SENATE COMMITTEE ON APPROPRIATIONS
Senator Anthony Portantino, Chair
2019 - 2020 Regular Session

AB 3070 (Weber) - Juries: peremptory challenges

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Urgency: No
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Policy Vote: PUB. S. 4 - 3
Mandate: No
Consultant: Shaun Naidu

Bill Summary: AB 3070 would make substantive and procedural revisions related to the prohibition on the use of a peremptory challenge to remove a prospective jury in a criminal trial on the basis of a protected characteristic of the prospective juror.

Fiscal Impact:
- Department of Justice: The department reports an annual ongoing cost of $1.788 million for 5.0 Deputy Attorneys General and 3.0 Legal Secretaries to handle an increase in appeals associated with this measure. (General Fund)

- Courts: Unknown, potentially-significant workload cost pressures to the courts to hear and decide objections to peremptory challenges, which would require an evidentiary hearing. While the superior courts are not funded on a workload basis, an increase in workload could result in delayed court services and would put pressure on the General Fund to fund additional staff and resources. For example, the Budget Act of 2020 appropriated $273.8 million from the General Fund to backfill continued reduction in fine and fee revenue for trial court operations. (General Fund*)

*Trial Court Trust Fund

Background: According to the analysis of this bill by the Assembly Committee on Judiciary:

> Existing law allows the parties in criminal and civil cases to remove jurors from the jury panel (also called a venire) by exercising challenges for cause and peremptory challenges. Challenges are made during the voir dire process during which the court, with the assistance of the attorneys, inquires of the prospective jurors to determine the suitability of individuals to render a fair judgment about the facts of the case.
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> Challenges for cause are statutory and include: incapacity; consanguinity or affinity; fiduciary, domestic or business relationship; serving as a juror or witness in previous trial involving parties; interest in the action; opinion on the merits; bias or prejudice; or being a party to another action. (Code of Civil Procedure Section 129; see also 7 Witkin Cal. Proc. Trial Sec. 130.) In contrast, peremptory challenges are made without need to state a cause. California court procedural manuals note, "the purpose of the peremptory challenge is to insure an impartial jury by allowing a specific number of jurors to be excused even though no statutory challenge for cause can be made; e.g., where a juror is believed to be biased but the

bias cannot be proved." (7 Witkin Cal. Proc. Trial Sec. 125.) That being said, while peremptory challenges are permitted without initially stating a reason, "it has long been made clear in criminal cases that those challenges may not be made for the purpose of excluding a cognizable group. [. . .] More recently this principle, grounded on the guaranties of equal protection and trial by a jury drawn by a fair cross-section of the community, has been applied in civil cases as well." (7 Witkin Cal. Proc. Trial Sec. 127.) In that light, the Code of Civil Procedure expressly prohibits the exercise of a peremptory challenge "to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of their sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation. (Code of Civil Procedure Section 231.5.)

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In 1986, the United States Supreme Court decided *Batson v. Kentucky*, recognizing that the peremptory challenge could be a vehicle for discrimination. (*Batson v. Kentucky, supra,* at p. 89.) Prior to that, in 1978, the California Supreme Court, in deciding *People v. Wheeler*, had forbidden 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. (*People v. Wheeler, supra,* at p. 276.) Subsequent cases have sought, with some difficulty, to define the limits of inquiry into the motives of the parties in exercise of peremptory challenges which are suspected to be based on race or gender.

Out of these cases, a three-part Batson-Wheeler process for evaluating peremptory challenges for evidence of discrimination has emerged. First, after a party objects to the use of peremptory challenge for a discriminatory purpose, the trial court must first resolve whether or not the proponent 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*, *supra*, at p. 168.) Evidence of discriminatory intent may include a party using a disproportionate number of their peremptory challenges against members of a specific group, or a party has failed to engage the prospective juror in meaningful questioning. (*People v. Wheeler, supra,* at pp. 280-281.)

If the court makes a prima facie inference of discriminatory action, the judge then asks the striking party to provide a justification for each 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). The reason may be "trivial", so long as it is facially neutral. (*People v. Arias, supra,* at p. 136.) Examples of reasons considered valid and non-discriminatory include: antipathy towards prosecutor or criminal justice system, bad feelings towards law enforcement, family member with criminal conviction, juror's occupation, hostile looks, hunches, or manner of dress. (*People v. Mayfield, supra,* at

> p. 724; *People v. Johnson, supra,* at p. 1217; *People v. Cummings, supra,* at p. 1282; *People v. Semien, supra,* at p. 708; *People v. Gutierrez, supra,* at p. 1125; *People v. Hall, supra,* at p. 170; *People v. Barber, supra,* at p. 396, respectively.)
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> Finally, following the attorney's explanation, the trial court must decide if their reasons are genuine or merely a pretext cloaking discriminatory intent. In making this decision, the court may consider an evaluation of the striking party's "state of mind" based on demeanor and credibility; comparison of the dismissed juror against similar jurors who are not members of the cognizable group whom the attorney did not dismiss; or whether or not the striking party failed to fully question the juror they now seek to dismiss. (*Hernandez v. New York, supra,* at p. 365; *Miller-El v. Dretke, supra,* at p. 241; *Id.* at p. 246, respectively.) If a peremptory challenge is ultimately determined to have been made with discriminatory intent, the court may decide to reseat the prospective juror, dismiss the panel and recommence voir dire, or give the aggrieved party additional peremptory challenges.

The court uses a "more probable than not" standard to evaluate current objections to peremptory challenges.

Proposed Law: This bill would:

- Prohibit a party from using a peremptory challenge to remove a prospective juror on the basis of the 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.
- Allow a party, or the trial court on its own motion, to object to the use of a peremptory challenge based on these criteria.
- Provide that specified reasons for peremptory challenges, including a prospective juror was inattentive, staring, failing to make eye contact, are presumptively invalid unless the trial court is able to confirm that the asserted behavior occurred, based on the court or objecting party's observations.
- Require the party exercising the challenge, upon objection, to state the reasons the peremptory challenge has been exercised and show by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's actual or perceived membership of a specified group.
- Require the court to evaluate the reasons given and make an express factual finding, based on clear and convincing evidence, on whether to grant the objection.
- Authorize the court, if it grants the objection, to take certain actions, including, but not limited to, starting a new jury selection, declaring a mistrial at the request of the objecting party, seating the challenged juror, or providing another remedy as the court deems appropriate.
- Subject the denial of an objection to de novo review by an appellate court, with the trial court's express factual findings reviewed for substantial evidence.
- Apply the provisions above to all jury trials, except for civil cases, in which jury selection begins on or after April 1, 2021.

Related Legislation: AB 2542 (Kalra, 2019-2022 Reg. Sess.) would prohibit the state from seeking or upholding a conviction or sentence that is discriminatory based on race, ethnicity, or national origin, as specified. AB 2542 is pending in this Committee.

Staff Comments: The Department of Justice anticipates an increased workload resulting from this measure. Committee staff queries if the anticipated personnel and costs reported by the department accurately reflects how many new cases would be litigated on appeal by DOJ due to AB 3070, as it is not known how many objections to peremptory challenges actually would occur.

In 2019, there were 3,919 felony jury trial dispositions and 2,440 (1,561 non-traffic and 879 traffic) misdemeanor jury trial dispositions in California state courts, for a total of 6,359 jury trial dispositions. If, for example, 1.5 percent of those cases (i.e., roughly 95 cases) include an objection to a peremptory challenge of a potential juror alleging discrimination based on the person's membership or perceived membership in a protected group and the court holds an evidentiary hearing for each objection that takes, on average, 45 minutes longer than for a non-evidentiary hearing, court workload costs associated with this measure would surpass the Suspense File threshold. As indicated above, while courts are not funded on a workload basis, an increase in workload could result in delayed services and would put pressure on the General Fund to fund additional staff and resources.

Amendments were made recently to AB 3070 to strike the application of the provisions of this bill to a challenge of a potential juror for cause. California Supreme Court Justice Goodwin Liu, whose words appear to be the inspiration behind this measure, stated the following about the discriminatory impact of the current practice of challenging potential jurors for cause:

> [A]lthough much attention has appropriately been paid to the inefficacy of *Batson v. Kentucky* (1986) 476 U.S. 79 in combating racial discrimination in peremptory strikes, there is significant evidence that removal of jurors for cause is an equally if not more significant contributor to the exclusion of Black jurors, which may result in juries with higher levels of implicit bias.
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> If the goal of [current efforts in California, including AB 3070,] is to better ensure that juries reflect a cross-section of our communities, then the topics worthy of attention may include whether current standards and processes for excusal of prospective jurors for cause contribute to racial disparities in jury selection and to implicit biases in the resulting petit juries. (*People v. Suarez* (Aug. 13, 2020, S105876) ___ Cal.4th ___ [2020 Cal. Lexis 5355] [conc. opn. of Liu, J.].)

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