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THIRD READING

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Bill No: AB 3070  
Author: Weber (D), et al.  
Amended: 8/21/20 in Senate  
Vote: 21

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SENATE PUBLIC SAFETY COMMITTEE: 4-3, 8/7/20  
AYES: Skinner, Bradford, Mitchell, Wiener  
NOES: Moorlach, Jackson, Morrell

SENATE APPROPRIATIONS COMMITTEE: 5-2, 8/20/20  
AYES: Portantino, Bradford, Hill, Leyva, Wieckowski  
NOES: Bates, Jones

SENATE FLOOR: 18-11, 8/30/20 (FAIL)  
AYES: Allen, Atkins, Beall, Bradford, Caballero, Durazo, Lena Gonzalez, Leyva,  
McGuire, Mitchell, Monning, Pan, Portantino, Rubio, Skinner, Stern,  
Wieckowski, Wiener  
NOES: Archuleta, Bates, Borgeas, Chang, Dahle, Grove, Jackson, Moorlach,  
Morrell, Roth, Wilk  
NO VOTE RECORDED: Dodd, Galgiani, Glazer, Hertzberg, Hill, Hueso,  
Hurtado, Jones, Melendez, Nielsen, Umberg

ASSEMBLY FLOOR: 53-16, 6/11/20 - See last page for vote

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**SUBJECT:** Juries: peremptory challenges and challenges for cause

**SOURCE:** California Attorneys for Criminal Justice

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**DIGEST:** This bill changes 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.

**ANALYSIS:**

Existing law:

- 1) 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.)
- 2) 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.)
- 3) 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.)
- 4) 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.)
- 5) 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.)

- 6) 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.)
- 7) 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.)
- 8) 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:
  - a) Antipathy towards prosecutor or criminal justice system. (*People v. Mayfield* (1997) 14 Cal.4th 668, 724.)
  - b) Bad feelings towards law enforcement. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1217.)
  - c) Family member with criminal conviction. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1282.)
  - d) Juror’s occupation. (*People v. Semien* (2008) 162 Cal.App.4th 701, 708.)
  - e) Hostile looks. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125.)
  - f) Hunches. (*People v. Hall* (1983) 35 Cal.3d 161, 170.)
  - g) Manner of dress. (*People v. Barber* (1988) 200 Cal.App.3d 378, 396.)

- 9) 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:
  - a) 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.)
  - b) 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.)
  - c) Whether or not the striking party failed to fully question the juror they now seek to dismiss. (*Id.* at p. 246.)
  
- 10) Requires the court, if it concludes that a juror has been improperly dismissed, to find an agreeable remedy, including:
  - a) Dismissing the panel and commencing jury selection again with a completely new venire. (*People v. Wheeler*, *supra* at p. 282.)
  - b) Ordering the improperly dismissed juror reseated if they are able to serve. (*People v. Willis* (2002) 27 Cal.4th 811.)
  - c) Giving the aggrieved party additional peremptory challenges. (*Id.* at p. 821.)
  - d) 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.)
  - e) Reversing a judgement and ordering a retrial. (*People v. Silva* (2001) 25 Cal.4th 345, 386.)

This bill:

- 1) 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.
- 2) Provides that a party or the trial court on its own motion may object to the improper use of a peremptory challenge.
- 3) Provides that after an objection is made the discussion shall happen outside the jury.

- 4) Provides that the court shall evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances. The court shall consider only the reason given and not speculate on additional reasons.
- 5) 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.
- 6) Defines an objectively reasonable person as someone who is aware that unconscious biases, in addition to purposeful discrimination have resulted in the unfair exclusion of potential jurors in the State of California.
- 7) Defines “a substantial likelihood” as more than a mere possibility but less than a standard of more likely than not.
- 8) Provides that for purposes of this section, a “unconscious bias” includes implicit and institutional biases.
- 9) 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, bear on the facts of the case to be tried.
  - 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 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 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 was contrary to or unsupported by the record.
- g) Whether the counsel or counsel's office has used peremptory challenges 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 counsel or counsel's office who made the challenge has a history of prior violations under *Baston v. Kentucky* or *People v. Wheeler*.
- 10) Provides that a peremptory challenge 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. The unchallenged prospective juror or jurors need not share any other characteristics with the challenged prospective juror for peremptory challenge, relying on this justification to be considered presumptively invalid.
- 11) 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.
- 12) Provides that upon a court granting an objection to the improper exercise of a peremptory challenge 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 defendant.
  - c) Seat the challenged juror.
  - d) Provide the objecting party additional challenges.
  - e) Provide another remedy as the court deems appropriate.
- 13) Provides that this section applies to all jury trials in which jury selection has not completed as of January 1, 2022.
- 14) 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 cognizable group as the challenged juror, regardless of whether the moving party made a comparative analysis argument in the trial court. 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.
- 15) Provides that this section shall not apply to civil cases until January 1, 2026.
- 16) Provides that it is the intent of the Legislature that the enactment of this section shall not, in purpose or effect, lower the standard for judging challenges for cause or expand the use of challenges for cause.
- 17) Contains a severability clause.

**FISCAL EFFECT:** Appropriation: No Fiscal Com.: Yes Local: No

According to the Senate Appropriations Committee:

- 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

**SUPPORT:** (Verified 8/20/20)

California Attorneys for Criminal Justice (source)  
 8th Amendment Project  
 American Civil Liberties Union  
 Anti-defamation League  
 Asian Americans Advancing Justice – California  
 California Appellate Defense Counsel, Inc.  
 California Innocence Coalition  
 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  
 Diego and Imperial Counties  
 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

Northern California Innocence Project, California Innocence Project, Loyola Project for the Innocent

Re:store Justice

San Francisco District Attorney's Office

San Francisco Public Defender

The Los Angeles Regional Reentry Partnership

Uncommon Law

**OPPOSITION:** (Verified 8/20/20)

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

San Diegans Against Crime

San Diego Deputy District Attorneys Association

Santa Cruz County District Attorney's Office

**ARGUMENTS 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.

**ARGUMENTS IN OPPOSITION:** The California District Attorneys Association opposes this bill stating:

CDAAs 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.....

ASSEMBLY FLOOR: 53-16, 6/11/20

AYES: Aguiar-Curry, Arambula, Bauer-Kahan, Berman, Bloom, Boerner

Horvath, Bonta, Burke, Calderon, Carrillo, Cervantes, Chau, Chiu, Chu, Daly, Eggman, Friedman, Gabriel, Cristina Garcia, Eduardo Garcia, Gipson, Gloria, Gonzalez, Gray, Holden, Jones-Sawyer, Kalra, Kamlager, Levine, Limón, Low, Maienschein, McCarty, Medina, Mullin, Nazarian, O'Donnell, Petrie-Norris, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Blanca Rubio, Salas, Santiago, Smith, Mark Stone, Ting, Weber, Wicks, Wood, Rendon

NOES: Bigelow, Brough, Chen, Choi, Cunningham, Megan Dahle, Diep, Flora,

Fong, Gallagher, Kiley, Lackey, Mathis, Obernolte, Patterson, Voepel

NO VOTE RECORDED: Cooley, Cooper, Frazier, Grayson, Irwin, Mayes,

Muratsuchi, Quirk, Rodriguez, Waldron

Prepared by: Mary Kennedy / PUB. S. /

8/30/20 23:50:31

\*\*\*\* END \*\*\*\*