocus the rule on the trial court's observations, based on a totality of the circumstances, as to whether the peremptory challenge was based on unconscious bias or prejudice. [13] This change creates a much more flexible rule that encompasses a wider range of possibly improper reasons for the use of a peremptory challenge, [14] and addresses the concerns of a wider range of historically marginalized groups.

The standard of decision in subsection (C) should be modified

Subsection (C) of the proposed rule addresses the standard of decision a court must employ in determining whether a litigant has improperly used a peremptory challenge based on unconscious bias or prejudice. The proposal standard set forth in the rule is "[i]f 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." I feel this is a standard is flawed for several reasons.

I propose that standard should be replaced by a determination by the *trial judge* that unconscious bias *was* a *substantial* or *significant* factor.

By substituting the "objective observer" for the trial court, the standard creates unnecessary complication and confusion. The decision should be vested with the trial court as it is in the best position to determine if a peremptory challenge was motivated by an improper reason. [15] This is

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[12] This is in contravention of the purposes of the Rules of Criminal Procedure, which are meant to be simple, fair, and broad enough to encompass a wide variety of situations. *See* Crim.P. 2 ("These Rules ...shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.")

[13] Of course, a party would still be able to argue the reasons listed in subsection (E) in support of their positon, and thus the removal of that subsection does not truly hamper the rule's effectiveness as to racial or ethnic unconscious bias.

[14] *See Id; see also People v. Flockhart*, 304 P.3d 227, 236-37 (Colo. 2013) (recognizing that the Rules of Criminal Procedure grant broad discretion to the trial court in conducting voir dire).

[15] *See* fn. 2, citing *Carillo,* 974 P.2d at 486 . Appellate Courts usually accord great deference to the trial court's handling of a challenge for cause because such decisions turn on an assessment of the juror's credibility, demeanor, and sincerity in explaining her state of mind. *See id.* at 485–86; *Russo,* 713 P.2d at 362.

especially important in the cases of determining whether unconscious bias was behind the peremptory as the observations of the trial court have a heightened significance in assessing such a difficult question. Further, by vesting the decision with the trial judge, appellate review would be under the "abuse of discretion" standard, [16] as opposed to the objective observer which would trigger "*de novo*" review as it is a question of law. [17] This important distinction gives deference to the observations and findings of fact from trial court, who is in the best position to observe them, whereas *de novo* review leaves the appellate court with only a cold record to discern the intricate unconscious mental processes of the attorney making the peremptory challenge, an extremely difficult task. [18] Further, *de novo* review from a cold record is much more likely to result in reversals by the appellate courts, reducing finality and increasing caseloads, backlogs, and uncertainty.

Further adding to the problems that would be generated by the proposed rule is use of the "*could* view" standard regarding whether the peremptory was motivated by unconscious bias. The *could* view standard invites speculation and uncertainty by saying it *might* have been unconscious bias that motivated the peremptory, a vague and confusing idea. Courts should not base their decisions about such an important issue upon speculation, and should instead base their decisions on actual proof and evidence. The *could* view standard also makes exercise of the peremptory almost impossible to defend; in order to uphold the use of a peremptory, the court would have to find that the challenge could not have *possibly* been motivated by unconscious bias or prejudice. As one commentator noted, "[e]verything that is known about implicit bias militates against such a conclusion being possible." [19] The outcome is that the parties would almost never be able to defend a peremptory on a non-white juror despite a myriad of legitimate reasons for the challenge.

Finally, the standard is too low in that if unconscious bias or prejudice was "a factor", i.e. that it played *any role at all* in the use of a peremptory challenge, the court must find it is improper. It is commonly understood that *everyone* has some level of unconscious bias, and "people's perceptions are somewhere between usually and always filtered through their own biases, prejudices, and preconceptions..." [20] How then can the party making the challenge successfully argue that unconscious bias had *no* impact or influence on their decision to use a peremptory? This contributes the above conclusion that practically every objection to a peremptory challenge would be successful as meeting the standard to defend it is nearly impossible. Instead the court should add a modifier, such as unconscious bias was "a *substantial* factor" or "a *significant* factor"; this allows for the idea that

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[16] *See Carillo*, 974, P.2d at 486-87. ("[T]he abuse of discretion standard is already a very high standard of review. This standard gives deference to the trial court's assessment of the credibility of a prospective juror's responses. It recognizes the trial court's unique role and perspective in evaluating the demeanor and body language of live witnesses, and it serves to discourage an appellate court from second-guessing those judgments based on a cold record."

[17] *See People v. Mulberger* 369 P.3d 610, 612 (Colo. App. 2012) (Construction of the statute governing challenges of potential **jurors** for cause presents a question of law that we review de novo.)

[18] *See People v. Davis,* 794 P.2d 159, 206 (Colo. 1990) (The trial court is in a superior position to evaluate these factors than is a reviewing court, which has access only to a cold record for its assessment.)

[19] Timothy J. Conklin, *The End of Purposeful Discrimination: The Shift to an Objective Batson Standard*, 63 B.C.L. Rev. 1037, 1087 (2022)

[20] *See* Anthony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U.L.REV. 155, 209-210 (2005) (presenting an overview of decision-making in the brain and discussing how implicit bias can influence the decision to use peremptory challenges.)

we all have unconscious biases that play a role in our decision-making, but addresses the heart of the issue - whether that bias was the impetus behind using a peremptory challenge.

These same concerns were raised in the debate over California's attempt to reform peremptory challenges. In 2020, California adopted a similar model to the proposed rule before the court, but with three substantial additions. First, California heightened the threshold by requiring there to be a "substantial likelihood" that unconscious bias played factor in the peremptory. [21] Second, it chose the "would view" standard over "could view." [22] Third, California's law extends its reach beyond race and includes ethnicity, gender identity, sexual orientation, national origin, and religious affiliation as protected groups. [23] The final rule reads as follows:

> If the court determines there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor in the use of the peremptory challenge, then the objection shall be sustained. [24]

I submit that the standard of decision in California's law results in a much fairer process for both sides to the dispute and represents a significantly better rule that the current proposal before the Court. The only addition I would make, as noted above, is substitution the judgment of the trial court in the place of the fiction "objective observer."

In summary, the issue of unconscious bias in jury selection is difficult, and the proposal before the court should be subjected to careful consideration and major revisions before it is enacted. A simplified approach that allows the court to address a wider range of unconscious biases that impact jury participation by historically marginalized groups, creates a more flexible and fair rule, allows the parties to be placed on equal footing in the litigation over the use of a peremptory challenge, and creates a better standard by allowing the trial court to make the determination of the motivations behind the exercise of a peremptory challenge is suggested for the court's consideration. Thank you.

Sincerely,

Christian Champagne
District Attorney
Sixth Judicial District

[21] Cal. Civ. Proc. Code § 231.7(d)(1) (West 2020)
[22] *Id.*
[23] *Id.*
[24] *Id.*