MAJORITY REPORT FOR THE ADOPTION OF CRIM. P. 24(d)(5) ADDRESSING THE EXERCISE OF PEREMPTORY CHALLENGES DURING JURY SELECTION

To: The Colorado Supreme Court
From: Kevin McGreevy, on behalf of a majority of the Rules of Criminal Procedure Committee
Date: March 5, 2021
RE: Adoption of Crim. P. 24(d)(5)

INTRODUCTION

On January 15, 2021, the Colorado Rules of Criminal Procedure Committee voted 7-5[1] to recommend the adoption of Crim. P. 24(d)(5) as set forth below. Judge John Dailey, Committee Chair, asked me to prepare this Majority Report.

A majority of the Committee recommends this Court amend Crim. P. 24 to recognize and address implicit racial bias in jury selection by adopting provisions similar to Washington State Rule GR 37. The Washington State Supreme Court unanimously adopted GR 37 in April 2018 to remedy the limitations of *Batson v. Kentucky,* 476 U.S. 79 (1986), with respect to implicit bias. *Batson* addressed only purposeful discrimination; GR 37 alters the framework for objections to peremptory challenges and sets a standard for sustaining an objection to peremptory challenges that eliminates the requirement of showing "purposeful discrimination." Concurring in *Batson,* Justice Thurgood Marshall noted that "conscious or unconscious racism" may render "the protection erected by the Court today … illusory." 476 U.S. at 106 (Marshall, J., concurring). By addressing as presumptively invalid many of the reasons that have been historically used to excuse jurors of color from service, this proposal aims to increase the number of people of color serving on juries. A majority of the Committee deemed the benefits of this rule far outweighed the perceived shortcomings of this proposal.

[1] Denver County Court Judge Chelsea Malone was unable to attend the meeting in person due to other professional obligations. On January 14, 2021, Judge Malone sent an email to the Committee voting in favor of the recommendation. The chair deemed this email to be a vote by proxy and declined to count the vote in the final tally. With her permission, Judge Malone's email to the Committee is attached to this memorandum as Exhibit 1. Thus, the sentiment of the Committee was 8-5 in favor of adoption of Crim. P. 24(d)(5).

I. PROPOSAL

Amend Crim. P. 24(d) by adding the following language:

(5) **Improper Bias**: The unfair exclusion of potential jurors based on race or ethnicity is prohibited.

(A) **Objection**. A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless the objecting party shows that new information is discovered.

(B) **Response**. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons for the peremptory challenge.

(C) **Determination**. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

(D) **Circumstances Considered**. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

(i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;

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

(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

(iv) whether a reason given to explain the peremptory challenge might be disproportionately associated with race or ethnicity; and

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

(E) **Reasons Presumptively Invalid**. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection, the following are presumptively invalid reasons for a peremptory challenge:

(i) having prior contact with law enforcement officers;

(ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;

(iii) having a close relationship with people who have been stopped by law enforcement, arrested, or convicted of a crime;

(iv) living in a high-crime neighborhood;

(v) having a child outside of marriage;

(vi) receiving state benefits; and

(vii) not being a native English speaker.

(F) **Reliance on Conduct**. The following reasons for peremptory challenges have also historically been associated with improper discrimination in jury selection: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties during *voir dire* so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

II. PROCESS

The Committee designated a subcommittee to investigate, evaluate, and potentially draft a proposal with respect to this issue. The subcommittee eventually drafted the above proposal, modeled after Washington State Rule GR 37. The subcommittee met several times and reviewed written materials from a variety of sources. In addition, the subcommittee interviewed (1) Roger Rogoff, King County Superior Court Judge (and former veteran prosecutor); (2) Hugh Barber, who

has been a King County prosecutor for 27 years; (3) Justice Steven Gonzalez, Washington Supreme Court; and (4) Justice Sheryl Gordon McCloud, Washington Supreme Court. A member of the subcommittee also interviewed Denver Judges Olympia Faye and Gary Jackson, as well as Washington State defense lawyer Robert Flennaugh (who is African-American), reporting back to the subcommittee on those interviews.

California recently enacted legislation similar to the Washington rule, essentially encompassing all the aspects of GR 37 and beyond. For example, in addition to race and ethnicity, the California legislation addresses gender, gender identity, sexual orientation, national origin, and religious affiliation. While GR 37 (and our proposed Crim. P. 24(d)(5)) lists seven presumptively invalid reasons to defend a peremptory strike, California lists thirteen reasons. Our Committee and/or subcommittee reviewed these and other states' considerations[2], as well as a variety of relevant law review and other articles.

Attached to this memorandum are:

Exhibit 1: Email from Judge Chelsea Malone;

Exhibit 2: GR 37, State of Washington;

Exhibit 3: California AB-3070, the legislation addressing the same issue;

Exhibit 4: Proposed rule pending before Connecticut Supreme Court regarding implicit bias in exercising peremptory challenges.

Exhibit 5: Notes from our discussion with Washington Supreme Court Justices Gonzalez and Gordon-McCloud;

Exhibit 6: Notes from our discussion with Judge Roger Rogoff and prosecutor Hugh Barber.

III. DISCUSSION

A. Reasons the Majority of the Committee Favors the Proposal.

1. This Amendment Will Directly Address Implicit Bias in the Courts and Thereby Strengthen Public Confidence in Colorado's Judiciary

[2] A task force initiated by the Connecticut Supreme Court has proposed a similar rule be adopted; it is attached as Exhibit 4.

This Court historically has recognized that "appearances can be as damaging to public confidence in the courts as actual bias or prejudice." *People v. District Court,* 192 Colo. 503 (1977). In 2017, Justice Marquez, dissenting in *People v. Beauvais,* recognized that, "The need for public confidence in our judicial process and the integrity of the criminal justice system is essential for preserving community peace. It is therefore of paramount importance that the community believes we guarantee even-handed entry into our criminal justice system by way of the jury panel." *People v. Beauvais*, 2017 CO 34, ¶ 104, 393 P.3d 509, 533 (internal citations omitted). On June 11, 2020, in response to the widespread national civil unrest around racial inequity following the death of George Floyd, this Court wrote a letter to all Judicial Branch employees. The letter stated that, "[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." The Court's letter also urged its readers to "engage respectfully and productively in the difficult dialogue that we must have to address the issues confronting the Black community and thus our community as a whole."

This proposed amendment to Crim. P. 24 translates these ideals into action by addressing the unconscious racial bias in the administration of justice that *Batson*'s framework is insufficient to prevent. It is a literal—not a symbolic—response to the truth that "[i]t must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons." *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017).

Four of the five judges on our Committee supported the adoption of Crim. P. 24(d)(5). As Judge Chelsea Malone of Denver said, "To the extent that our criminal justice system embraces or shields implicit bias, here is our opportunity to stand against that and send the same clear message as Washington: 'racial minorities are valued in the administration of justice: their voices in jury rooms are valued and their life experiences matter in how trials are decided.' I cannot think of a more important message for us to deliver during these divisive times."

Judge Deborah Grohs, who sits in the Fourth Judicial District, and Judge Dana Nichols, from Weld County, both supported the proposal, noting that it eliminates the need (under *Batson*) for a trial court to find a lawyer exercising a contested peremptory challenge to be engaged in purposeful discrimination. The Committee recognized that this proposed rule will inevitably improve education for both lawyers and judges about the real impact of unconscious bias on jury selection. As Judge Rogoff and Mr. Barber from Washington observed, increased training among

Washington lawyers on implicit bias following the adoption of GR 37 has debunked the belief that a prospective juror's race is a reliable proxy for how that person will hear evidence or decide a case. That change only came about because of the adoption of GR 37.

2. The Proposed Amendment Replaces Those Parts of the Batson Analysis That Leave Room for Implicit Bias in Jury Selection with an Effective, Workable Framework for Addressing It.

The proposed amendment does away with *Batson's* requirement that the objecting party establish a prima facie case of purposeful discrimination to rebut the initial presumption "that a [party] has exercised peremptory challenges on constitutionally permissible grounds[.]" *People v. Morales,* 356 P.3d 972, 978 (Colo. App. 2014). This ensures that when a party suspects a peremptory challenge is based on the prospective juror's race, the issue will be addressed on its merits, regardless of whether purposeful or unconscious bias informed it. The proposed amendment continues to afford the party making the peremptory challenge the opportunity to explain its basis.

Instead of requiring the objecting party to prove purposeful discrimination, the proposed amendment directs the trial court to consider the totality of the circumstances following an objection and to deny the peremptory challenge if an objective observer could view race or ethnicity as a factor in the peremptory challenge. Establishing an objective inquiry subject to *de novo* appellate review is critical to preventing the unfair exclusion of minorities from jury service.[3]

By doing away with *Batson*'s prima facie showing of purposeful discrimination and defining an objective standard of analysis, the proposed amendment recognizes the truth of Justice Marshall's observation that implicit bias—by its very nature—is never purposeful. *Batson,* 476 U.S. at 106 (Marshall, J. concurring). It also removes the implication that, by sustaining the objection, the trial court is in a sense finding the striking party is both dishonest about its proffered race-neutral reasons and that the peremptory challenge itself was consciously racist.

Section 5(E) of the proposed rule identifies challenges that are based on factors inextricably connected to a prospective juror's race as presumptively invalid. Minority community members are often more likely to live in high-crime neighborhoods and/or know people who have been stopped by police or arrested and/or prosecuted for a crime than their white counterparts, and these

[3] This also does away with the need to remand cases for further factual findings to assess discriminatory intent, when the passage of time has made such factual findings unlikely to be reliable.

experiences are inextricably linked to their race. Both the subcommittee and the Committee as a whole discussed this list of presumptive factors in depth. We drafted our list from the State of Washington's list; the California legislation includes these same factors.[4] The Washington Supreme Court Justices we spoke with explained that GR 37's list of presumptively invalid rationales was based on a review of national cases and social science which identified justifications for peremptory challenges that commonly mask implicit racial bias.

It is important to note that the listed reasons are only presumptively invalid, and the party making the peremptory challenge is entitled to establish any additional reason to support the challenge once an objection is made.[5] Given the unarticulated nature of implicit racism, specifically identifying these presumptively invalid reasons is important. Our Committee and subcommittee also recognized that using examples to help educate practitioners and others about what unconscious racism looks like would be helpful.

Section 5(F) recognizes that many peremptory challenges currently survive a *Batson* objection because the challenging party offers a race-neutral characterization of the prospective juror's demeanor. While demeanor may still constitute a valid race-neutral reason, this section simply requires corroboration of the prospective juror's alleged demeanor by either the trial court or opposing counsel in order to sustain the peremptory challenge on that basis. This change makes sense; courts have long recognized that characterizing a prospective juror's demeanor as the impetus for a peremptory challenge is inherently subjective and "particularly susceptible to the kind of abuse prohibited by *Batson.*" *United States v. Sherrills,* 929 F.2d 393, 395 (8th Cir. 1991).

A concern raised about the "demeanor" portion of the proposal was that "no party will, in open court, call the court's attention to the jurors' odd conduct." The proposed rule, however, does not require that a record on a prospective juror's demeanor be made in open court. Neither Judge Rogoff nor prosecutor Barber reported that this provision had proved onerous on the trial court level in Washington. They explained that a lawyer need only to whisper or pass a note to opposing counsel (e.g., "keep an eye on juror No. 5") or briefly approach the bench with the same

[4] While the California legislation also lists additionally presumptive invalid bases, the subcommittee chose not to propose them to the Committee once we decided on the Washington model.

[5] Judge Rogoff of King County discussed an instance when he denied a challenge for cause that closely resembled one of the presumptively invalid reasons, but then allowed the peremptory challenge for that juror. In that circumstance, Judge Rogoff determined that the presumption had been overcome, given the facts and circumstances of juror questioning, despite initially denying the challenge for cause.

quick verbal shorthand, in order to verify a concern over demeanor. This portion of the rule is necessary to refute pre-textual, unverified demeanor issues of jurors, and serves a vital purpose to address a short-coming of *Batson*.

3. The Proposed Amendment Achieved Increased Participation in Jury Service by People of Color in Washington.

In spite of initial concerns over how the rule would impact courts and prosecutors, the Washington judges and prosecutors who spoke to our subcommittee reported that the rule's benefits overwhelmingly outweighed their initial fears. Judge Rogoff and Mr. Barber reported that juries are indeed more diverse since the rule was put into place, which increases the diversity of views during deliberations. Judge Rogoff and Justice Gonzalez both cited to the social science that validates the conclusion that a more heterogeneous group reaches better decisions. Judge Rogoff is hopeful that, over time, the rule will increase the number of minority community members who respond to a jury summons, based on the positive experiences related by increased numbers of minority community members who are able to serve on a jury rather than being dismissed on peremptory challenges. Both men agreed that in the wake of GR 37, the increased training for lawyers on jury selection immediately improved jury selection overall. Prosecutor Barber discussed how training prosecutors disabused his colleagues of the notion that a prospective juror's race was a valid proxy for how that person might receive a party's evidence or decide a case. Neither Judge Rogoff nor Mr. Barber described the rule as a significant increased burden on judges or practitioners during trials. In fact, the rule made practitioners more thoughtful about peremptory challenges.

Justices Gonzalez and Gordon-McCloud told the Committee that the rule sent an explicit, clear message that Washington courts value racial minorities in the administration of justice: their voices in jury rooms are esteemed and their life experiences matter in how trials are decided. The majority of our Committee recognizes—as did the Washington drafters—that the rule does not address peremptory challenges improperly motivated by gender or sexual orientation. The California legislation enacted does. But we agreed with Washington's conclusion that race is different, should be addressed first given the history of its misuse in the criminal justice system, and that this amendment should not be rejected solely because it does not encompass all improperly motivated peremptory challenges.

Non-diverse juries fundamentally undermine the confidence in communities of color about the fairness of criminal justice outcomes. Committee member Karen Taylor remarked that when she did criminal appellate work for the State Public Defender, her first meeting with Black and Latinx clients often included a description of the criminal trial wherein every actor but the client (the judge, the lawyers, the witnesses and the jurors) was white. Not once did a white client complain to her of the unfairness of the racial make-up of the participants of the system.

By adopting this proposed amendment, the Court will put into action its expressed commitment to ensuring that citizen juries—vital to the protection of our democratic principles—necessarily include the voices and experiences of those who have historically been excluded from them.

B. Response to Arguments Put Forward by the Minority of Committee Members Opposed to the Proposal.

The Minority Report misunderstands the proposed rule. Far from being "symbolic," it is a practical and necessary response to curb the very real harm of implicit bias in jury selection. That goal is squarely within the purview of the Rules of Criminal Procedure, which "are intended to provide for the just determination of criminal proceedings." Crim. P. 2. Central to the purpose of the Criminal Rules is securing "fairness in the administration of justice." *Id.* Racial discrimination in the jury system "pose[s] a particular threat both to the promise of the [Fourteenth] Amendment and to the integrity of the jury trial." *Peña-Rodriguez,* 137 S.Ct. at 867. *See also* § 13-71-104(3)(a), C.R.S. ("No person shall be exempted or excluded from serving as a trial or grand juror because of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, economic status, or occupation.").

Prior to our Committee meeting to consider the proposal, one of the prosecutor members provided the Committee written comments based on discussions with prosecutors in the 2nd and 18th Judicial Districts. According to that document:

> [t]he prosecutors agreed that the proposed rule would serve a laudable aim. They also agreed that the proposed rule would trigger more irrational acquittals and 11-1 verdicts because juries would contain more people who are biased against police witnesses. However, the prosecutors did not unanimously agree about whether the rule's costs would outweigh its benefits. Most prosecutors believe that the answer is yes, but the contrary view was ably expressed.

The Minority Report revisits this notion by claiming that section (E)(ii)) of the proposed rule would cause an "unintended harm" by preventing parties from using a peremptory challenge—rather than a challenge for cause—to exclude prospective jurors who express a distrust of law enforcement or a belief that law enforcement engages in racial profiling. Relying on a conclusory (and unsupported) claim that, "[i]n the current system, trial judges are reluctant to excuse prospective jurors for cause," the Minority Report equates a juror who does not trust the police with a juror who always believes sex assault victims, and argues that attorneys should not be forced to retain jurors who indicate that notwithstanding their beliefs, they can return a verdict solely on the evidence and the court's instructions. The minority's reasoning is fundamentally flawed.

First, the Minority Report offers no reliable evidence—including any anecdotal evidence—to support its baseline claim that in the "current system," judges are reluctant to grant challenges for cause. Second, the proposed rule allows for the possibility that a peremptory challenge could be exercised (and an objection overruled) if an objective observer determines that race is not a factor in the excusal. Third, the Minority Report's suggestion that trial judges will not grant a challenge for cause if the juror in question also states an inability to be fair ignores the fact that trial judges must evaluate such a response in light of all of the prospective juror's other statements: they are not obligated to believe it. *See Dunlap v. People,* 173 P.3d 1054, 1082 (Colo. 2007) ("The trial court is in a unique position" to assess "the potential juror's demeanor, credibility and sincerity."). But most importantly, the historical, race-based reasons why a prospective juror would distrust the police simply do not apply in the case of a prospective juror who reflexively believes all alleged sex assault victims.

Justice Gonzalez, who grew up in Los Angeles, then spent years as a prosecutor before becoming a judge, was taken aback at the suggestion that a peremptory challenge against a person of color because of the prospective juror's distrust of law enforcement or belief that law enforcement engaged in racial profiling would be accepted as race-neutral. He suggested that nearly every member of a racial minority has directly or indirectly experienced incidents of racial profiling that white prospective jurors (and white judges and white lawyers) never experience. Without more, these lived experiences do not mean that a person is incapable of fairly evaluating evidence in a criminal case.

As the practitioners and members of the judiciary from Washington expressed, allowing the life experiences of those who have experienced actual or perceived racial profiling into the jury

room brings a valid perspective that must not be excluded from citizen juries. If prospective jurors state that that they will never believe a word from a law enforcement witness, then a challenge for cause should be granted. But prospective jurors who do not reflexively trust the police or who believe racial profiling sometimes happens, are only articulating their ability to follow what COLJI-Crim. E:01 directs all jurors to do: "consider all the evidence in light of your experience in life." Excluding that perspective does our communities a disservice and signals that only jurors with certain life experiences are welcome in our criminal justice system. Indeed, all members of the Washington legal community the subcommittee interviewed were asked about the prospective juror who believes law enforcement engages in racial profiling, and all were adamant that this presumptively invalid rationale was vital to expose the biased assumptions behind a peremptory strike based on that rationale.

The Minority Report's suggestions that the proposed rule eliminate the "objective observer" standard, eliminate "could" in favor of "was" as a measure of whether race or ethnicity was a factor, and make the standard apply to a "significant factor" is an attempt to eviscerate the effectiveness of the rule. Before adopting GR 37, Washington debated whether "could" or "would" was the more appropriate standard. Recognizing that "would" inevitably shifts the analysis requiring a finding akin to purposeful discrimination, Washington rejected it. Another benefit of "could" expressed at our Committee meeting is the discretion it affords the trial judge to sustain an objection without having to insinuate that the lawyer made the peremptory challenge with any conscious racist intent. The Minority Report suggests a rule require a finding that race "was" a significant factor. This suggestion would add to *Batson*'s required finding of purposeful discrimination the additional requirement that purposeful discrimination was a "significant factor" behind the peremptory challenge. Setting aside the fact that a state court cannot establish a more onerous standard than *Batson*, our guests from Washington were clear that the standard adopted in GR 37 best served the overarching goal of increasing racial and ethnic minority jury service.

Other concerns expressed in committee debate included whether it is necessary to first gather data to prove that racial minorities are excluded by peremptory challenge from Colorado juries; whether the list of presumptive invalid reasons is too broad, or too narrow, for Colorado; and whether the proposed rules should also address additional bases for discrimination such as gender, gender identity, sexual orientation and economic disparity. The Minority Report suggests this Court adopt an identical civil rule, that will perhaps take additional time to formulate or debate

within the Civil Rules Committee. Whether intentionally or not, these concerns are rationales to avoid action.[6] Rules can always be amended, but Washington has done the difficult work of framing the issue and has road-tested it successfully for nearly three years.

Central to the prosecutors' written opposition to the proposed rule before our Committee is their perception that the rule, intended to empanel more racially diverse juries, will "trigger more irrational acquittals and 11-1 verdicts[.]" This same thinking was memorialized in a prosecution training manual condemned by the Supreme Court that directed lawyers to exclude racial minorities from jury service because "'[m]inority races almost always empathize with the Defendant.'"[7] *Miller-El v. Cockrell,* 537 U.S. 322, 335 (2003). Surely unintentionally, this concern over "irrational acquittals" stated by unidentified prosecutors demonstrates exactly why adoption of Crim. P. 24(d)(5) is necessary: excluding citizens from jury service based on racial stereotypes is at odds with a justice system explicitly premised on equality.

The Minority Report calls into question whether racial prejudices influence jury selection at all in Colorado.[8] (Minority Report at 2, asking, "to what extent is implicit bias actually resulting in the exclusion of people of color"). Indeed, one member on the Committee dismissively viewed the proposed amendment as "a solution in search of a problem," and stated that, in his many years of conducting trials, he has not seen racial bias in the selection of juries. This experience was not voiced by others on the Committee and was contradicted by a defense lawyer on the Committee who revealed that racial bias definitely impacted his own jury selection practices, particularly when he was a younger lawyer. The suggestion that implicit bias simply does not exist both denies reality and fails to recognize the very real fact that minority jurors are often excluded from jury service. It is precisely why the rule is necessary.

Finally, the Minority Report puts forward a proposal that has garnered a fair amount of academic interest: either get rid of *Batson* and any restrictions on peremptory challenges or get rid of peremptory challenges altogether. It would be hard for this Court to eliminate *Batson*, given its

---

[6] We place in that same category the Minority Report's, fn. 6, which cites the uncertainty of the applicable appellate standard of review as a reason not to amend. Footnote 6 of the Minority Report ignores this Court's recent decision declining to address what the current standard of review is for a *Batson* violation in *People v. Wilson*, 351 P.3d 1126, 1130, n3 (Colo. 2015). Amending Crim. P. 24 will have no effect on the *status quo* in that regard.

[7] Brief for Petitioner, Case No. 01-7662, p. 4 (quoting Dallas County Attorney training manual entitled "Jury Selection in a Criminal Case.").

[8] It is true that the State Judicial Department does not collect and maintain data on the race of prospective jurors, prospective jurors who are excused on peremptory challenges, or those who serve on juries.

constitutional foundations in due process, as well at §13-71-104(3)(a), C.R.S. Neither a majority of the Committee nor the subcommittee favored the elimination of peremptory challenges, for good reasons. Both prosecutors and defense lawyers agreed that some jurors may not fit within a challenge for cause, but likewise might not be good for a case; that all trial practitioners have removed jurors for compassionate reasons with peremptory challenges; and that, for reasons unrelated to race, gender, or other prohibited criteria, certain jurors are not suited to certain cases. As well, peremptory challenges in criminal trials are guaranteed by §16-10-104(1), C.R.S. Furthermore, there was no evidence produced to suggest that abolishing all peremptory challenges would likely have the same effect to promote the service of racial minorities on juries, which is the explicit intent of this proposed amendment to Crim. P. 24.

As here, the prosecutors in Washington were the most vehement objectors to GR 37. According to 27-year Washington prosecutor Barber, he and his colleagues feared it was unworkable, resented being deemed "implicitly racist" for jury-selection sentiments long held, and thought the rule would undermine the prosecution function. Their fears were unfounded, he said. Both Judge Rogoff and Mr. Barber firmly believe GR 37 is both simple to administer and serves a critical purpose: ensuring the criminal justice is more fair and reducing the implicit and unconscious bias that can infiltrate and impact the administration of the criminal trials.

CONCLUSION

This proposal presents the Court with an opportunity to take action to address implicit racial bias in the criminal trial system. The Court can do so with the benefit of seeing that such a rule has worked well and achieved its desired effect in another state. A majority of the Criminal Rules Committee urges you to adopt this change.

EXHIBIT 1

Kevin McGreevy

From: Malone, Chelsea - DCC Judge <chelsea.malone@denvercountycourt.org>
Sent: Thursday, January 14, 2021 8:03 PM
To: michaels, kathryn; sberry@co.jefferson.co.us; jedson@da18.state.co.us; gilman, shelley; grohs, deborah; hoffman, morris; matt.holman@coag.gov; abe@rklawpc.com; Kevin McGreevy; nichols, dana; bob.russel@denverda.org; karen.taylor@coloradodefenders.us; Sheryl.uhlmann@coloradodefenders.us; yacuzzo, karen
Cc: carlos.samour@judicial.state.co.us; dailey, john; owens, wanda
Subject: RE: Criminal Rules Meeting: Excerpts related to Washington General Rule 37

Dear Committee Members,

I am training in a new courtroom tomorrow, so regretfully, I am unable to attend our meeting. I realize that I am missing any discussion as to why we should not adopt proposed Crim.P. 24(d)(5). After review of Mr. McGreevy's memo and the materials provided to us, however, I am strongly in favor of adopting the proposed changes.

To the extent that our criminal justice system embraces or shields implicit bias, here is our opportunity to stand against that and send the same clear message as Washington: "racial minorities are valued in the administration of justice: their voices in jury rooms are valued and their life experiences matter in how trials are decided." I cannot think of a more important message for us to deliver during these divisive times.

The rule still allocates the primary responsibility of determining the issue to the trial court, which is what *Batson* requires and provides for. The trial court's determination is set forth on the record and can be reviewed on appeal. Both sides may still challenge a juror for cause should that juror be truly unfit or unfair. I was impressed that the Washington judge and prosecutor found the new rule "made practitioners more thoughtful about the basis for their challenges."

I am in favor of Colorado standing at the forefront of fighting racial discrimination in the criminal justice system and in giving our citizens more fair trials. Thank you to the subcommittee for their hard work on this.

Best,
Chelsea

EXHIBIT 2

West's Revised Code of **Washington** Annotated
Part I. **Rules** of **General** Application
General Rules (GR) (Refs & Annos)

General Rules, GR **37**

Rule 37. JURY SELECTION

Currentness

(a) Policy and Purpose. The purpose of this **rule** is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.

(b) Scope. This **rule** applies in all jury trials.

(c) Objection. A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this **rule**, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.

(d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this **rule**, the party exercising the peremptory challenge shall articulate the reasons that the peremptory challenge has been exercised.

(e) Determination. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its **ruling** on the record.

(f) Nature of Observer. For purposes of this **rule**, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in **Washington** State.

(g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

(i) the number and types of Questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to Question the prospective juror about the alleged concern or the types of Questions asked about it;

(ii) whether the party exercising the peremptory challenge asked significantly more Questions or different Questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;

(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

(iv) whether a reason might be disproportionately associated with a race or ethnicity; and

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

(h) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in **Washington** State, the following are presumptively invalid reasons for a peremptory challenge;

(i) having prior contact with law enforcement officers;

(ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;

(iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;

(iv) living in a high-crime neighborhood;

(v) having a child outside of marriage;

(vi) receiving state benefits; and

(vii) not being a native English speaker.

(i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in **Washington** State: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

Credits
[Adopted effective April 24, 2018.]

Relevant Notes of Decisions (1)
View all 1
Notes of Decisions listed below contain your search terms.

Construction and application

New **rule** governing jury selection, which was adopted to remedy problems with the existing *Batson* test, applied prospectively to all trials occurring after its effective date, and thus, did not apply to murder defendant's case, even though it was on direct appeal at the time the **rule** went into effect; in defendant's case, the jury selection and *Batson* challenge both occurred before the **rule** became effective, and while the **rule** was partly remedial, it also affected substantial constitutional rights, and was therefore partly substantive. State v. Jefferson (2018) 429 P.3d 467. Criminal Law 1181(2)

GR 37, WA R GEN GR 37

Annotated Superior Court Criminal Rules, including the Special Proceedings Rules -- Criminal, Criminal Rules for Courts of Limited Jurisdiction, and the Washington Child Support Schedule Appendix are current with amendments received through 10/1/20. Notes of decisions annotating these court rules are current through current cases available on Westlaw. Other state rules are current with amendments received through 10/1/20.

End of Document

EXHIBIT 3

2020 Cal. Legis. Serv. Ch. 318 (A.B. 3070) (WEST)

CALIFORNIA 2020 LEGISLATIVE SERVICE

2020 Portion of 2019-2020 Regular Session

Additions are indicated by **Text**; deletions by
* * * .
Vetoes are indicated by ~~Text~~ ;
stricken material by ~~**Text**~~ .

CHAPTER 318
A.B. No. 3070

AN ACT to add, repeal, and add Section 231.7 of the Code of Civil Procedure, relating to juries.

[Filed with Secretary of State September 30, 2020.]

LEGISLATIVE COUNSEL'S DIGEST

AB 3070, Weber. Juries: peremptory challenges.

Existing law provides for the exclusion of a prospective juror from a trial jury by peremptory challenge. Existing law prohibits a party from using a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of the sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation of the prospective juror, or on similar grounds.

This bill would, for all jury trials in which jury selection begins on or after January 1, 2022, prohibit a party from using a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups. The bill would allow a party, or the trial court on its own motion, to object to the use of a peremptory challenge based on these criteria. Upon objection, the bill would require the party exercising the challenge to state the reasons the peremptory challenge has been exercised. The bill would require the court to evaluate the reasons given, as specified, and, if the court grants the objection, would authorize the court to take certain actions, including, but not limited to, starting a new jury selection, declaring a mistrial at the request of the objecting party, seating the challenged juror, or providing another remedy as the court deems appropriate. The bill would subject the denial of an objection to de novo review by an appellate court, as specified. The bill would, until January 1, 2026, specify that its provisions do not apply to civil cases.

The people of the State of California do enact as follows:

SECTION 1. (a) It is the intent of the Legislature to put into place an effective procedure for eliminating the unfair exclusion of potential jurors based on race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, through the exercise of peremptory challenges.

(b) The Legislature finds that peremptory challenges are frequently used in criminal cases to exclude potential jurors from serving based on their race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or

perceived membership in any of those groups, and that exclusion from jury service has disproportionately harmed African Americans, Latinos, and other people of color. The Legislature further finds that the existing procedure for determining whether a peremptory challenge was exercised on the basis of a legally impermissible reason has failed to eliminate that discrimination. In particular, the Legislature finds that requiring proof of intentional bias renders the procedure ineffective and that many of the reasons routinely advanced to justify the exclusion of jurors from protected groups are in fact associated with stereotypes about those groups or otherwise based on unlawful discrimination. Therefore, this legislation designates several justifications as presumptively invalid and provides a remedy for both conscious and unconscious bias in the use of peremptory challenges.

(c) It is the intent of the Legislature that this act be broadly construed to further the purpose of eliminating the use of group stereotypes and discrimination, whether based on conscious or unconscious bias, in the exercise of peremptory challenges.

SEC. 2. Section 231.7 is added to the Code of Civil Procedure, to read:

<< CA CIV PRO § 231.7 >>

231.7. (a) A party shall not use a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.

(b) A party, or the trial court on its own motion, may object to the improper use of a peremptory challenge under subdivision (a). After the objection is made, any further discussion shall be conducted outside the presence of the panel. The objection shall be made before the jury is impaneled, unless information becomes known that could not have reasonably been known before the jury was impaneled.

(c) Notwithstanding Section 226, upon objection to the exercise of a peremptory challenge pursuant to this section, the party exercising the peremptory challenge shall state the reasons the peremptory challenge has been exercised.

(d)(1) The court shall evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances. The court shall consider only the reasons actually given and shall not speculate on, or assume the existence of, other possible justifications for the use of the peremptory challenge. 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. The court need not find purposeful discrimination to sustain the objection. The court shall explain the reasons for its ruling on the record. A motion brought under this section shall also be deemed a sufficient presentation of claims asserting the discriminatory exclusion of jurors in violation of the United States and California Constitutions.

(2)(A) For purposes of this section, an objectively reasonable person is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California.

(B) For purposes of this section, a “substantial likelihood” means more than a mere possibility but less than a standard of more likely than not.

(C) For purposes of this section, “unconscious bias” includes implicit and institutional biases.

(3) In making its determination, the circumstances the court may consider include, but are not limited to, any of the following:

(A) Whether any of the following circumstances exist:

(i) The objecting party is a member of the same perceived cognizable group as the challenged juror.

(ii) The alleged victim is not a member of that perceived cognizable group.

(iii) Witnesses or the parties are not members of that perceived cognizable group.

(B) Whether race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, bear on the facts of the case to be tried.

(C) The number and types of questions posed to the prospective juror, including, but not limited to, any the following:

(i) Consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the concerns later stated by the party as the reason for the peremptory challenge pursuant to subdivision (c).

(ii) Whether the party exercising the peremptory challenge engaged in cursory questioning of the challenged potential juror.

(iii) Whether the party exercising the peremptory challenge asked different questions of the potential juror against whom the peremptory challenge was used in contrast to questions asked of other jurors from different perceived cognizable groups about the same topic or whether the party phrased those questions differently.

(D) Whether other prospective jurors, who are not members of the same cognizable group as the challenged prospective juror, provided similar, but not necessarily identical, answers but were not the subject of a peremptory challenge by that party.

(E) Whether a reason might be disproportionately associated with a race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups.

(F) Whether the reason given by the party exercising the peremptory challenge was contrary to or unsupported by the record.

(G) Whether the counsel or counsel's office exercising the challenge has used peremptory challenges disproportionately against a given race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, in the present case or in past cases, including whether the counsel or counsel's office who made the challenge has a history of prior violations under Batson v. Kentucky (1986) 476 U.S. 79, People v. Wheeler (1978) 22 Cal.3d 258, Section 231.5, or this section.

(e) A peremptory challenge for any of the following reasons is presumed to be invalid unless the party exercising the peremptory challenge can show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case:

(1) Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system.

(2) Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.

(3) Having a close relationship with people who have been stopped, arrested, or convicted of a crime.

(4) A prospective juror's neighborhood.

(5) Having a child outside of marriage.

(6) Receiving state benefits.

(7) Not being a native English speaker.

(8) The ability to speak another language.

(9) Dress, attire, or personal appearance.

(10) Employment in a field that is disproportionately occupied by members listed in subdivision (a) or that serves a population disproportionately comprised of members of a group or groups listed in subdivision (a).

(11) Lack of employment or underemployment of the prospective juror or prospective juror's family member.

(12) A prospective juror's apparent friendliness with another prospective juror of the same group as listed in subdivision (a).

(13) Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for peremptory challenge relying on this justification to be considered presumptively invalid.

(f) For purposes of subdivision (e), the term “clear and convincing” refers to the degree of certainty the factfinder must have in determining whether the reasons given for the exercise of a peremptory challenge are unrelated to the prospective juror's cognizable group membership, bearing in mind conscious and unconscious bias. To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case.

(g)(1) The following reasons for peremptory challenges have historically been associated with improper discrimination in jury selection:

(A) The prospective juror was inattentive, or staring or failing to make eye contact.

(B) The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.

(C) The prospective juror provided unintelligent or confused answers.

(2) The reasons set forth in paragraph (1) are presumptively invalid unless the trial court is able to confirm that the asserted behavior occurred, based on the court's own observations or the observations of counsel for the objecting party. Even with that confirmation, the counsel offering the reason shall explain why the asserted demeanor, behavior, or manner in which the prospective juror answered questions matters to the case to be tried.

(h) Upon a court granting an objection to the improper exercise of a peremptory challenge, the court shall do one or more of the following:

(1) Quash the jury venire and start jury selection anew. This remedy shall be provided if requested by the objecting party.

(2) If the motion is granted after the jury has been impaneled, declare a mistrial and select a new jury if requested by the defendant.

(3) Seat the challenged juror.

(4) Provide the objecting party additional challenges.

(5) Provide another remedy as the court deems appropriate.

(i) This section applies in all jury trials in which jury selection begins on or after January 1, 2022.

(j) The denial of an objection made under this section shall be reviewed by the appellate court de novo, with the trial court's express factual findings reviewed for substantial evidence. The appellate court shall not impute to the trial court any findings, including findings of a prospective juror's demeanor, that the trial court did not expressly state on the record. The reviewing court shall consider only reasons actually given under subdivision (c) and shall not speculate as to or consider reasons that were not given to explain either the party's use of the peremptory challenge or the party's failure to challenge similarly situated jurors who are not members of the same cognizable group as the challenged juror, regardless of whether the moving party made a comparative analysis argument in the trial court. Should the appellate court determine that the objection was erroneously denied, that error shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial.

(k) This section shall not apply to civil cases.

(*l*) It is the intent of the Legislature that enactment of this section shall not, in purpose or effect, lower the standard for judging challenges for cause or expand use of challenges for cause.

(m) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(n) This section shall remain in effect only until January 1, 2026, and as of that date is repealed.

SEC. 3. Section 231.7 is added to the Code of Civil Procedure, to read:

<< CA CIV PRO § 231.7 >>

231.7. (a) A party shall not use a peremptory challenge to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.

(b) A party, or the trial court on its own motion, may object to the improper use of a peremptory challenge under subdivision (a). After the objection is made, any further discussion shall be conducted outside the presence of the panel. The objection shall be made before the jury is impaneled, unless information becomes known that could not have reasonably been known before the jury was impaneled.

(c) Notwithstanding Section 226, upon objection to the exercise of a peremptory challenge pursuant to this section, the party exercising the peremptory challenge shall state the reasons the peremptory challenge has been exercised.

(d)(1) The court shall evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances. The court shall consider only the reasons actually given and shall not speculate on, or assume the existence of, other possible justifications for the use of the peremptory challenge. 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. The court need not find purposeful discrimination to sustain the objection. The court shall explain the reasons for its ruling on the record. A motion brought under this section shall also be deemed a sufficient presentation of claims asserting the discriminatory exclusion of jurors in violation of the United States and California Constitutions.

(2)(A) For purposes of this section, an objectively reasonable person is aware that unconscious bias, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in the State of California.

(B) For purposes of this section, a "substantial likelihood" means more than a mere possibility but less than a standard of more likely than not.

(C) For purposes of this section, "unconscious bias" includes implicit and institutional biases.

(3) In making its determination, the circumstances the court may consider include, but are not limited to, any of the following:

(A) Whether any of the following circumstances exist:

(i) The objecting party is a member of the same perceived cognizable group as the challenged juror.

(ii) The alleged victim is not a member of that perceived cognizable group.

(iii) Witnesses or the parties are not members of that perceived cognizable group.

(B) Whether race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, bear on the facts of the case to be tried.

(C) The number and types of questions posed to the prospective juror, including, but not limited to, any the following:

(i) Consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the concerns later stated by the party as the reason for the peremptory challenge pursuant to subdivision (c).

(ii) Whether the party exercising the peremptory challenge engaged in cursory questioning of the challenged potential juror.

(iii) Whether the party exercising the peremptory challenge asked different questions of the potential juror against whom the peremptory challenge was used in contrast to questions asked of other jurors from different perceived cognizable groups about the same topic or whether the party phrased those questions differently.

(D) Whether other prospective jurors, who are not members of the same cognizable group as the challenged prospective juror, provided similar, but not necessarily identical, answers but were not the subject of a peremptory challenge by that party.

(E) Whether a reason might be disproportionately associated with a race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups.

(F) Whether the reason given by the party exercising the peremptory challenge was contrary to or unsupported by the record.

(G) Whether the counsel or counsel's office exercising the challenge has used peremptory challenges disproportionately against a given race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, in the present case or in past cases, including whether the counsel or counsel's office who made the challenge has a history of prior violations under Batson v. Kentucky (1986) 476 U.S. 79, People v. Wheeler (1978) 22 Cal.3d 258, Section 231.5, or this section.

(e) A peremptory challenge for any of the following reasons is presumed to be invalid unless the party exercising the peremptory challenge can show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case:

(1) Expressing a distrust of or having a negative experience with law enforcement or the criminal legal system.

(2) Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.

(3) Having a close relationship with people who have been stopped, arrested, or convicted of a crime.

(4) A prospective juror's neighborhood.

(5) Having a child outside of marriage.

(6) Receiving state benefits.

(7) Not being a native English speaker.

(8) The ability to speak another language.

(9) Dress, attire, or personal appearance.

(10) Employment in a field that is disproportionately occupied by members listed in subdivision (a) or that serves a population disproportionately comprised of members of a group or groups listed in subdivision (a).

(11) Lack of employment or underemployment of the prospective juror or prospective juror's family member.

(12) A prospective juror's apparent friendliness with another prospective juror of the same group as listed in subdivision (a).

(13) Any justification that is similarly applicable to a questioned prospective juror or jurors, who are not members of the same cognizable group as the challenged prospective juror, but were not the subject of a peremptory challenge by that party. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for peremptory challenge relying on this justification to be considered presumptively invalid.

(f) For purposes of subdivision (e), the term “clear and convincing” refers to the degree of certainty the factfinder must have in determining whether the reasons given for the exercise of a peremptory challenge are unrelated to the prospective juror's cognizable group membership, bearing in mind conscious and unconscious bias. To determine that a presumption of invalidity has been overcome, the factfinder shall determine that it is highly probable that the reasons given for the exercise of a peremptory challenge are unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case.

(g)(1) The following reasons for peremptory challenges have historically been associated with improper discrimination in jury selection:

(A) The prospective juror was inattentive, or staring or failing to make eye contact.

(B) The prospective juror exhibited either a lack of rapport or problematic attitude, body language, or demeanor.

(C) The prospective juror provided unintelligent or confused answers.

(2) The reasons set forth in paragraph (1) are presumptively invalid unless the trial court is able to confirm that the asserted behavior occurred, based on the court's own observations or the observations of counsel for the objecting party. Even with that confirmation, the counsel offering the reason shall explain why the asserted demeanor, behavior, or manner in which the prospective juror answered questions matters to the case to be tried.

(h) Upon a court granting an objection to the improper exercise of a peremptory challenge, the court shall do one or more of the following:

(1) Quash the jury venire and start jury selection anew. This remedy shall be provided if requested by the objecting party.

(2) If the motion is granted after the jury has been impaneled, declare a mistrial and select a new jury if requested by the defendant.

(3) Seat the challenged juror.

(4) Provide the objecting party additional challenges.

(5) Provide another remedy as the court deems appropriate.

(i) This section applies in all jury trials in which jury selection begins on or after January 1, 2022.

(j) The denial of an objection made under this section shall be reviewed by the appellate court de novo, with the trial court's express factual findings reviewed for substantial evidence. The appellate court shall not impute to the trial court any findings, including findings of a prospective juror's demeanor, that the trial court did not expressly state on the record. The reviewing court shall consider only reasons actually given under subdivision (c) and shall not speculate as to or consider reasons that were not given to explain either the party's use of the peremptory challenge or the party's failure to challenge similarly situated jurors who are not members of the same cognizable group as the challenged juror, regardless of whether the moving party made a comparative analysis argument in the trial court. Should the appellate court determine that the objection was erroneously denied, that error shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial.

(k) It is the intent of the Legislature that enactment of this section shall not, in purpose or effect, lower the standard for judging challenges for cause or expand use of challenges for cause.

(*l*) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(m) This section shall become operative January 1, 2026.

End of Document

EXHIBIT 4

Connecticut Proposed Rule: Proposed December 2, 2020 for Adoption by the Connecticut Supreme Court by the Supreme Court's Task Force on Implicit Bias in the Jury Selection Process and Batson Challenges.

https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf

I. NEW GENERAL RULE. JURY SELECTION

(a) Policy and Purpose. The purpose of this rule is to eliminate the unfair exclusion of potential jurors based upon race or ethnicity.

(b) Scope; Appellate Review: The rule applies to all parties in all jury trials. The denial of an objection to a peremptory challenge made under this rule shall be reviewed by an appellate court de novo, except that the trial court's express factual findings shall be reviewed under a clearly erroneous standard. The reviewing court shall not impute to the trial court any findings, including findings of the prospective juror's demeanor, which the trial court did not expressly state on the record. The reviewing court shall consider only reasons actually given and shall not speculate as to, or consider reasons, that were not given to explain either the party's use of the peremptory challenge or the party's failure to challenge similarly situated jurors, who are not members of the same protected group as the challenged juror. Should the reviewing court determine that the objection was erroneously denied, then the error shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial.

(c) Objection. A party may object to the use of a peremptory challenge to raise a claim of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the prospective juror.

(d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reason that the peremptory challenge has been exercised.

(e) Determination. The court shall then evaluate from the perspective of an objective observer, as defined in section (f) herein, the reason given to justify the peremptory challenge in light of the totality of the circumstances. If the court determines that the use of the challenge against the prospective juror, as reasonably viewed by an objective observer, legitimately raises the appearance that the prospective juror's race or ethnicity was a factor in the challenge, then the challenge shall be disallowed and the prospective juror shall be seated. If the court determines that the use of the challenge does not raise such an appearance, then the challenge shall be permitted and the prospective juror shall be excused. The court need not find purposeful discrimination to disallow the peremptory challenge. The court must explain its ruling on the record. A party whose peremptory challenge has been disallowed pursuant to this rule shall not

be prohibited from attempting to challenge peremptorily the prospective juror for any other reason, or from conducting further voir dire of the prospective juror.

(f) Nature of Observer. For the purpose of this rule, an objective observer (1) is aware that 17 purposeful discrimination, and implicit, institutional, and unconscious biases, have historically resulted in the unfair exclusion of potential jurors on the basis of their race, or ethnicity; and (2) is deemed to be aware of and to have given due consideration to the circumstances set forth in section (g) herein.

(g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

(i) the number and types of questions posed to the prospective juror including consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the questions asked about it;

(ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the prospective juror, unrelated to his testimony, than were asked of other prospective jurors;

(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

(iv) whether a reason might be disproportionately associated with a race or ethnicity;

(v) if the party has used peremptory challenges disproportionately against a given race or ethnicity in the present case, or has been found by a court to have done so in a previous case;

(vi) whether issues concerning race or ethnicity play a part in the facts of the case to be tried;

(vii) whether the reason given by the party exercising the peremptory challenge.

(h) Reasons Presumptively Invalid. Because historically the following reasons for was contrary to or unsupported by the record. peremptory challenges have been associated with improper discrimination in jury selection in Connecticut or maybe influenced by implicit or explicit bias, the following are presumptively invalid reasons for a peremptory challenge:

(i) having prior contact with law enforcement officers;

(ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;

(iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;

(iv) living in a high-crime neighborhood;

(v) having a child outside of marriage;

(vi) receiving state benefits;

(vii) not being a native English speaker; and

(viii) having been a victim of a crime. The presumptive invalidity of any such reason may be overcome as to the use of a peremptory challenge on a prospective juror if the party exercising the challenge demonstrates to the court's satisfaction that the reason, viewed reasonably and objectively, is unrelated to the prospective juror's race or ethnicity and, while not seen by the court as sufficient to warrant excusal for cause, legitimately bears on the prospective juror's ability to be fair and impartial in light of particular facts and circumstances at issue in the case.

(i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection: allegations that the prospective juror was inattentive, failing to make eye contact or exhibited a problematic attitude, body language, or demeanor. If any party intends to offer one of these reasons or a similar reason as a justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A party who intends to exercise a 18 peremptory challenge for reasons relating to those listed above in i shall, as soon as practicable, notify the court and the other party in order to determine whether such conduct was observed by the court or that party. If the alleged conduct is not corroborated by observations of the court or the objecting party, then a presumption of invalidity shall apply but may be overcome as set forth in subsection (h).

(j) Review Process. The chief justice shall appoint an individual or individuals to monitor issues relating to this rule.

EXHIBIT 5

12/15/20 Notes: Crim. P. 24 Subcommittee Meeting
Q&A with Justices Gonzales and Gordon-McCloud

Attendees: Kevin McGreevy, Shelly Gilman, Sheryl Uhlmann, Karen Taylor, Bob Russell, John Dailey, Dana Nichols

The subcommittee met, with other members of the committee, to hear from Justices Gonzalez and Gordon-McCloud. Justice Steven Gonzalez has been a member of the Washington Supreme Court since January 1, 2012. Prior to his appointment, Justice Gonzalez was a state and federal prosecutor, as well as a private practice litigation attorney, handling both criminal and civil cases. In January 2021, he will become the Chief Justice of the Washington Supreme Court.

Justice Sheryl Gordon-McCloud has been a member of the Washington Supreme Court since 2012. She currently serves on the Court's Rules Committee. Prior to her membership on the Court, Justice Gordon-McCloud was an appellate attorney, often taking up the causes of those whose access to impact litigation was limited. She has received numerous awards for her advocacy.

In April of 2018, the Washington Supreme Court voted 9-0 to adopt GR 37. Justices Gonzalez and Gordon-McCloud have graciously agreed to discuss with us their perspective on the Rule, and answer questions from us.

Q1: Prior to the adoption of GR 37, what did you perceive to be the shortcomings of *Batson* as a guardrail against improper use, based on race/ethnicity, of peremptory challenges?

Gordon McCloud: Batson is so limited in its ability to protect against actual basis, because a lot of bias is implicit. Obviously it offers no protection against implicit basis. On the ground basically, especially in smaller jurisdictions, Batson means the judge has to call someone out as a racist, who wants to do that? The analytical basis of Batson flawed. So there was a real disincentive to uphold Batson challenges given that it's explicitly calling out racism.

Gonzalez: From the perspective of a person of color sitting on the bench, it was my expectation (under Batson) that counsel would dismiss people of color either for cause or peremptories. I think that peremptories should go altogether, but I understand there are good reasons for peremptories. GR37 is the next best step to getting rid of peremptory challenges. All of the studies showed that bias infected peremptories even when attorneys thought they were exercising challenges fairly. GR37 protects not just the rights of the accused but also the rights of jurors not to be removed for race Batson did not protect that right

Q2: What do you perceive to be the strengths of GR 37 in addressing these problems?

Gonzalez: GR 37 eliminates need for making explicit finding that an attorney was acting with racist intent. It makes it much more difficult to remove a minority member. It means more diverse panels. There is no decline in quality of panels. Studies have shown that heterogeneous panels make better decisions than homogenous panels.
Gordon-McCloud: It's only been in effect for a year or two, and we are already getting some cases. A study is being undertaken already about how it works – I think the study should wait

about five years, so there's more data. Unlike Justice Gonzales, the key problem I saw (before GR 37) was the State excusing persons of color, not both sides. I think GR37 addresses that problem but maybe not completely.

Q3: The standard for a trial court to evaluate an objection (based on race/ ethnicity) to a peremptory challenge in GR 37 is, "if an objective observer could view race or ethnicity as a factor in the use of a peremptory challenge…".

(a) **Why "an objective observer"?**

Gordon-McCloud: The next sub para defines objective observer as "aware of implicit bias." We always think we're objective and neutral so definition as someone who is aware of implicit bias is the key to the meaning.

(b) **Any discussion on whether "a factor" was too low a bar, compared to "significant factor"?**

Gonzalez: There was lots of discussion and many iterations of the rule and arguments about whether we were going too far. At issue were whether an objective observer "would" or "could" consider race as a factor and whether it should be a "factor" or a "significant factor" My concern is that these lower standards would water the rule down. It's important not to substitute what's normal for what is neutral. In fact the norm is to assume jurors of color won't be neutral. This rule is an attempt to pass a rule that actually works, unlike Batson which allows counsel to do an end run around the rule be coming up with race neutral reasons. In my view if the rule is stronger than it should be that's probably a good thing because it means more jurors of color will serve.

Q4: GR 37 lists seven facially race-neutral reasons that are presumptively invalid in defending a peremptory challenge.

(a) **Where did these reasons come from?**

Gonzalez: The research; the State v. Saintcalle decision contains the research. We wanted to call out things indicated by research.

(b) **Why list some reasons in the rule, when surely there are more pretextual reasons to mask improper uses of peremptory challenges?**

Gordon-McCloud: There's just so much room for reasons. Reasons we chose were based on the case law on reasons that have been used in the past to get rid of jurors of color. The rule is open ended so other reasons are not excluded.

(c) **Walk us through an example. If an African-American juror says that she distrusts law enforcement, given her and her family's experiences, but believes she can be fair in this case (and the challenge for cause is denied), why is it important for the court to disallow a peremptory challenge as to that juror?**

Gonzalez: experience of people of color are different. I grew up in LA and was routinely pulled over – so if you ask me do I distrust the motives of LE – yes, but I also served as a prosecutor, been my experience that both sides discriminate – this is my experience as a judge and as a prosecutor, so that perspective informs my view. It's important to disallow peremptory challenge in this situation to preserve the integrity of the system.

[d] **Is there room between a denial for cause, but overcoming the presumption of one of the seven reasons, such that a GR 37 objection would be over-ruled?**

Gonazlez – this is yet to be determined, I'm not sure there always is.

Gordon- McCloud – There's just so much education that needs to happen. A juror being suspicious of LE isn't a bias, it's their experience. I would not grant a challenge for cause for a juror like the one in the example

Q: do you harbor some belief that judges should be more lenient in granting cause?

Gonzales: yes, absolutely. Jurors shouldn't be rehabilitated by judges, its coercive. If it's easier to get cause then we can be more comfortable with higher standard for exercising peremptories.

Q5: GR 37 also prohibits unverified demeanor rationales for exercising peremptory challenges. Why?

Gordon-McCloud: We wanted demeanor to be raised at the time the demeanor was occurring so there would be adversarial comment at the time. Again its from the cases, where an after the fact discussion w/ juror out of room made demeanor observations unverifiable.

Q6: During the debate over GR 37 before it became GR 37, what were some of the concerns raised in adopting a rule?

Gonzalez: Tradition and resistance to change. Concern that rule should address other demographics. Concern that this was unfair to counsel who need to have peremptory so they could have a fair jury, except that counsel is really always trying to get a jury that favors their side, not an unbiased jury. It's really the court's job to ensure that a jury is unbiased.

Gordon McCloud – I was concerned it would be a first step towards eliminating peremptory challenges but that's not the case so far

Q7: What changes would you make, if any, if you were adopting a GR 37 today?

Gordon-McCloud: Fine with it as it is until we get the data back (to see if changes needed). I originally wondered if it should be applied to all lawyers or just to the state b/c historically it was the state that was responsible for the racist system. I'd like to wait another 4 years and see how its doing.

Gonzalez: I suppose it's possible to pass a less stringent rule, but for me saying its just about race, Batson doesn't work, let's see if it works. I think it's a clean very strong rule and believe it's going to make a better system and already has. Allows court to

Q8: Why adopt a rule on use of peremptory challenges regarding race/ethnicity, but not gender, sexual orientation, or economic status?

Gordon-McCloud: the right to peremptory challenges is valuable and critical to the underdog and limiting peremptories is like using chemo to address a growing cancer. We don't want to target there more broadly than needed.

Gonzalez: It's also about the jurors. People of color feel like fodder coming to a courtroom knowing that we won't be treated fairly so why come at all? If that perception changes then more people of color may show up. It's also important to address just one thing initially to be able to measure whether it works. If you tried to address all of the

Q9: How does GR 37 assist reviewing courts in evaluating objected-to uses of peremptory challenges?

Gordon-McCloud: You're getting a better record. For example by requiring discussion of demeanor to occur while it's happening. At least in the more urban areas lawyers are more aware of how they are asking questions and aware of making a better record.

Q10: Questions from the other Committee members:

Bob Russel: Before the rule, what was the test the reviewing court using?

Gonzales: No clear agreement. I used 9th cir approach.

Bob Russle: After GR37 when court is reviewing: If court ruled there was an error in denying a challenge is that error of constitutional dimension?

Gordon McCloud – We discussed whether the rule was constitutionally compelled or within the powers of the court – there are different views on our court by people who voted for the rule – we haven't answered this question yet. Certainly rule is based on Batson but whether it's constitutional error remains an open question.

Gonzales: Undecided currently, I think we'll be asked to decide in cases coming up.

EXHIBIT 6

12/8/20 Notes: Crim. P. 24 Subcommittee Meeting

Q&A with Judge **Roger Rogoff** and Prosecutor **Hugh Barber**

Attendees: Kevin McGreevy, Shelly Gilman, Sheryl Uhlmann, Karen Taylor, Bob Russell, John Dailey

The subcommittee met, with other members of the committee, to hear from a judge and prosecutor in Washington on how Washington's GR37 plays out in criminal trials, its impact, its faults, and its usefulness. Judge Rogoff, until early December 2020, was a judge on the Superior Court bench in King County, Washington. Prior to his seven years on the bench, he spent 14 years as a prosecutor in King County. Hugh Barber is a senior prosecutor in King County, and has been for 27 years. The format was question and answer, and lasted about 45 minutes.

Background of Guests (not noted)

Q: Was GR 37 needed & impact

Roger: Change was needed – *Batson* had lost its power. The initial response – this is a scary new rule – prosecutors and judges were concerned about how it'd work. Both prosecutors and judges now believe it works. Overwhelmingly positive feedback from judges. Did informal survey of colleagues and they had positive response.

Recap: forces us to be more cognitive of our biases and makes us better participants in system and thus makes system more trustworthy for everyone. Hasn't impacted outcomes, and has meant that more people of color on juries.

Hugh: If you look at it in terms of King county – no compelling need because very progressive office/county and not a tremendous amount of diversity. Rule addresses absolutely real problem and was absolutely needed statewide. Reached out to trial attorney friends and feedback – rule is good because it makes prosecutors more thoughtful about why we make challenges and preconceived notions about who want on jury. Think it has been kind of neutral in its limited history – but it cannot help but increase diversity on who sits on a jury.

Recap: Overwhelmingly positive, a little clunky until you figure out the procedures. Thinks that " has it impacted outcomes of convictions" is wrong question, because if outcomes of conviction change, that is probably for the better because the racial diversity of the jury reached a better decision.

Q: has rule put more blacks on jury? If you could re-do would you?

Hugh: Yes has increased jury diversity. I would not take it back if I could take it back. Believe GR 37 to be a net positive because it makes us more aware of implicit bias. Sends a message that the justice system cannot discriminate. I don't see any negative but even if did I think positive impact would outweigh the negative.

Roger: Has increased diversity, don't think it has yet impacted number of jurors of color on venires (showing up for jury duty). Sample size is small and haven't yet had an opportunity to see how it will work over time. Biggest impact on prosecutor – has changed what questions are asked, how jurors of color are treated. Acceptance that jurors of color should be serving and should be seated based on what they say not how they look.

Q: did rule negatively impact morale or outcomes for prosecutors?

Hugh: not a negative impact. This is not necessarily a negative, but if you have a juror who you have objectively reasonable reasons to get them off but they are a person of color, you have to be very conscious about questioning because of concern about GR 37. This is not necessarily a negative though.

Q: How difficult is it for judges?

Roger: Procedurally it is like a *Batson* challenge – you figure out a way to do it. Not any more difficult than *Batson*.

Hugh: From prosecutor's perspective there is a difference in what we have to establish when a challenge is made.

Roger: One thing that is nice about rule is that it's more of an objective test than Batson – nice for judge because judge doesn't have to call the DA racist

Q: has this changed cause challenges:

Roger: denied challenge for cause, then had to consider GR37 – might have been better to grant cause challenge. This rule may help court focus on cause challenges rather than prosecution making half-ass decisions on peremptory challenges.

Q: anything you would change about rule

Hugh: Might change squishy language "if an objective observer could conclude that race could be a factor…" could result in disparate outcomes because subject to interpretation – but not sure how you fix that without going back to watered-down *Batson*.

Roger: One thing to improve is throwing in language that helps establish procedure for dealing with hearing on challenge, e.g. take a break, do this, then do this…

Q; GR 37 has 7 presumptively invalid reasons for challenge, feelings about them? Helpful or not?

Hugh: It's a weird list. Don't like it, is it inclusive? To the extent that it instructs prosecutors that these things are not okay maybe it is a good thing, but they should know that already.

Roger: Trial lawyers rely on a lot of unsaid stuff, much of which is impacted by implicit bias. So it is really uncomfortable for lawyers who have been around for a long time – I am watching and can see this person does not like me – so it is uncomfortable but it's completely legit to do this. Lawyers should be uncomfortable – that is a reason for the rule.

Q: GR 37 has a demeanor component : the preference for a 3rd person witness to verify a challenge based on demeanor. How does this play out in the courtroom?

Roger: Have not heard prosecutors use demeanor as a basis for challenge since rule came in to play

Hugh: still may base exercise of preemptory challenge on demeanor. But have never used demeanor alone as a reason. It requires prosecutors to follow-up, and ask juror to express response, and not just rely on demeanor that could be misinterpreted.

Q: Why race and not other suspect classes?

Roger: Race historically is the problem and we did not want to mess around with other classes. If that's the harm you want to fix, fix that problem

Hugh Barber: gender and sexual id were on the table but there has not been the same historical exclusion of these groups

Bob Russel Question: is bad experience with law enforcement presumptively invalid reason? How does this work – if prosecutor is honestly trying to exclude someone who can't be fair to cops?

Hugh: I think a prosecutor has to follow up and cannot just assume juror will be unfair, even before GR37. We would expect jurors, particularly jurors of color, to have bad experiences with law enforcement.

Roger : if you follow up further you learn that there's a challenge for cause or you find out that the juror can be fair. Compare to jurors who indicate that they like/trust cops and can still be fair. Ultimately you may be able to overcome the presumption that it is a fair use of a peremptory challenge, but it is a harder hill to climb.

Sheryl Uhlmann Question: Is rule used against defense and how does that play out?

Roger: Yes. Prosecutors can and have used it against the defense, and it plays out by going through the process. Sometimes it is a prosecutor that wants to make a point, bias on both sides. Historically the problem has been with prosecutors making peremptory challenges. Has seen it with defense excluding jurors of color but not white jurors.