

**RULE CHANGE 2025(15)**

**COLORADO RULES OF CRIMINAL PROCEDURE**

## Rule 24. Trial Jurors

(a) - (c) [NO CHANGE]

(d) **Peremptory Challenges.**

(1) - (4) [NO CHANGE]

(5) **Improper Bias (Including Unconscious or Implicit Bias).** This rule pertains to peremptory challenges against a prospective juror whom the parties stipulate or the trial court finds is more likely than not a member of a racial or ethnic minority group. The exclusion of prospective jurors based on race or ethnicity is prohibited. When a party claims that the opposing party's peremptory challenge is rooted in improper bias (including unconscious or implicit bias), the court must conduct a three-step analysis as follows:

(I) **Objection.** A party may object to the use of a peremptory challenge to raise the issue of improper bias. Any discussion related to the objection must be conducted outside of the hearing of the jury panel. Additionally, the objection must be made before the prospective juror is excused, unless the objecting party shows that the objection stems from new information discovered after the prospective juror's excusal.

(II) **Prima Facie Case.** When addressing an objection to a peremptory challenge under this rule, the court must first determine whether the objecting party has made a prima facie showing that the peremptory challenge was based on the prospective juror's race or ethnicity. It suffices for such a showing that the totality of the relevant circumstances gives rise to an inference of racial or ethnic motivation. The court may raise an objection to a peremptory challenge on its own, and such objection will constitute the requisite prima facie showing.

(III) **Response and Rebuttal.** If the court finds that the objecting party has failed to make the requisite prima facie showing, the court must overrule the objection and allow the peremptory challenge. Conversely, if the court finds that the objecting party has made the requisite prima facie showing, the court must direct the party exercising the peremptory challenge to articulate a race- and ethnicity-neutral reason for the challenge. The party exercising the peremptory challenge must not attempt to articulate such a reason unless directed to do so by the court. The court must then determine whether the given reason is, on its face, race- and ethnicity-neutral. In assessing such neutrality, the court may not consider the stated reason's plausibility or persuasiveness; rather, the court must assume the stated reason is true and then determine whether, as stated, the reason is neutral or is instead based on the prospective juror's race or ethnicity. If the court finds that the stated reason is rooted in improper bias, it must sustain the objection. But if the court determines that the proffered reason is, on its face, race- and ethnicity-neutral, it must give the objecting party an opportunity to rebut the stated reason. The objecting party must not attempt to rebut the given reason for the peremptory challenge unless directed to do so by the court.

**(IV) Final Determination.** The court must evaluate the persuasiveness of the reason given to justify the peremptory challenge in light of any rebuttal offered and the totality of the relevant circumstances. If the court finds that the objecting party has met its burden of establishing purposeful discrimination by showing, by a preponderance of the evidence, that the peremptory challenge was substantially motivated by race or ethnicity, the court must disallow the peremptory challenge and direct the prospective juror to remain on the jury panel. However, if the court finds that the objecting party has not met its burden, the court must allow the peremptory challenge and excuse the prospective juror. In ruling on the record, the court may consider a party's unconscious or implicit bias, as both conscious bias and unconscious or implicit bias may contribute or lead to purposeful discrimination, but the court must guard against engaging in speculation. Express demeanor and credibility findings, though not required, are the preferred practice.

**(V) Circumstances Considered.** In making its final determination, the court must consider any relevant circumstances, including but not limited to the following, which may reflect that the peremptory challenge was substantially motivated by race or ethnicity:

(A) the number and types of questions posed to the prospective juror, including whether the party exercising the peremptory challenge failed to question the prospective juror about the reason for the challenge;

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

(C) whether other prospective jurors provided similar answers or made similar statements but were not the subject of a peremptory challenge by the party exercising the peremptory challenge;

(D) if the basis of the peremptory challenge concerns the prospective juror's alleged bias against law enforcement or the criminal justice system, whether the party exercising the peremptory challenge explored the issue through questioning or rehabilitation, and whether that party challenged the prospective juror for cause on that basis;

(E) whether the justification for the peremptory challenge might be disproportionately associated with race or ethnicity. Such justification may include, but is not limited to, the prospective juror:

- a. having had prior contact with law enforcement,
- b. having a close relationship with others who have had contact with law enforcement,
- c. living in a high-crime neighborhood, or
- d. not being a native English speaker;

(F) if the basis of the peremptory challenge concerns the demeanor, attitude, or body language of the prospective juror, whether such demeanor, attitude, or body language was contemporaneously brought to the attention of the court or was corroborated by the court’s own observation or that of opposing counsel; and

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

The court need not make a finding as to each relevant circumstance. Neither the existence nor the absence of any particular relevant circumstance is determinative.

### COMMITTEE COMMENT

The rule is changed to permit, but not to require, the court to allow the simultaneous questioning of more than 12 potential jurors and one or two alternate jurors at one time. Further, the rule permits, but does not require, the court to allow the exercise of peremptory challenges, in writing, in its discretion, as is done in civil cases. This rule change is intended to apply to both district and county court criminal cases.

Nothing in subsection (d)(5) alters *Batson v. Kentucky*, 476 U.S. 79 (1986), or its application in Colorado jurisprudence. Subsection (d)(5) is simply intended to provide further guidance when a peremptory challenge allegedly seeks to improperly exclude a prospective juror based on race or ethnicity. Any provisions in this subsection addressing unconscious or implicit bias, including specifically part (d)(5)(IV) (“Final Determination”) and part (d)(5)(V) (“Circumstances Considered”), are not inconsistent with *Batson*, as both conscious bias and unconscious or implicit bias may contribute or lead to purposeful discrimination. See generally *Batson*, 476 U.S. at 106 (Marshall, J., concurring) (“A prosecutor’s own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is ‘sullen,’ or ‘distant,’ a characterization that would not have come to his mind if a white juror had acted identically.”); see also *State v. Saintcalle*, 309 P.3d 326, 338 n.8 (Wash. 2013) (plurality opinion) (noting that “purposeful discrimination” arguably “already encompasses unconscious bias” because “the ‘purposeful discrimination’ requirement was never intended to be a proxy for . . . anything resembling a conscious mens rea, but rather a signpost for distinguishing between discriminatory purpose and disproportionate impact”; and further observing that both the United States Supreme Court’s jurisprudence and scholarship support the proposition that *Batson*’s “purposeful discrimination” requirement means “not that the state’s attorney need be found intentionally racist,” but rather “that racial bias (conscious or unconscious . . . ) be the source of any disparate impact.” (citation omitted)), abrogated in part on other grounds by *City of Seattle v. Erickson*, 398 P.3d 1124 (Wash. 2017); Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 Emory L. J. 1053, 1090–93 (2009) (concluding that “discriminatory purpose” includes unconscious or implicit bias under current equal protection jurisprudence).

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**Amended and Adopted by the Court, En Banc, June 26, 2025, effective January 2, 2026.**

**By the Court:**

**Carlos A. Samour, Jr.  
Justice, Colorado Supreme Court**