(**Without Reference to File**)

CONCURRENCE IN SENATE AMENDMENTS
AB 3070 (Weber)
As Amended August 21, 2020
Majority vote

SUMMARY:

Prohibits a party from using a peremptory challenge to remove a prospective juror on the basis of race, ethnicity, gender, and other specified characteristics, and outlines a court procedure for objecting to, evaluating, and resolving improper bias in peremptory challenges.

Major Provisions

1) Prohibits a party from using a peremptory challenge to remove a prospective juror on the basis of race, ethnicity, gender, gender identity, sexual orientation, national origin, religious affiliation**,** *or perceived membership in any of those groups*.

2) Permits a party, *or trial court*, to object to the use of a peremptory challenge in order to raise the issue of improper bias based on specified identity groups, including *unconscious* bias.

3) Requires the party exercising the peremptory challenge to state the reason for the peremptory challenge, and requires the court to evaluate the reasons given to justify the challenge and determine whether *there is a substantial likelihood that* an objective observer, aware of unconscious biases, would view race, ethnicity, gender, and other specified characteristics, as a factor in the use of the challenge.

4) Prohibits the use of specified reasons for exercising a peremptory challenge (e.g., expressing a distrust of law enforcement, the prospective juror's neighborhood, not being a native English speaker) unless the party can show by clear and convincing evidence that the rationale is unrelated to the prospective juror's identity group *and that the reasons articulated affect the prospective juror's ability to be fair and impartial in the case*.

5) Requires that the court, upon granting an objection to the improper exercise of a peremptory challenge, provides an acceptable remedy, including, but not limited to, seating the challenged juror or jurors, or declaring a mistrial.

6) Requires the appellate court to review the denial of an objection de novo. Requires the reviewing court to consider only the reasons given in 5), above, and not speculate on any other reasons.

The Senate Amendments:

1) Expand the improper use of peremptory challenges to include removing a prospective juror on the basis of perceived membership of a specified group.

2) Permit a trial court to object to the improper use of a peremptory challenge on its own motion.

3) Clarify the standards for determining the improper use of a peremptory challenge to remove a prospective juror based on their race, ethnicity, or other specified group.

4) Clarify the standards for determining whether a peremptory challenge based on a presumptively invalid reason is an improper use of a peremptory challenge, based on the prospective juror's race, ethnicity, or other specified group. Add the requirement that the party making the peremptory challenge demonstrate that the reason bears on the prospective juror's ability to be fair and impartial in the case.

5) Clarify that specified behaviors by prospective jurors are presumptively invalid reasons for a peremptory challenge unless the court confirms that the behavior occurred and the party making the peremptory challenges explains why the behavior matters to the case.

6) Add specific remedies for an improper use of a peremptory challenge. Specify the circumstances under which certain remedies can be used.

7) Delay the implementation of these requirements until January 1, 2022.

8) Require the appellate court to consider only the trial court's express factual findings, stated on the record.

9) Exempt civil cases from these requirements. Sunset this exemption on January 1, 2026.

10) State that the provisions in this section are severable.

11) Include several minor technical amendments.

COMMENTS:

Presently, Batson-Wheeler motions are used to evaluate whether the dismissal of a prospective juror via a peremptory challenge was unlawfully discriminatory. The author and sponsors of this bill, as well as many other legal experts, argue that the current Batson-Wheeler system makes it nearly impossible to prove discrimination in the use of peremptory challenges. The present inability to adequately address racial discrimination in jury selection undermines the integrity and impartiality of the court as a result, and raises the question of whether the current jury selection process can reliably produce a jury that represents a fair cross-section of the community.

This bill seeks to address deficiencies in the Batson-Wheeler procedure by outlining new procedures for identifying and evaluating unlawful discrimination in jury selection.

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, in order to select a jury composed of individuals that can render a fair judgment about the facts of the case.

Challenges for cause are statutory and include incapacity, relationship to the parties, interest in the action, opinion on the merits, or bias or prejudice. (Code of Civil Procedure Section 129.) In contrast, peremptory challenges are made without need to state a cause, often for the purpose of removing a juror who "is believed to be biased but the bias cannot be proved." (7 Witkin Cal. Proc. Trial Sec. 125.) However, California law 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.)

The United States Supreme Court, in deciding *Batson v. Kentucky*, and the California Supreme Court, in *People v. Wheeler*, recognized that the peremptory challenge could be a vehicle for discrimination and forbad 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. (*Batson v. Kentucky* (1986) 476 U.S. 79, 89; *People v. Wheeler* (1978) 22 Cal.3d 258, 276.) These and subsequent cases have fleshed out a three-part Batson-Wheeler process for evaluating peremptory challenges for evidence of discrimination has emerged.

First, the party objecting to the use of peremptory challenge for a discriminatory purpose must raise 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 striking party must provide a facially neutral justification for each peremptory challenge (i.e., not expressly related to the prospective juror's race, ethnicity, or other specified characteristic). 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.

Finally, the trial court must decide if the reasons are genuine or merely a pretext cloaking discriminatory intent, taking into account the striking party's apparent "state of mind" (*Hernandez v. New York* (1991) 500 U.S. 352, 365.); comparison of the dismissed juror against other similar jurors; or whether or not the striking party failed to fully question the juror. If a peremptory challenge is ultimately determined to have been made with discriminatory intent, the court has several options for remedies.

Multiple studies of criminal and civil jury trials have shown that, even after *Batson*, peremptory challenges are used at different rates depending on the race of the prospective jurors. A study of the jury selection in capital cases in North Carolina found that "prosecutors struck eligible black venire members at about 2.5 times the rate they struck eligible venire members who were not black." (Grosso, O'Brien and Woodworth. "A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials" (2012). Iowa Law Review, Forthcoming.)

Justice Liu of the California Supreme Court noted that "in adjudicating *Batson* claims in more than 100 cases over the past two decades, this court has found unlawful discrimination in jury selection only once," leading him to have "serious doubts as to whether our jurisprudence has held true to *Batson*'s mandate." (*People v. Harris* (2013) 57 Cal.4th 804, 865-866.)

This bill incorporates suggestions from a workgroup convened by the Washington Supreme Court to address concerns with *Batson* procedures as well as language from existing California law prohibiting discrimination. The primary changes between existing court procedure (Batson-Wheeler) and the procedure under this bill are as follows:

1) Instead of protecting only against acts of intentional discrimination, this bill addresses unlawful discrimination in jury selection in the form of both intentional and unconscious, implicit bias.

2) Instead of using a subjective test where the court must determine the actual motivation of the opposing party, this bill uses an objective test to measure discrimination (whether an objective observer would view unlawful bias as a factor in the elimination of a prospective juror).

3) Instead of requiring reasons for the peremptory challenge to be given only after a "prima facie" case of discrimination is shown, this bill requires the challenging attorney to state their reasons on the record whenever an objection is made that the challenge is discriminatory. This gives appellate courts more information with which to determine whether discrimination occurred during jury selection.

4) Instead of permitting any "facially neutral" reason for a peremptory challenge, this bill disallows reasons that are commonly associated with racial and ethnic groups and women, unless they can be shown to be unrelated to the prospective juror's identity groups.

5) Instead of allowing the court to find new reasons to justify a peremptory challenge, this bill requires the court to examine only the reasons given and not speculate on any other unstated reasons for the challenge.

According to the Author:

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. … Perhaps more important, the existing procedure cannot address strikes exercised because of implicit bias, that is, unconscious or automatic attitudes and stereotypes. ...

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.

Arguments in Support:

The California Public Defenders Association writes in support of the bill:

CPDA members can attest to the failure of the *Batson* framework in preventing jurors from being excused based on race, ethnicity and other improper factors. This bill goes a long way to righting a wrong that has permeated the criminal justice system for many years.

Arguments in Opposition:

The California District Attorneys Association writes in opposition of the bill:

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.

FISCAL COMMENTS:

According to the Senate Appropriations Commitee:

1) *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)

2) *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

VOTES:

ASM JUDICIARY: 8-3-0
YES: Mark Stone, Chau, Chiu, Gonzalez, Holden, Kalra, Maienschein, Reyes
NO: Gallagher, Kiley, Obernolte

ASM APPROPRIATIONS: 13-5-0
YES: Gonzalez, Bauer-Kahan, Bloom, Bonta, Calderon, Carrillo, Chau, Eggman, Gabriel, Eduardo Garcia, Petrie-Norris, McCarty, Robert Rivas
NO: Bigelow, Megan Dahle, Diep, Fong, Voepel

ASSEMBLY FLOOR: 53-16-10
YES: 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
NO: Bigelow, Brough, Chen, Choi, Cunningham, Megan Dahle, Diep, Flora, Fong, Gallagher, Kiley, Lackey, Mathis, Obernolte, Patterson, Voepel
ABS, ABST OR NV: Cooley, Cooper, Frazier, Grayson, Irwin, Mayes, Muratsuchi, Quirk, Rodriguez, Waldron

SENATE FLOOR: 18-11-11
YES: Allen, Atkins, Beall, Bradford, Caballero, Durazo, Lena Gonzalez, Leyva, McGuire, Mitchell, Monning, Pan, Portantino, Rubio, Skinner, Stern, Wieckowski, Wiener
NO: Archuleta, Bates, Borgeas, Chang, Dahle, Grove, Jackson, Moorlach, Morrell, Roth, Wilk
ABS, ABST OR NV: Dodd, Galgiani, Glazer, Hertzberg, Hill, Hueso, Hurtado, Jones, Melendez, Nielsen, Umberg

SENATE FLOOR: 39-0-1

YES: Allen, Archuleta, Atkins, Bates, Beall, Borgeas, Bradford, Caballero, Chang, Dahle, Dodd, Durazo, Galgiani, Glazer, Lena Gonzalez, Grove, Hertzberg, Hill, Hueso, Hurtado, Jackson, Leyva, McGuire, Melendez, Mitchell, Monning, Moorlach, Morrell, Nielsen, Pan, Portantino, Roth, Rubio, Skinner, Stern, Umberg, Wieckowski, Wiener, Wilk
ABS, ABST OR NV: Jones

UPDATED:

VERSION: August 21, 2020

CONSULTANT: Emily Wonder and Nicholas Liedtke / JUD. / (916) 319-2334 FN: 0003466