SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

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Author:	Weber		
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Urgency:	No	**Fiscal:**	Yes
Consultant:	MK		

Subject: ***Juries: Peremptory Challenges and Challenges for Cause***

HISTORY

Source: California Attorneys for Criminal Justice

Prior Legislation: None

Support: 8th Amendment Project; American Civil Liberties Union/Northern California/Southern California/San Diego and Imperial Counties; Anti-defamation League; Asian Americans Advancing Justice – California; California Appellate Defense Counsel, INC.; California Innocence Coalition: Northern California Innocence Project, California Innocence Project, Loyola Project for The Innocent; California Public Defenders Association; California Religious Action Center of Reform Judaism; Californians for Safety and Justice; Communities United for Restorative Youth Justice; Democratic Party of The San Fernando Valley; Disability Rights California; Drug Policy Alliance; Ella Baker Center for Human Rights; Equal Justice Society; Equal Rights Advocates; Equality California; Exonerated Nation; Friends Committee on Legislation of California; Initiate Justice; League of Women Voters of California; Lutheran Office of Public Policy – California; National Association of Social Workers, California Chapter; Re:store Justice; San Francisco District Attorney's Office; San Francisco Public Defender; The Los Angeles Regional Reentry Partnership; Uncommon Law

Opposition: Association of Deputy District Attorneys; California District Attorneys Association; California State Sheriffs' Association; California Statewide Law Enforcement Association; Los Angeles County District Attorney's Office; Peace Officers Research Association of California (PORAC); San Diegans Against Crime; San Diego Deputy District Attorneys Association; Santa Cruz County District Attorney's Office

Assembly Floor Vote: 53 - 16

PURPOSE

The purpose of this bill is to change the procedures to determine whether peremptory challenges and challenges for cause have been improperly used to exclude juror(s) because of their race, ethnicity, gender, gender identity, sexual orientation, national origin or religious affiliation, or perceived membership with any of those groups.

Existing law requires that all persons selected for jury service be selected at random from the population of the area served by the court and that all qualified persons have an equal opportunity to be considered for jury service in the state. (Code of Civil Procedure Sections 191 and 192.)

Existing law prohibits a party from using a peremptory challenge to remove a prospective juror on the basis of the assumption that the prospective juror is biased merely because they have a characteristic listed or defined in Government Code Section 11135, or on similar grounds. (Code of Civil Procedure Section 231.5.)

Existing law provides that after any jurors have been removed from the panel for cause, the parties may remove a specified number of jurors peremptorily (without giving any reason), and provides a specified number of peremptory challenges to which each party is entitled depending on the number of parties in the litigation and whether the case is criminal or civil in nature. (Code of Civil Procedure Section 231.)

Existing law provides that a defendant's right to trial by a jury drawn from a representative cross section of the community, as guaranteed by the Sixth Amendment of the federal Constitution and article I, section 16, of the California Constitution, is violated when a "cognizable group" within that community is excluded from the jury venire. In order for a group to be considered cognizable, two requirements must be met: (1) the group's members must share a common perspective arising from their life experience in the group; and (2) it must be shown by the party seeking to prove a violation of the representative cross section rule that no other members of the community are capable of adequately representing the perspective of the group assertedly excluded. (*Rubio v. Superior Court* (1979) 24 Cal.3d 93, 97-98, citing *People v. Wheeler* (1978) 22 Cal.3d 258, 272; see also *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1274.)

Existing law prohibits the State from excluding members of the defendant's race from the jury venire on account of race, or on the false assumption that members of their race as a group are not qualified to serve as jurors. (*Batson v. Kentucky* (1986) 476 U.S. 79, 85-88.)

Existing law prohibits peremptory challenges based on group bias in civil lawsuits in federal district court. (*Edmonson v. Leesville Concrete Co*. (1991) 500 U.S. 614, 630-631.)

Existing law establishes a procedure (a "Batson-Wheeler hearing") whereby the court can address the use of a peremptory challenge (sometimes referred to as a "strike") that is believed to have been made in a discriminatory manner:

a) Requires a party to make a timely objection if they believe the striking party is exercising their peremptory challenges in a discriminatory manner. (*People v. Perez* (1996) 48 Cal.App.4th 1310, 1314.)

b) Requires the trial court to resolve whether or not the objecting party has raised a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (*Johnson v. California* (2005) 545 U.S. 168.) In reaching this conclusion, many factors may raise an inference of discriminatory intent, including the following:

i) Where a party has struck most or all members of an identified group or has used a disproportionate number of their peremptory challenges against members of that group. (*People v. Wheeler, supra* at p. 280.)

ii) Where a party has failed to engage the prospective juror in meaningful questioning. (*Id.* at pp. 280-281.)

Existing law requires, if the court finds a prima facie inference of discriminatory action, the striking party to provide a justification for each challenged peremptory. Valid justifications need only be genuine and neutral, not necessarily justification of challenge for cause (*People v. Arias* (1996) 13 Cal.4th 92, 136), and may include the following:

i) Antipathy towards prosecutor or criminal justice system. *(People v. Mayfield* (1997) 14 Cal.4th 668, 724.)

ii) Bad feelings towards law enforcement. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1217.)

iii) Family member with criminal conviction. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1282.)

iv) Juror's occupation. (*People v. Semien* (2008) 162 Cal.App.4th 701, 708.)

v) Hostile looks. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125.)

vi) Hunches. (*People v. Hall* (1983) 35 Cal.3d 161, 170.)

vii) Manner of dress. (*People v. Barber* (1988) 200 Cal.App.3d 378, 396.)

c) Requires the court to decide if the proffered reasons are true or merely a pretext cloaking discriminatory intent. In making this decision, the court may consider the following:

i) An evaluation of the striking party's "state of mind" based on demeanor and credibility. (*Hernandez v. New York* (1991) 500 U.S. 352, 365.)

ii) Comparison of the dismissed juror against similar jurors who were not members of the cognizable group, whom the attorney did not dismiss. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 241.)

iii) Whether or not the striking party failed to fully question the juror they now seek to dismiss. (*Id.* at p. 246.)

Existing law requires the court, if it concludes that a juror has been improperly dismissed, to find an agreeable remedy, including:

i) Dismissing the panel and commencing jury selection again with a completely new venire. (*People v. Wheeler, supra* at p. 282.)

ii) Ordering the improperly dismissed juror reseated if they are able to serve. (*People v. Willis* (2002) 27 Cal.4th 811.)

iii) Giving the aggrieved party additional peremptory challenges. (*Id.* at p. 821.)

iv) Imposing monetary sanctions on the striking attorney, if the judge warned the attorneys before starting jury selection to comply with Batson-Wheeler. (*People v. Muhammad* (2003) 108 Cal.App.4th 313, 324-325.)

v) Reversing a judgement and ordering a retrial. (*People v. Silva* (2001) 25 Cal.4th 345, 386.)

This bill provides that a party shall not use a peremptory challenge to remove a prospective juror on the basis of prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.

This bill provides that a party or the trial court on its own motion may object to the improper use of a peremptory challenge or the use of a challenge for cause.

This bill provides that after an objection is made the discussion shall happen outside the jury.

This bill provides that the court shall evaluate the reasons given to justify the peremptory challenge or the use of a challenge for cause in light of the totality of the circumstances. The court shall consider only the reason given and not speculate on additional reasons.

This bill provides that if the court determines there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor in the use of the peremptory challenge or the use of a challenge for cause then the objections shall be sustained. The court does not need to find purposeful discrimination to sustain the objections.

This bill defines an objectively reasonable person as someone who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination have resulted in the unfair exclusion of potential jurors in the State of California.

This bill defines "a substantial likelihood" as more than a mere possibility but less than a standard of preponderance of the evidence.

This bill provides that in making its determination, the circumstances the court may consider include, any of the following:

a) Whether any of the following circumstances exist:

   i) The objecting party is a member of the same perceived cognizable group as the challenged juror.

   ii) The alleged victim is not a member of that perceived cognizable group.

   iii) Witnesses of the parties are not members of that perceived cognizable group.

b) Whether race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, are facts that may be a factor in the case.

c) The number and types of questions posed to the prospective juror, including, but not limited to, any of the following:

   i) Consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the concerns later stated by the party as the reason for the peremptory challenge.

   ii) Whether the party exercising the peremptory challenge or challenge for cause engaged in cursory questioning of the potential juror.

   iii) Whether the party exercising the peremptory challenge or challenge for cause asked different questions of the potential juror in contrast to questions asked of other jurors from different perceived or cognizable groups about the same topic or whether the party phrased questions differently.

d) Whether other prospective jurors, who are not members of the same cognizable group as the challenged prospective juror, provided similar, but not necessarily identical, answers were not the subject of a peremptory challenge or challenge for cause by that party.

e) Whether a reason might be disproportionality associated with a race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups.

f) Whether the reason given by the party exercising the peremptory challenge or challenge for cause.

g) Whether the party has used peremptory challenges or challenges for cause disproportionality against a given race, ethnicity, gender, gender identity, sexual orientation, national origin or religious affiliation, or perceived membership in any of those groups, in the present case or in past cases including whether the party who made the challenge has a history of prior violations under *Baston v. Kentucky* or *People v. Wheeler*.

This bill provides that a peremptory challenge or challenge for cause for any of the following reasons is presumed to invalid unless the party can show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of these groups, and that the reasons articulated bear on the prospective juror's ability to be fair and impartial in the case.

a) Expressing a distrust or having a negative experience with law enforcement or the criminal legal system.
b) Expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner.
c) Having a close relationship with people who have been stopped, arrested or convicted of a crime.
d) A prospective juror's neighborhood.
e) Having a child outside of marriage.
f) Receiving state benefits.
g) Not being a native English speaker.
h) The ability to speak another language.

i) Dress, attire, or personal appearance.
j) Employment in a field that is disproportionately occupied by members of a protected group or that serves a population disproportionately comprised of members of one of those groups.
k) Lack of employment or underemployment of the prospective juror or the prospective juror's family member.
l) A prospective juror's apparent friendliness with another prospective juror who is a member of a protected group.
m) Any justification that is similarity applicable to a questioned prospective juror or jurors, who are not members of the same protected group as the challenged prospective juror, but were not subject of a peremptory challenge or challenge for cause. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for peremptory challenge or challenge for cause, relying on this justification to be considered presumptively invalid.

This bill provides that the following reasons for peremptory challenges have historically been associated with improper discrimination in jury selection and deemed to be presumptively invalid unless the court is able to confirm the assertive behavior based on the court's own observations or observations of counsel and the party offering the reason can justify why the asserted demeanor etc. is relevant to the case to be tried:

a) The prospective juror was inattentive, or staring or failing to make eye contact.
b) The prospective juror exhibited either a lack of rapport or problematic attitude, body language or demeanor.
c) The prospective juror provided unintelligent or confused answers.

This bill provides that upon a court granting an objection to the improper exercise of a peremptory challenge or challenge for cause the court shall do one of the following:

a) Quash the jury venire and start jury selection anew. This remedy shall be provided if requested by the objecting party.
b) If the motion is granted after the jury has been impaneled, declare a mistrial and select a new jury if requested by the objecting party. This remedy is available only to the defendant.
c) Seat the challenged juror.
d) Provide the objecting party additional challenges.
e) Provide another remedy as the court deems appropriate,

This bill provides that this section applies to all jury trials in which jury selection has not completed as of January 1, 2021.

This bill provides that the denial of an objection made under this section shall be reviewed by the appellate court de novo, except that the trial court's express factual finding shall be reviewed for substantial evidence. The appellate court shall not impute to the trial court any findings, including findings of the prospective juror's demeanor, which the trial court did not expressly state on the record. The reviewing court shall consider only reasons actually given and shall not speculate as to or consider reasons that were not given to explain either the party's use of the peremptory challenge or the party's failure to challenge similarly situated jurors who are not members of the same protected group as the challenged juror. Should the appellate court

determine that the objection was erroneously denied, that the error shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial.

COMMENTS

1. Need for This Bill

According to the author:

> California citizens are too often excluded from serving on juries because of their race, ethnicity, gender, sexual orientation, or other legally-protected characteristics. The judicial procedure designed to reduce this long-standing practice is limited to acts of intentional discrimination. This approach has failed.
>
> Courts have acknowledged that it can be difficult and often impossible for the trial judge to determine whether the lawyer making the challenge actually intended to discriminate. Trial courts rarely even require attorneys to present their reasons for excluding a juror, and when reasons are given, judges must rely on a subjective test that requires the court to attempt to determine the actual motivation of the attorney challenging a potential juror. Thus, even when judges require lawyers to provide reasons for a challenge, both the trial courts and the reviewing courts have been strongly inclined to accept whatever justifications are offered. Reasons given by the party making the strike will almost always suffice even if they are "trivial" or "arbitrary or idiosyncratic"—so long as they are not patently discriminatory or patently false. California courts routinely permit justifications that are supposedly "race neutral," but are clearly substitutes for discrimination, such as whether the juror (or the juror's family) has had negative experiences with police, lives in a particular neighborhood, wears his or her hair in a certain way, dresses in a certain way, has a particular demeanor, or believes that the law enforcement system treats people of color unfairly. Additionally—even after a trial is already completed—California courts often invent their own reasons why an attorney may have challenged a juror to affirm the trial judge's ruling that the peremptory challenge was not discriminatory.
>
> Perhaps more important, the existing procedure cannot address strikes exercised because of implicit bias, that is, unconscious or automatic attitudes and stereotypes. Numerous studies have shown—and the California Legislature has explicitly found—that implicit bias is pervasive and affects all actors in the criminal legal system. *See* AB 242 (Cal. 2019) (codified at Cal. Bus. & Prof. Code § 6070.5 & Govt. Code § 68088). In particular, the Legislature stated that "most people have an implicit bias that disfavors African Americans and favors Caucasian Americans, resulting from a long history of subjugation and exploitation of people of African descent." AB 242, § 1(3).
>
> Decades of jury selection under the existing procedure have been especially detrimental to African Americans, Latinos, and other people of color. AB 3070 aims to remedy the discriminatory use of peremptory challenges (also known as

"strikes") against prospective jurors, and, especially against African Americans, who prosecutors have historically and continue to remove disproportionately from juries.

2. Peremptory challenges

Peremptory challenges to jurors have been part of the civil law of California since 1851, and were codified in the original Field Codes in 1872. Their previous history in England dates back to at least the Fifteenth Century when persons charged with felonies were entitled to 35 peremptory challenges to members of the jury panel. Peremptory challenges have permeated other nations which have based their systems of justice on English Common Law. Today, nations with roots in English law, such as Australia, New Zealand, and Northern Ireland, continue to utilize peremptory challenges in jury selection.

In 1986, the United States Supreme Court decided *Batson v. Kentucky*, recognizing that the peremptory challenge could be a vehicle for discrimination. Subsequent cases have sought, with some difficulty, to define the limits of inquiry into the motives of the parties in exercise of challenges which might be based on race or gender. In California, under Civil Code Section 231.5, a party may not excuse a juror with a peremptory challenge based on race, color, religion, sex, national origin, sexual orientation or similar grounds. If questioned, the attorney who exercised the potentially discriminatory challenge must provide the court with a lawful and neutral reason for the use of the challenge.

Under the present system, a potential juror may be excused for cause under a number of specified circumstances (generally incompetence, incapacity, and apparent implied or actual bias). One common use of peremptory challenges is to remove potential jurors who meet the legal definition, but who the attorney suspects may be biased or incompetent.

3. Process for challenging a peremptory challenge

If a question arises as to whether a peremptory challenge was improperly made, this bill provides that the court shall evaluate the reasons to justify the peremptory challenge in light of the totality of the circumstance and only consider the reasons actually given. If the court determines there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin or religious affiliation, or the perceived membership in one of these groups a factor in the use of the peremptory then the challenge shall be sustained. The court shall explain its ruling on the record. The bill does not explicitly say that the court shall explain the reasons for its ruling on the record. The author may wish to clarify this so there will be more details for an appellate court to review.

4. Objectively reasonable person

This bill defines an objectively reasonable person as a person that is aware that implicit, institutional and unconscious biases, in addition to purposeful discrimination have resulted in the unfair exclusion of potential jurors in the State of California. Is the understanding of implicit, institutional and unconscious bias well known and consistent enough that there will be consistency among the various trial courts as to what these terms mean?

5. Substantial likelihood

This bill defines substantial likelihood as requiring more than a mere possibility but less than a standard of the preponderance of the evidence. Is this definition of substantial likelihood consistent with the definition already understood by courts? In order to cause less confusion and create more consistency, the author should make sure the definitions of terms are consisted with the already understood meaning of those terms.

6. Parties

When determining whether or not a peremptory challenge was inappropriate one of the factors this bill uses is whether the party has used peremptory challenges disproportionately against a give race in the past. In a criminal case the "party" is the people of the state of California on one side. It is not even clear what discovery would be necessary to make this determination. Even if the intent is that a particular prosecutor's office has used challenges inappropriately it may not be the case that the particular attorney in the case has. Or the reverse could be true, the office as a whole as a good record but this particular attorney has been known to often kick off jurors with a particular characteristic. The more appropriate term would be counsel then the focus can be on how that particular attorney has acted in the past. Focusing on the particular counsel should also result in the intended effect of changing the practices in the office.

7. Presumed invalid peremptories

The bill lists a number of reasons for which a peremptory challenge will be presume dot be invalid unless it can be shown by clear and convincing evidence that a reasonable person would view the rationale as unrelated to a prospective juror's characteristic.

Is clear and convincing the appropriate standard in this case? The California Judges Association are "concerned that the "clear and convincing evidence" standard to rebut presumptively invalid challenges of jurors is a problem. Especially when elevating the burden of proof from "preponderance of the evidence" to clear and convincing, we are concerned that judges will rarely have sufficient "evidence" to make such a ruling."

Should all the listed reasons be presumed invalid? For example, could a person's employment status be relevant in an embezzlement case or some other case related to employment? Can a person's attire be clearly linked to a person of one of the protected classes?

8. Challenges to jurors by peremptory and cause

This bill sets up new procedures to address improper dismissals of jurors. As amended on July 28 it addresses not only peremptory challenges but also challenges for cause. While peremptory challenges are created by statute, challenges for cause are based on the U.S. and California Constitutions and the right to trial by an impartial jury. (See *People v. Black* (2014) 58 Cal. 4th 912) Including challenges in cause in this bill could result in a constitutional challenge to the whole bill and the bill being found invalid. The author may wish to consider removing the challenges for cause from this bill.

9. Standard on appeal

This bill provides that the denial of an objection made under this section shall be reviewed by the appellate court de novo, except that the trial court's express factual finding shall be reviewed for substantial evidence. The appellate court shall not impute to the trial court any findings, including findings of the prospective juror's demeanor, which the trial court did not expressly state on the record. The reviewing court shall consider only reasons actually given and shall not speculate as to or consider reasons that were not given to explain either the party's use of the peremptory challenge or the party's failure to challenge similarly situated jurors who are not members of the same protected group as the challenged juror. Should the appellate court determine that the objection was erroneously denied, that the error shall be deemed prejudicial, the judgment shall be reversed, and the case remanded for a new trial.

Is the intent that the court's legal ruling shall be reviewed de novo based on the court's explanation of its reasoning on the record if they are supported by evidence but if the court does not explain its ruling on the record, the appellate court cannot create reasons for the ruling? Could this be more clearly stated to give guidance to the appellate court?

10. Operative date

This bill takes effect January 1, 2021. Is this enough time for judges to be trained in the new standards and procedures, especially in light of the fact that we still may be facing issues relating to COVID-19? The California Judge Association notes that:

> AB 3070 represents wholesale revisions to the process for asserting, objecting to, and adjudicating peremptory challenges, at the same time that tens of thousands of criminal cases are backlogged throughout California due to COVID-19. Depending upon the county, it is possible that virtually all judges, including retired judges sitting by assignment, will be drafted into conducting criminal proceedings. It is critical that proper training be conducted on the changes occasioned by the bill, in order to reduce appeals and most critically, to dispense justice fairly and impartially.

11. Argument in Support

The sponsor of the bills states:

> The California Attorneys for Criminal Justice (CACJ), a statewide association of criminal defense attorneys in private practice or working in public defender offices, sponsors and writes in strong support of AB 3070 (Weber) to create an effective procedure for bringing an end to discrimination in the selection of juries. Jury trials are a fundamental pillar of our criminal justice system, designed to preserve the presumption of innocence and the fair administration of justice. Unfortunately, juries across the country, and in California, often fail to adequately reflect a cross-section of the community. Despite current safeguards, too often individuals are excluded from juries because of their race, ethnicity, gender, sexual orientation or other legally-protected characteristics. This bill would improve the process to identify inappropriate bias in the jury selection process.

Discrimination has long been condemned by the United States Supreme Court as a shameful stain on our justice system that "casts doubt on the integrity of the judicial process and places the fairness of a criminal proceeding in doubt" and that "not only violates our Constitution but is at war with our basic concepts of a democratic society and a representative government."

Over the last four decades, our courts have employed the Batson procedure, which was designed to root out intentional acts of discrimination by lawyers when they exercise peremptory challenges to eliminate prospective jurors. However, social science research shows that African Americans are excluded from juries by peremptory challenges at much higher rate – as much as 2.5 times as high – as the rate at which others are struck.

Under current law, courts are often left with little recourse to address bias in jury selection, especially if the offending attorney masks his or her true intent. There are many cases in California where justices on the Appellate Courts, and even California Supreme Court justices, have acknowledged the need to improve our jury selection laws to prevent racial bias.

AB 3070 (Weber) improves the current jury selection procedure, modeled on a rule the Washington Supreme Court adopted and in effect since 2018. This procedure:
1. Addresses unlawful discrimination in the selection of juries, regardless of whether the bias is intentional or implicit;
2. Replaces the unworkable, subjective approach with an objective test to measure whether discrimination has occurred;
3. Requires the attorney challenging a juror to state the reasons for the challenge whenever an objection is made that the challenge is discriminatory;
4. Disallows "facially neutral" reasons that are now permitted but that are inextricably intertwined with race or ethnicity (such as whether the potential juror has had negative experiences with police, or lives in a "high-crime" neighborhood, or believes that the law enforcement system treats people of color unfairly).

CACJ is committed to equal justice for all Californians and to the right of all citizens to participate in the jury system. We are troubled that, despite decades of promises, there is no effective method to ensure citizens are free from discrimination when they are called for jury service and that defendants are tried by juries that fairly reflect their communities. Our criminal justice system is filled with wrongful convictions that perhaps could have been prevented if we were able to address racial bias in jury selection. AB 3070 is a critical step to improve the integrity of our criminal justice system.

12. Argument in Opposition

The California District Attorneys Association opposes this bill stating:

CDAA wholeheartedly shares your goal of ensuring that peremptory challenges never be used to improperly exclude potential jurors based on their race, ethnicity, gender, gender identity, sexual orientation, national origin or religious affliction. Nothing is more fundamental to our system of justice. However, AB 3070, in its current form, is fatally flawed.

- **The bill is premature.** Chief Justice Tani Cantil-Sakauye recently appointed members of a "working group" she created in January that is tasked with undertaking "a thoughtful, inclusive study" of how jury selection operates in practice in California. This workgroup will consider whether modifications or additional measures are warranted to address impermissible discrimination against cognizable groups in jury selection. Enacting sweeping changes in jury selection, a bedrock feature of our justice system, before this working group has even begun to thoroughly review the issue is premature, at best, as the provisions of this bill may very well be at odds with its findings.
- **The bill illogically includes challenges for cause.** Alarmingly, in just the last few days, this bill was amended to include more than a dozen reasons that are presumptively invalid for *cause* challenges, in addition to the peremptory challenges in the bill's original version. We are deeply concerned that this amendment suggests a lack of appreciation for how the jury selection process works. Unlike peremptory challenges, *there is no need for an attorney to provide justification for cause challenges*. Rather, cause challenges are governed by statute, are limited to either disqualification or bias, **and are decided by the court**. Simply put, including cause challenges in the bill makes no sense.

- **The bill is one-sided.** Under the provisions of the bill, if a potential juror expresses a distrust of or has had a negative experience with law enforcement, that is presumptively an invalid reason for a prosecutor to exercise a peremptory challenge. However, *the same rule does not apply to the defense if a potential juror trusts and respects law enforcement or has had generally positive experiences with police.*
- **The bill will punish innocuous conduct.** By using a relatively low standard, i.e., "substantial likelihood," the bill would allow for a finding of an improper peremptory challenge even when a judge determines it is more likely than not that there was no discrimination.
- **The bill infers ill intent without any basis.** The bill does not require purposeful discrimination and punishes purported unconscious thought. It presumes implicit, institutional and unconscious bias has impacted the jury selection process without any evidence that a particular prosecutor possesses any bias, subconscious or otherwise.
- **The bill mandates evidentiary presumptions without any support or evidence.** Instead of requiring some showing that a reason given for exercising a peremptory challenge is invalid or a pretext for bias, the bill automatically presumes that a litany of seemingly valid reasons are presumed to be invalid. These common sense reasons include expressing a distrust of law enforcement, having a close relationship with a criminal, being inattentive, and providing unintelligible answers. This presumption runs contrary to existing California court precedent where it is presumed that a peremptory challenge is proper unless otherwise shown.[1] Justice will not be served if jurors are selected who have expressed an unwillingness to perform their most basic task, i.e., to fairly assess the evidence, and attorneys have been discouraged from exercising challenges for legitimate reasons because of the presumption of discriminatory use.

[1] *People v. Neuman* (2009) 176 Cal.App.4th 571.

- **The bill runs counter to long-standing Supreme Court precedent.** It allows for untimely objections, meaning objections made well after a jury has been selected and jeopardy has attached. Our Supreme Court has long held that, "To be timely, a *Batson/Wheeler* objection must be made before the jury is sworn."[2]

- **The bill will have unintended consequences.** It could hinder the prosecution in cases where persons of color have been victimized by presumptively invalidating challenges to jurors who may distrust key witnesses (i.e., police officers).

- **The bill may be unconstitutional.** The motivation for creating a list of challenges that is intentionally and clearly tailored to make it difficult for the prosecution, but not the defense, to excuse jurors in all but a few cases may be pure. However, it
- skews challenges in a way that destroys the balance needed for a fair trial as required by due process and thus is likely to be challenged on grounds it violates section 29 of Article I of the California Constitution.

This legislative session has been like no other in California history. There has been precious little opportunity to engage in meaningful discussions with legislators or staff. **This bill represents nothing less than an upheaval of California's jury selection process, and it is being advanced without the benefit of the extensive debate, careful review and sober consideration that should attend such expansive changes to our jury system. (***emphasis in original)*

We urge this Committee to delay action on AB 3070 while the Chief Justice's working group has a chance to give more thoughtful study to the issues raised by the bill. We echo the concerns raised by the Association of African American California Judicial Officers who, in urging the withdrawal of this bill, noted that "far reaching reform proposals, such as AB 3070, should be subject to full review and discussion before it is offered to the full Assembly for consideration." That full review has indisputably *not* taken place and we join the AACJO in imploring the author and the Legislature to table this legislation until the Chief Justice's working group reports its findings.

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[2] *People* v. *Cunningham* (2015) 61 Cal.4th 609, 662, citing to *People* v. *Howard* (1992) 1 Cal.4th 1132, 1154 and *People* v. *Thompson* (1990) 50 Cal.3d 134, 179; accord *People* v. *Roldan* (2005) 35 Cal.4th 646, 701.