

COLORADO SUPREME COURT
ADVISORY COMMITTEE ON THE RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
Friday, July 15, 2022

A quorum being present, the Colorado Supreme Court’s Advisory Committee on the Rules of Criminal Procedure was called to order by Judge John Dailey at 12:45 p.m. in the Supreme Court Conference Room. Members present at or excused from the meeting were:

Name	Present	Excused
Judge John Dailey, Chair	X	
Sheryl Berry	X	
Christian Champagne	X	
Judge Kandace Gerdes	X	
Judge Shelley Gilman	X	
Matt Holman	X	
Abe Hutt	X	
Judge Chelsea Malone	X	
Kevin McGreevy	X	
Judge Dana Nichols	X	
Robert Russel	X	
Karen Taylor	X	
Sheryl Uhlmann	X	
Judge Vincente Vigil	X	
Non-Voting Participant		
Karen Yacuzzo	X	

- I. Attachments & Handouts**
 - A. July 15, 2022 agenda
 - B. April 15, 2022 minutes
 - C. Implicit Bias Subcommittee Memo
 - D. Alternative Rule 24(d) Proposal
 - E. Civil Infraction Rules Form A Change Request

- II. Approval of Minutes**
 - A. The April 15, 2022 minutes were approved by acclamation.

- III. Announcements from the Chair**
 - A. Chair Judge Dailey took the announcements out of order before the approval of the minutes.
 - B. Judge Dailey welcomed the newest member of the committee, Judge Vincente Vigil, and asked the members to introduce themselves.
 - C. Judge Dailey announced that the court adopted the proposed changes to Rule 43.
 - D. Judge Dailey announced that he will be retiring at some point next year.

IV. Old/New Business

A. Combatting Implicit Bias in Jury Selection (Mr. McGreevy)

Judge Dailey recounted how this particular subject had been returned to the committee. And he said that if the committee submits a proposed change to the court, it would most likely be put out this time for public comment and a public hearing.

On behalf of the subcommittee, Kevin McGreevy presented a proposed rule, similar in many respects, different in some, from the original rule proposed by the committee. Mr. McGreevy noted the subcommittee's efforts to come up with more consensus about the provisions of the present proposal.

Mr. McGreevy initially led the committee in a discussion on whether such a rule is necessary. One member noted that promoting racial diversity or decreasing racial bias are two separate issues; another mentioned that these are very connected ideas and that juries are not currently reflective of communities, which creates a situation in which communities lose trust in the judicial branch. This member also noted that a justice system that is more reflective of communities will help build trust in the system. Another member noted that all the judges on the subcommittee are in favor of having a rule of this type.

Members of the committee noted that, although jury pools can be diverse, sitting juries are often not. A subcommittee member who spoke to individuals using a similar rule in Washington reported that the Washington rule had improved the diversity of sitting jurors. Other members noted that much of the support for a rule like this is anecdotal evidence, so results are not guaranteed; another member responded that anecdotal evidence should not be discounted because it may reflect reality.

Committee members differed on whether the proposed rule change would increase the amount of time it will take to select a jury.

From here, the committee turned to discrete issues in the proposed rule.

Whether to Add Additional Categories to Race and Ethnicity

The committee discussed whether to add categories. Various members pointed out that (a) it was a large national, state, and local discussion on racial and ethnic bias that prompted this type of proposal; (b) a conservative approach (limiting the rule to race and ethnicity) would allow the committee to consider how the rule is working before considering how additional categories might work; (c) gender and national origin categories may not be needed because those types of biases do not seem to be reasons people are excluded from serving on juries; (d) (but) excluding categories other than race and ethnicity from the rule would seemingly allow discrimination on the basis of those other categories; and (e) any rule adopted will be a large change, so a large

change should also include other categories of people that have been the subject of historical discrimination.

Determining the Validity of a Challenge

Then the committee turned to the standard of determining the validity of peremptory challenges, i.e., whether (a) an observer or a reasonable observer, (b) could or would (c) view or reasonably view (d) race or ethnicity (e) to be a factor or a significant or substantial factor (f) in making the challenge.

A large discussion point was over the wording, “could” vs. “would.” Some argued that, because the rule is being proposed to address historic discrimination of people of color, it should be as broad as possible; others, however, noted that “could” renders the standard so speculative as to make the rule unworkable.

The committee also discussed whether to explicitly list certain circumstances (and if so, what that list should contain) that a court should consider in determining the validity of a proposed peremptory challenge.

Appellate Standard of Review

Out of concern that the rule as proposed would invite *de novo* review, some members thought the proposed rule should specifically reference an *abuse of discretion* standard of review. Others, however, noted that other rules don’t identify appellate standards of review

Presumptively Invalid Reasons for A Challenge

The committee discussed whether to list presumptively invalid grounds for a challenge and disagreed about including a couple of specific items. The most controversial “presumptively invalid” reason for challenging a juror was that concerning “expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling.”

Alternative Proposal

Mr. Russel asserted that he does not expect to achieve robust support but would like to have a vote on an alternative proposal. Some members liked it, others didn’t.

From here, the committee moved on to voting on specific issues.

- 1) The committee voted 8-4 in favor of limiting the proposed rule to the categories of race and ethnicity.
- 2) The committee voted 8-4 in favor of using *objective observer* in the rule.

- 3) The committee voted 8-4 in favor of using the *could* standard.
- 4) The committee voted 7-5 in favor of including the term *reasonably view* in the rule.
- 5) The committee voted 4-8 against requiring that race or ethnicity be a “significant” or “substantial” factor in the challenge.
- 6) The committee voted 0-12 against including an appellate standard of review.
- 7) The committee voted 8-4 to keep *reasons presumptively invalid* in the rule.
- 8) The committee voted 8-4 in favor of the rule setting out presumptively invalid reasons.
- 9) The committee voted 8-4 in favor of proposed subsections (d)(5)(A), (B), and (F), which cover the procedure for raising and resolving objections to allegedly improper peremptory challenges.
- 10) The committee voted 8-4 to include in the rule the proposed section on *circumstances that should be considered* in determining the validity of a challenge.
- 11) The committee voted 7-5 in favor of including “receiving state benefits” as a presumptively invalid reason for exercising a peremptory challenge.
- 12) The committee voted 8-4 in favor of the rule proposed by a majority of the subcommittee, as modified by the votes on the individual topics noted above.
- 13) The committee voted against the alternate proposal by a vote of 4-8.

Mr. McGreevy and Mr. Russel will prepare majority and minority reports, respectively, for the supreme court’s benefit.

Rule 24. Trial Jurors

(a) - (c) [NO CHANGE]

(d) Peremptory Challenges.

(1) - (4) [NO CHANGE]

[\(5\) Improper Bias. The 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 reasonably 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.** 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.

(e) - (g) [NO CHANGE]

COMMENTS [NO CHANGE]

B. Civil Infraction Rules—HB 22-1229’s Possible Impact on Form A

Judge Dailey took this item of business out of order and considered this item first.

Judge Dailey noted that Ms. Yacuzzo has preliminarily determined that Form A of the Traffic Infractions Rules does not need to be updated in response to HB 22-1229.

Nonetheless, Sheryl Uhlmann, Sheryl Berry, and Christian Champagne were assigned to review the legislation to see if any action is needed.

V. New Business

None.

VI. Future Meetings

October 21st, 2022

The committee adjourned at 3:13 PM.