**Crim. P. 24(d)(5) Proposal**

***General Thoughts***

* Thank you for your hard work in crafting this proposal. The Court recognizes this is a difficult issue and is looking for greater consensus from the rules committee before moving forward.
* In sharing the following questions with you, we do not necessarily expect an itemized response. Our goal is simply to provide you with food for thought as you seek greater consensus.

***Questions***

* Did the committee consider broadening the rule to include gender? Did the committee focus on race/ethnicity because there is a more immediate concern about that form of discrimination in jury selection (and an expectation that case law like *J.E.B.* would continue to govern as to gender discrimination), or because expanding the rule to include gender would make the rule unwieldy? Should there be a discussion about the perception the proposal could create if it omits gender discrimination or if gender discrimination is subject to a different analysis than race/ethnicity discrimination?
* (5)(C): The committee appears very divided on the standard. The proposal uses “objective observer *could* view race or ethnicity as a factor”; the minority report suggests “*was* a *significant* factor.” Is it possible to bridge this divide? Has the full committee discussed the minority report alternate proposal? Would there possibly be greater consensus around some kind of compromise or different language?
* (5)(D)(v): The proposal refers to “whether the party has used peremptory challenges disproportionately against a given race or ethnicity . . . *in past cases*.” How does the committee envision this type of evidence would be presented?
* (5)(E): Is the introductory phrase “Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection” backed by case law? Is it necessary in the text of the rule?
* (5)(E): The majority report emphasizes 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.” (Majority Report page 7.) The text of the proposed rule makes no reference to overcoming the presumption. Should it? If so, should it include details on how the presumption may be overcome?
* (5)(E)(ii): The minority report expresses concern about this provision because it indicates possible actual bias. This provision does appear to be different than (E)(i), (iii)-(vii) in that these other circumstances do not indicate bias (although some of them may be used improperly as proxies for assumed bias). Is (E)(ii) necessary? Put differently, are the overarching goals of the proposed rule change accomplished without (E)(ii)?
* (5)(E)(v): This provision refers to a juror’s receipt of “state benefits.” Was it the committee’s intent to limit this provision to state benefits and not include federal benefits?
* (5)(F): As with (5)(E), is the introductory phrase “The following reasons for peremptory challenges have also historically been associated with improper discrimination in jury selection” backed by case law? Is it necessary in the text of the rule?
* (5)(F): How does the committee envision that the notice during voir dire will play out? Will this process require frequent bench conferences?
* (5)(F): The majority report notes that “this section . . . requires corroboration of the prospective juror’s alleged demeanor by either the trial court or opposing counsel to sustain the peremptory challenge” on the basis of a juror’s demeanor. (Majority Report page 7.) However, the language of the rule does not phrase it in terms of requiring corroboration either by the court or opposing counsel. Instead, the rule says, “A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.” The phrasing in the rule suggests that opposing counsel’s failure to corroborate the behavior will require the challenge to be denied (essentially allowing opposing counsel to veto the challenge). Was this the committee’s intent? And, regardless, are there concerns with requiring corroboration by either the court or opposing counsel?
* (5)(F): The phrase “provided unintelligent or confused answers” seems nebulous and might invite frequent debate about what would qualify; given the resultant potential for wide variation regarding the implementation of this phrase, did the committee consider confining (5)(F) to demeanor?