To: Colorado Supreme Court Committee on the Rules of Criminal Procedure
From: Kevin McGreevy
Date: June 20, 2022
Re: Implicit Bias and jury selection

Our subcommittee met to revisit a rule of criminal procedure to address implicit bias in the exercise of peremptory challenges for those rare cases that proceed to trial. The members of our subcommittee were Judges Gilman, Nichols and Malone, and attorneys Champaign, McGreevy, Russell, Taylor and Uhlmann. We were able to achieve greater consensus on several issues compared to our work in 2021, and had spirited debate on the few remaining issues of disagreement. This memorandum attempts to outline the points of agreement and disagreement, and offer our Committee some alternative viewpoints in the remaining areas of disagreement to focus our discussion.

1. We were unanimous in that all the members of subcommittee could live with a rule on this topic. A majority of the subcommittee thought the proposed rule was very important – that it addressed a vital promotion of fairness, albeit in a relatively small and infrequent aspect of the overall criminal justice system. Some members were less enthusiastic than others, and disagreement remains over a few portions of language. Nevertheless, a rule addressing implicit bias in the exclusion of jurors on peremptory challenges had benefits. One member pointed out that the value of having a rule, for symbolic significance of addressing racial bias, outweighed any shortcomings the rule might have in practical effect.

2. We discussed whether or not to include gender as a category in addition to race/ethnicity. The majority of the subcommittee thought gender addressed different historical and current challenges than race/ethnicity, and the proposed rule should *not* address gender. If we propose the adoption of a rule to the Court, we suggest that if a rule is adopted, we would revisit the mechanics of how the rule is operating, and discuss an amendment to address gender issues, either in this rule or a separate rule at a later time. We would also look to investigate the experiences of judges, practitioners, and appellate courts in California, as the Golden State did enact prescriptions for gender (and gender identity, as well as other categories) in its statute that also address race/ethnicity in the exercise of peremptory challenges.

3. **Unanimously agreed upon changes.** As for the rule itself, we all agreed to start with a review of the previous rule we proposed. There was unanimous agreement on certain changes, including:

   a. In proposed Crim. P. 24(d)(5), eliminate the word "unfair" in the phrase, "The unfair exclusion of potential jurors based on race or ethnicity is prohibited."

   b. In proposed Crim. P. 24(d)(5)(E), we agreed, if any presumptive invalid reasons are presented, to eliminate the historical background language and begin the paragraph, "The following are presumptively invalid reasons for a peremptory challenge." This was a compromise, as some members preferred to keep the original language, but subcommittee members agreed in the spirit of consensus to eliminate that language.

c. In proposed Crim. P. 24(d)(5)(E)(v), eliminate "having a child outside of marriage."

d. In proposed Crim. P. 24(d)(5)(F), eliminate, "or provide unintelligent or confused answers."

4. **Unanimously agreed upon portions of the rule.** The subcommittee was unanimous in the language of the proposed rule, including the above changes, set forth in Crim. P. 24(d)(5) (A), (B) and (F). As discussed below, the subcommittee reached substantial consensus on (D), leaving subsections (C) and (E) as the two areas with some disagreement.

5. **Substantial consensus**. Proposed Crim. P. 24(d)(5)(D) sets forth a non-exhaustive list of considerations the trial court may want to consider in making its ruling on an objection to a peremptory challenge pursuant to this rule. One member suggested the direction should be for the trial judge to consider "the totality of the circumstances" without illustrative examples. The majority of our subcommittee, including the trial judges, thought the illustrative lists, (i)-(v), was helpful in identifying potential circumstances that assist the court and practitioners in navigating the proposed rule. The debate on proposed Crim. P. 24(d)(5)(D) was relatively mild, with differing views on preferences, but a general acknowledgement that this subsection was not the heart of any strong disagreements.

6. **Two remaining areas of disagreement**. Two areas of the proposed rule sparked the most lengthy debate, with all the members contributing various thoughts. These are found at Crim. P. 24(d)(5)(C) and (E). In essence: What standard should be applied for the trial court's determination, and what factors should be listed as presumptively invalid.

7. **Standard for the trial court's determination: Crim. P. 24(d)(5)(C).** The subcommittee discussed seven possible alternatives. In our discussions, three of the seven alternatives were more strongly advocated by various members of the sub-committee. The three proposals most discussed were:

i. The court determines that an objective observer could view race or ethnicity as a factor.

ii. The court determines race or ethnicity was a significant/substantial factor.

iii. The court determines that an objective observer could reasonably view race or ethnicity as a factor.

In evaluating the standard and its alternatives, we primarily discussed five subjects:

a. The role of the objective observer;

b. The difference between "could" and "would";

c. Whether "factor" should be modified by "significant/substantial";

d. Whether a reasonableness requirement should be included to mitigate the concern that peremptory challenges would be denied based on incredible or speculative reasons; and

e. The role of appellate review.

A majority of the subcommittee desired choice (i) above, a number (but not all) of those in favor of (i) were willing to compromise to promote (iii), a minority of members preferred (ii), and perhaps one of them was willing to compromise to (iii). Most if not all the members of the subcommittee found the discussion of the topics helpful, so we will try to recapture some highlights here.

*Objective observer***.** Those in favor of keeping the 'objective observer' standard offered several points in favor. First, it allowed the judge to give some distance in sustaining the objection to the peremptory challenge without telling the attorney (or *pro se* litigant) that the judge personally perceives racial animus behind the strike. Second, it allows the no-strike zone to increase, which is a point of our proposed rule, to allow more racial minorities to serve on a jury. While the judge may not want to perceive racial bias, and while the perception of individual judges may vary greatly, the judge may determine an objective observer could find race played a role in the proposed juror excusal. Third, the objective observer, in combination with "could", is the mechanism to unveil the implicit bias without having to show purposeful discrimination – one of the major impetuses for the proposed rule. And fourth, it works just fine in the state of Washington. The opponents of the objective observer raised concerns that it set up a straw level of determination that was unnecessary. Furthermore, the objective observer language invited a *de novo* review on appeal.

*Could versus would***.** The difference between "could" versus "would" is largely one of evaluating how large a set of circumstances one wants to create to prevent race from being a factor in jury selection. "Could" makes the range more broad than "would" – for example, "would" requires a certainty that race played a role, whereas "could" allows for the possibility that race played a role in the peremptory challenge. For those favoring "could", it seemed to live up to the first principle articulated in the proposed rule: The exclusion of potential jurors based on race or ethnicity is prohibited. For those favoring "would", the focus is whether the exclusion is certainly "based" on race or ethnicity, and not *possibly* based on race or ethnicity. A majority of our subcommittee favored "could" over "would."

Modifying "factor" with significant or substantial. The legislation drafted in the 2022 session included a compromise that modified "factor" with "substantial" – meaning, race or ethnicity was, could be, or otherwise determined on a standard to be a "substantial factor" in the strike of a juror. Those in favor of the modification to "substantial" (or "significant") were interested in eliminating the denial of all peremptory challenges because race could play an insignificant, unconscious factor in every challenge. Others on the subcommittee felt strongly that modification of "factor" was an allowance that some racial or ethnic bias could play a role,

as long as it was not the predominant role, and that was contrary to the purpose of the rule (and contrary to a sense of justice in the grand scheme of the criminal justice system). Two members expressed concern that modifying "factor", particularly with a "would", was not deviating from *Batson*, and therefore not addressing the opportunity for more people of color to serve on a jury that the proposal will, according to Washington's experience, provide.

"Reasonably view" race as a factor. In response to the concern that race could always be a theoretical factor in every challenge, a subcommittee member proposed language that did not modify "factor" but rather inserted a measure of reason into the determination. For some on the subcommittee, this was an acceptable compromise. Others thought that it added an element of allowance of race to impact a decision, or that it was not clearly addressing the problem that race could reasonably be factored into every peremptory challenge.

Appellate review. One subcommittee member, let's call him Bob R. for anonymity, opined that the mechanism and standard for determination was less vital than the standard of review by an appellate court. The larger concern was whether an appellate court would analyze a denial of an objection to a peremptory strike *de novo* or on plain error. The concern was that *de novo* would be a second bite at the apple for potential reversal, and that the trial court is in a better position to make these determinations from bearing witness to the proceeding compared to the transcripts.

One view of this issue is: The purpose of the rule is to increase minority participation in jury service, and/or reduce the impact of racial/ethnic bias in the exercising of peremptory challenges. Consequences on appeal are, at best, secondary, so if a specific provision in the rule identifies the appellate standard in order to secure greater consensus in favor of the proposed rule, that seems to be a reasonable trade.

One other view was: Our criminal rules are usually not in the business of deciding appellate review standards, and perhaps we should not start now.

One other view was: *De novo* is better than the kabuki theater that currently exists on the limited remands *Batson* cases currently enjoy, when attorneys and courts try to recreate the record before returning to the Court of Appeals. A *de novo* review would eliminate the need for a remand, and promote a speedier decision on appeal. In contrast, it was suggested that the trial judge at the time of the peremptory challenge was in a better position to make the determination than an appellate court reviewing transcripts.

8. **Presumptively invalid reasons**. Proposed Crim. P. 24(d)(5)(E) lists seven presumptively invalid reasons. The majority of the subcommittee agreed with the list. We discussed two additions. First, it was proposed that a presumptively invalid reason be, "a sign of support for law enforcement" to balance out the distrust of law enforcement. One member expressed the opinion that the point of the proposed rule was to address the historic exclusion of people of color from jury service, not to keep Caucasians on juries – Caucasians are already well represented in jury service and have not faced historic discrimination. We also discussed adding "crime victim even if no charges were filed." As a compromise, this drew support from several sub-committee members, though we were unsure if any data supported this would promote more

people of color from serving on a jury and whether there was any correlation between this factor and historic discrimination against people of color. One member pointed out that, for Colorado, we had no data to support any of the presumptively invalid pretextual reasons as it related to peremptory challenges in Colorado. The majority of the subcommittee thought the list as proposed was fine, with some willing to compromise on the "crime victim" inclusion in order to promote greater consensus for the rule as a whole.

A majority of the sub-committee supported a proposal to amend Crim. P. 24(d) with the following language:

> (5) **Improper Bias**: The exclusion of potential jurors based on race or ethnicity is prohibited.
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> > (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.
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> > (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.
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> > (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.
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> > (D) **Circumstances Considered**. In making its determination, the circumstances the court should consider include, but are not limited to, the following:
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> > > (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;
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> > > (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**. To provide context for the types of rationales that do not support the exercise of a peremptory challenge, 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;

(vi) receiving state benefits; and

(vii) not being a native English speaker.

(F) **Reliance on Conduct**. The following reasons for peremptory challenges may be associated with improper discrimination in jury selection: allegations that the prospective juror was sleeping, inattentive, or staring or 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 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.