

Date of Hearing: June 2, 2020

ASSEMBLY COMMITTEE ON APPROPRIATIONS

Lorena Gonzalez, Chair

AB 3070 (Weber) – As Amended May 4, 2020

Policy Committee: Judiciary

Vote: 8 - 3

Urgency: No

State Mandated Local Program: No

Reimbursable: No

SUMMARY:

This bill prohibits a party from using a peremptory challenge to remove a prospective juror for implicitly biased reasons related to race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation. Specifically, this bill:

- 1) Authorizes a party to object to the use of a peremptory challenge to raise the issue of implicit bias.
- 2) Requires the court to evaluate the reasons given, and if the court grants the objection, either declare a mistrial, seat the challenged juror or provide another remedy as the court deems appropriate.
- 3) Requires the denial of an objection to be reviewed *de novo* by an appellate court.

FISCAL EFFECT:

Possible minor cost pressure (GF/Trial Court Trust Fund) to the trial and appellate courts in workload to hear and review objections to peremptory challenges based on implicit bias. Courts already hear and rule on peremptory challenge objections based on membership in a protected class, however, this bill provides more guidance on what courts should consider when determining whether a peremptory challenge is implicitly discriminatory.

COMMENTS:

- 1) **Purpose.** AB 3070 prohibits the use of peremptory challenges in jury selection on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, and outlines new court procedures for evaluating and addressing peremptory challenges that are potentially discriminatory.
- 2) **Batson/Wheeler.** The United States Supreme Court ruled in *Batson v. Kentucky*, that peremptory challenges may be a vehicle for discrimination. Prior to that, in 1978, the California Supreme Court, in deciding *People v. Wheeler*, forbid the use of peremptory challenges based on the belief that certain individuals are biased because they are members of a specific racial, ethnic, or religious group. If the court makes a *prima facie* inference of discriminatory action, the judge then asks the party seeking to strike a potential juror to provide a justification for each peremptory challenge. For a peremptory challenge to be considered valid, the reason given must be facially neutral (i.e., not expressly related to the

prospective juror's race, ethnicity, or other specified characteristic). This bill prohibits basing peremptory challenges on grounds that may be implicitly biased to particular jurors. It requires the courts use an objective test in considering bias and removes the objecting party's obligation to make a *prima facie* case of bias before opposing counsel is required to respond. This bill also eliminates the use of facially neutral reasons that disproportionately affect certain groups.

- 3) **Jury Selection Work Group.** The California Supreme Court announced in January 2020 that it planned to convene a Jury Selection Work Group to study how *Batson/Wheeler* operates in practice in California and whether modifications or additional measures are warranted to address impermissible implicit bias in jury selection. Chief Justice Cantil-Sakauye planned to appoint a work group of stakeholders, including judges, prosecutors, defense counsel, and other practitioners in criminal and civil litigation to study bias in jury selection. The appointment of the Work Group was delayed by the COVID-19 pandemic.

- 4) **Arguments in Support.** According to the California Public Defenders Association:

Existing law has wholly failed to prevent discrimination in jury selection. Members of the California Supreme Court, Courts of Appeals and numerous commentators have lamented the failure of the *Batson* framework to prevent the discrimination in the selection of jurors.

- 5) **Arguments in Opposition.** According to the California District Attorneys Association:

AB 3070 would upend literally decades of state and federal jurisprudence, beginning with the seminal California case of *People v. Wheeler* (1978) 22 Cal. 3d 258, would remove judicial discretion during voir dire, and would replace the prohibition on purposeful discrimination with a vague objective standard.

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