**Addeddum to Report on Rule 24(d)(5)**

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| To:From:Date: | Criminal Rules CommitteeRobert M. Russel1/15/21 |

I add this memo to the report that Kevin McGreevy submitted on behalf of the subcommittee on the proposed Rule 24(d)(5). Mine was the lone vote against adoption. I came to this view after consulting with prosecutors from both the 2nd and 18th Judicial Districts.

The 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 prosecutors generally believe that the proposed rule could be improved:

1. The rule’s benefits are derived largely from parts (A), (B), and (C). Those provisions replace the *Batson* framework — which is designed solely to combat conscious racial bias — with a framework that enables the trial court to remedy unconscious or implicit bias. But there is significant concern about the test that the trial court is required to apply in **part (C)**. It seems that virtually every peremptory challenge — by the prosecution or defense, against a racial minority or not — could be rejected on the ground that “an objective observer *could* view race or ethnicity as *a factor*.” The rule would better serve its intended purpose if, in part (C), the word “could” were replaced by “would.” As it stands, the existing “objective” test will admit of vastly inconsistent applications, depending on the judge.
2. **Part D** sets forth the totality of circumstances test that trial courts must employ in making their “objective” determinations. Most prosecutors believe that this section will significantly increase the length of voir dire, both because the parties will want to ensure that they are asking the same questions of all jurors, and because the court will have to address a prescribed list of factors in making its determination. Additionally, there is some doubt about the wisdom of factor (D)(v), which seems likely to generate collateral skirmishes. The proposed rule would be improved by replacing part (D) with a generic “totality of the circumstances” test.
3. **Part (E)(ii)** generated the most attention. The following comment accurately reflects the general consensus:

I think many of us are struggling with the basic underlying philosophical fault line about whether distrust of the criminal justice system is a valid race-neutral reason for a peremptory challenge. I think it is very hard for prosecutors to get our heads around the possibility that we need to disregard distrust of the system entirely in voir dire and that we cannot separate distrust of the system from race. Many of our standard voir dire strategies are designed to get at this very issue to find people who are likely to be biased against the prosecution from the outset. One common way to do this, given the time pressures in voir dire, is to ask jurors to rate the criminal justice system on a number scale. Then in the absence of other information, we might use a peremptory to excuse those jurors who give the lowest ratings. It is discombobulating to try come to terms with the idea that this is a racially discriminatory practice.

Prosecutors’ opposition to the proposed rule would soften considerably if factor (E)(ii) were removed from the list of “reasons presumptively invalid.”

1. If part (D) doesn’t sufficiently guarantee longer voir dire, then **part (F)** should do the trick. No party will, in open court, call the court’s attention to jurors’ odd conduct. That will have to be done in a series of bench conferences.

Ultimately, I urge caution in recommending this rule. In stating that that GR 37 has achieved its desired effect in Washington, the subcommittee’s majority is relying on the anecdotal opinions of three judges and one prosecutor. In the absence of data about minority participation before and after the rule’s adoption, I remain skeptical about its efficacy.

And I note that Washington has not yet ironed out all the potential kinks. What will happen if a trial judge errs in applying GR 37? Will the Washington Supreme Court elevate its prophylactic rule[[1]](#footnote-1) to the status of structural error and automatically reverse? Or will it require the complaining party to show prejudice (and, if so, how)? At this point, the Washington Supreme Court doesn’t know the answer.

1. I use the term “prophylactic rule,” recognizing that there may be a better way to characterize a rule that is designed neither to protect the defendant’s rights nor to enhance the accuracy or reliability of criminal verdicts. [↑](#footnote-ref-1)