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State of Colorado  
Denver

Chair:  
Judiciary Committee  
Member:  
Finance Committee  
State, Veterans, & Military  
Affairs Committee

PETE LEE – SENATE DISTRICT 11

March 16, 2022

The Honorable John Dailey  
Chair, Colorado Criminal Rules Committee  
Colorado Court of Appeals  
2 E. 14<sup>th</sup> Avenue  
Denver, CO 80203

re: Crim.P. 24(d)(5)

Dear Judge Dailey and Members of the Committee,

We want to thank you for the effort that your Committee put into the proposed amendments to Crim.P. 24 last year. Following the Supreme Court's rejection of those amendments without soliciting public comment or hearing, we introduced SB22-128, which substantially mirrored the language submitted to the Court by your committee. All 22 elected prosecutors in Colorado opposed this bill before the Senate Judiciary Committee, and many opposition witnesses suggested that further work by your Committee was the best way to address implicit racial bias in peremptory challenges to prospective jurors. The opposition witnesses uniformly agreed that action is needed to root out and address implicit race bias in jury selection, as did those who testified in support of our bill. In light of the fact that not a single prosecutor supported this bill, we decided to postpone it indefinitely and seek another path forward.

We write to ask your Committee to revisit this issue and to do so swiftly. To assist you, we would like to share some of the concerns that we heard from stakeholders about our bill. These concerns were voiced exclusively by prosecutors. Although we made several requests for written feedback and concrete suggested amendments from opposition stakeholders, those requests were ignored. It is impossible to square this failure with testimony from multiple prosecutors that they agree racial bias has no



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seem that commitment would have prompted them to work constructively to amend our bill, but that was not the case. However, the following themes emerged from our conversations with prosecutors who opposed our bill, and we offer the following summary of those themes for your Committee to consider.<sup>1</sup>

Some prosecutors thought that *Batson v. Kentucky* was a sufficient tool and that no change at all was needed. As one prosecutor remarked, “[*Batson*] is a well thought out construct and addresses the issue and places the judge in the position of being the fact finder to determine whether racist tendencies are being used by either side.” We disagree. Procedurally, *Batson* continues to be misapplied in trial courts in Colorado, as the many appellate opinions that remand for that reason demonstrate. We believe eliminating *Batson*’s three-step process in favor of a more streamlined approach will conserve judicial resources and result in far fewer remand hearings. Substantively, *Batson* fails to prevent lawyers and judges from excluding people from jury service as a result of implicit bias, because it requires of finding purposeful discrimination before a peremptory challenge may be denied. A lawyer’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. A judge’s own conscious or unconscious racism may lead him to accept such an explanation as well supported.” *Batson v. Kentucky*, 476 U.S. 69, 106 (1986) (Marshall, J., concurring).

Some prosecutors who testified against our bill criticized its requirement that a party must state all justifications for a peremptory challenge at once following an objection, noting that this prevented a “back and forth” exchange. We note that a division of the court of appeals recently clarified that such a “back and forth” exchange, which allows the party defending the peremptory challenge to concoct new race-neutral reasons if its initial justifications are rejected, is impermissible under current law. *People v. Madrid*, 494 P.3d 624, 620 (Colo. 2021).

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<sup>1</sup> During testimony before the Senate Judiciary Committee, one prosecutor criticized our bill for not being supported by sufficient stakeholder work. We disagree vehemently with that notion and—again—note the lack of *any* written feedback or proposed amendments from *any* prosecutor, despite our repeated requests.





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The bill’s test (whether an objective observer could view the prospective juror’s race or ethnicity as a factor in the use of the peremptory challenge) drew criticism from opponents. We believe some of that criticism was well-founded and we were prepared to amend that portion of our bill to refer to “a substantial factor.” However, we disagree with the notion that “could view” should be changed to “would view.” The latter is not materially different than *Batson*’s requirement that the trial court find purposeful discrimination before denying a peremptory challenge. Too often, trial courts have mistakenly assumed that such a finding is the same “as a finding that the proponent of the strike is racist. And equating the two substantially undermines *Batson*. In fact, such a misunderstanding of *Batson* improperly ignores less blatant race-based strikes and raises the burden for the objecting party.” *People v. Ojeda*, 2022 CO 7 ¶ 50 (Feb. 14, 2022). By articulating an objective standard, the “could view” test eliminates what has proved to be a significant stumbling block for trial courts and has resulted in the continued use of peremptory challenges to exclude minority community members from “the most substantial opportunity that most citizens have to participate in the democratic process.” *Flowers v. Mississippi*, 139 S.Ct. 2228, 2238 (2019).

Some stakeholders noted that gender should also be included in the scope of the bill. Although our bill did not do so, we certainly agree that excluding prospective jurors from service based on their gender identity runs afoul of the law. Perhaps your Committee can consider including language to prevent this in any proposed amendments it submits for the Court’s consideration, although protecting against excluding minority citizens from jury service should rightly be prioritized, given our country’s long history of that practice.

One stakeholder suggested that being a prior crime victim should also be a presumptively invalid justification for a peremptory challenge and noted that minorities are often victims of crime. We also thought this was a valid observation, so long as it is not limited to those cases in which charges were actually filed.

Some prosecutors expressed a belief that implicit bias in jury selection can be remedied by in-house training. While we support such an effort and hope that such training is already being offered to criminal lawyers, it is very clear that training alone will not remedy the shortcomings in the application of *Batson*’s test.



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Finally, we heard from some prosecutors that it was unfair that our bill did not define “prior positive experiences with law enforcement” or a belief that racial profiling is not used by the police as presumptively invalid reasons for a peremptory challenge. Given that the intent of our bill was to address the hundreds of years of excluding minority citizens from jury service, we disagree that including this language furthers that goal. We hope your Committee will focus on the wrong that should be addressed, which is to prevent defining the lived experiences of minority community members, standing alone, as a valid reason for exclusion from jury service, rather than expansive language that would obscure that focus.

The communities we represent interpreted the Court’s prior refusal to even solicit input from the public about the proposed amendments to Crim.P. 24 as a clear message that its members have no interest in addressing racial bias in our criminal courts in any meaningful way. We are hopeful that the Court will allow public comment and public hearing on any proposed amendments to Crim.P. 24 your Committee submits. Such a process can only increase Coloradans’ confidence that the judiciary in Colorado will not countenance violations of citizens’ constitutional right to serve on criminal juries on illegitimate grounds, and that its members will translate occasional public statements decrying racism in the criminal courts into concrete action.

We encourage the Judicial Branch to anticipate questions on the progress your Committee has made on this issue during the SMART Act hearings in January of next year, with the expectation that those questions will be answered to our satisfaction. Collecting data on the race of citizens struck from jury panels by peremptory challenges is a simple task, as other states have proven. And that data is critical to crafting a well-informed solution to a problem that even those who opposed our bill admit exists. In our experience, an agency’s failure to collect data on an issue often signals a disinclination to explore a meaningful remedy.



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We hope that those who opposed our bill are correct in believing that your Committee will be able to resolve the current deficits in Crim.P. 24 so that introducing legislation on this issue next year is unnecessary.

Senator Pete Lee  
Chair, Senate Judiciary  
Committee

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Senator Julie Gonzales  
Vice Chair, Senate Judiciary  
Committee

A handwritten signature in black ink, appearing to read "Julie Gonzales", written in a cursive style.

Representative Jennifer Bacon  
Member, House Judiciary  
Committee

A handwritten signature in black ink, appearing to read "Jennifer Bacon", written in a cursive style.

Representative Steven Woodrow  
Member, House Judiciary  
Committee

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