SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No:	SB 1133	**Hearing Date:**	May 20, 2020
Author:	Jackson		
Version:	February 19, 2020		
Urgency:	No	**Fiscal:**	No
Consultant:	GC		

Subject: ***Peremptory Challenges***

HISTORY

Source: California Judges Association

Prior Legislation: SB 843 (Budget) Chapter 33, Stats. 2016
SB 213 (Block) not heard Assembly Public Safety 2006
SB 794 (Evans) not heard in Assembly Public Safety 2014
AB 1557 (Feuer) – 2007, died on Assembly Floor Inactive File
AB 886 (Morrow) – 1997-98, never heard by Assembly Judiciary
AB 2003 (Goldsmith) – 1996, failed Assembly Floor
AB 2060 (Bowen) – 1996, never heard by Assembly Judiciary

Support: Fresno County Superior Court; Judicial Council of California; Orange County Superior Court; San Joaquin County Superior Court

Opposition: California Attorneys for Criminal Justice; California Public Defenders Association

PURPOSE

The purpose of this bill, as proposed to be amended, is to extend the sunset provision which reduces the number of peremptory challenges that the prosecution and defense get in misdemeanor trials.

Existing law permits challenges to jurors under the following provisions:

- A want of any of the qualifications prescribed by this code to render a person competent as a juror.
- The existence of any incapacity which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party. (Code of Civil Procedure § 228.)
- A peremptory challenge exercised by a party to the action. (Code of Civil Procedure § 225(b).)

Existing law specifies a challenge for cause based upon bias may be taken for one or more of the following causes:

- Consanguinity or affinity within the fourth degree to any party or to any alleged witness or victim in the case at bar.
- Having the following relationships with a party: parent, spouse, child, guardian, ward, conservator, employer, employee, landlord, tenant, debtor, creditor, business partners, surety, attorney, and client.
- Having served or participated as a juror, witness, or participant in previous litigation involving one of the parties.
- Having an interest in the outcome of the event or action.
- Having an unqualified opinion or belief as to the merits of the action founded on knowledge of its material facts or of some of them.
- The existence of a state of mind in the juror evincing enmity against, or bias towards, either party.
- That the juror is party to an action pending in the court for which he or she is drawn and which action is set for trial before the panel of which the juror is a member.
- If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude the juror finding the defendant guilty, in which case the juror may neither be permitted nor compelled to serve. (Code of Civil Procedure § 229.)

Existing law permits each party (prosecution and defense) in criminal cases 10 peremptory challenges. There are an additional five peremptory challenges in criminal matters to each defendant and five additional challenges, per defendant, to the prosecution when defendants are jointly charged. (Code of Civil Procedure § 231(a).)

Existing law specifies 20 peremptory challenges per party in criminal matters when the offenses charged are punishable with death, or life in prison. There are an additional five peremptory challenges in criminal matters to each defendant and five additional challenges, per defendant, to the prosecution when defendants are jointly charged. (Code of Civil Procedure § 231(a).)

Existing law allows parties in criminal matters punishable with a maximum term of one year or less six peremptory challenges each. When two or more defendants are jointly tried, their challenges shall be exercised jointly, but each defendant shall be also entitled to two additional challenges which may be exercised separately, and the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed to the defendants. (Code of Civil Procedure § 231(b).)

Existing law provides that the provisions limiting misdemeanors to six peremptory challenges are due to sunset on January 1, 2021. If the provisions sunset misdemeanor offenses punishable by more than 90-days would revert to 10 peremptory challenges.

This bill, as proposed to be amended, extends the sunset provisions to January 1, 2024.

COMMENTS

1. Need for This Bill

According to the author:

> According to the bill's sponsor, the California Judges Association, there is a need to maintain current law by removing a sunset and thereby keeping the number of peremptory challenges legal counsel can use in criminal misdemeanor trials at six per side. California allots one of the highest numbers of peremptory challenges for misdemeanor trials in the country. While peremptory challenges are an important element of our justice system the current jury selection process has proven itself to be time consuming for potential jurors, burdensome and costly for employers, and inefficient to our justice system. SB 843 (Stats. 2016, ch. 33) temporarily reduced the number of peremptory challenges legal counsel may utilize in criminal misdemeanor cases from 10 peremptory challenges per side to six per side. The reduction in the number of peremptory challenges available resulted in:
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> - On average, fewer peremptory challenges were employed.
> - Plaintiffs' counsel averaged 5.2 peremptory challenges a case prior to the passage of SB 843 and 3.9 challenges after its passage. Defendants' attorneys used an average of 5.7 challenges before SB 843 and 4.0 after its passage. This shows that both sides were not using all their challenges before or after the passage of SB 843.
> - The dispersion of peremptory challenges decreased, suggesting that there are fewer instances in which attorneys use atypically large numbers of peremptory challenges.
> - Jury panels decreased in size from an average of 50.1 prospective jurors to 47.1. By applying these findings statewide, the reduction in the number of jurors sent to the courtroom for voir dire can be inferred to be in the thousands.
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> Modestly reducing the number of peremptory challenges made the jury selection progress more efficient and as a result, reduced the workload for the already over-burdened court system and enabled people to get back to work faster which increases community cost savings and juror satisfaction. Maintaining the six peremptory challenges per side is an efficiency that is universally supported by the Courts. Even at six challenges per side, that is still more than a majority of states, and twice what is given in federal court.

2. Jury Selection Process

The current process permits the parties to remove jurors from the panel in a criminal case by exercising both challenges for "cause" and "peremptory" challenges. These challenges are made during the voir dire phase of the trial, 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. At the commencement of voir dire, the jurors are asked to reveal any facts which may show they have a disqualification (such as hearing loss) or a

relationship with one of the parties or witnesses. Some of these facts (such as employment by one of the parties) may amount to an "implied" bias which causes the juror to be excused from service. Other facts (such as having read about the case in the newspapers) may lead to questioning of the juror to establish whether an actual bias exists. A party usually demonstrates that a juror has an actual bias by eliciting views which show the juror has prejudged some element of the case. After any jurors have been removed from the panel for disqualification and bias, the parties may remove jurors without giving any reason, by exercising peremptory challenges.

In general, the number of peremptory challenges[1] available to each side is:

a) 20 in capital and life imprisonment cases;

b) 10 in criminal cases where the sentence may exceed 90 days in jail;

c) 6 in criminal cases with sentences less than one year in jail; or,

d) 6 in civil cases

Prior to passage of the state budget in 2016, misdemeanors were only limited to 6 peremptory challenges in cases where the defendant faced 90-days or less in county jail. Most misdemeanor offenses were given 10 peremptory challenges.

3. History of 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.

[1] Additional peremptory challenges are awarded to all parties when multiple defendants are involved. The prosecution gains a proportionate number to the defense in such cases.

4. Peremptory Challenges as the Only Method of Eliminating Suspected Bias, Suspected Incompetence, or Suspected Incapacity

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.

- **Suspected Bias**: In general, many jurors come into the jury selection process with certain biases. Studies have shown that jury bias is particularly prevalent in criminal cases. In fact, this is one of the reasons we have the presumption of innocence.

  The jury process is set up to divulge and eliminate these biases through education in basic legal principles such as the presumption of innocence, right against self-incrimination and the burden of proof. Often, jurors begin their jury service with the belief that a defendant must prove his or her innocence. Other jurors may expressly state that they believe that it is incumbent upon the defendant to testify in order to obtain a not guilty verdict. Still others commonly state when questioned that they would vote guilty at the beginning of the case, despite the fact that the defendant is presumed innocent. Upon questioning, if the juror simply states that they can fairly apply the instructions of the judge they meet the legal standard of unbiased.

- **Suspected Incompetence**: Jurors are expected to have basic competence in order to adequately judge the facts and circumstances of a case. For example, jurors are expected to have a basic understanding of the English language. Minimal ability to understand the language is generally accepted. One potential use of a peremptory challenge would be to remove a juror who can answer and communicate in yes and no responses, but who may not have the ability to read and comprehend the jury instructions. When a case depends on a complex understanding of the jury instructions, a juror who is less literate may not be sufficiently competent to decide the facts of the case. While this juror is not removable for cause, an attorney may choose to exercise a peremptory challenge.

- **Suspected Incapacity:** Jurors are expected to be physically and mentally capable of service. For example, a juror who is so physically infirm that they are unable to sit and comprehend the testimony and courtroom presentation may not be capable of serving on a jury. In instances where the judge determines that the potential juror's health is legally sufficient, an attorney may choose to remove said juror through use of a peremptory challenge. The attorney may feel that the potential juror's infirmity may be so distracting that they could not devote sufficient attention to the determination of the facts of the case.

5. Misdemeanors can be Serious Offenses Imposing a Criminal Record

The types of cases included in this bill are comparatively serious in nature compared to most civil matters. First, unlike civil matters, the prosecution must convince a unanimous jury by the highest legal standard under the law. Second, these cases involve matters which can result in imprisonment for up to one year. If multiple offenses are charged, a defendant could potentially be sentenced to consecutive multi-year stints. In addition to their liberty interests, criminal defendants must also carry a criminal record. Misdemeanors such as vehicular manslaughter, assault, battery, molestation and domestic violence would be covered under this legislation.

6. 2020 Judicial Council Report on Peremptory Challenges

Pursuant to the 2016 budget provisions that limited peremptory challenges to 6 challenges, the Judicial Council was tasked with reporting to the legislature in 2020. The Judicial Council published their report entitled "Peremptory Challenges in Criminal Misdemeanor Cases" on January 17, 2020.[2]

The report found that the average number of peremptory challenges in criminal misdemeanor cases dropped to 8.4 from a prior average of 11.5. That shows a modest drop in the number of peremptory challenges that are utilized after the limitation on challenges in misdemeanor cases.

The report also showed a virtually insignificant drop in jury panel sizes from 50.1 jurors to 47.1 per panel.

In terms of court time the report indicated there was no significant change. The in-session time in criminal misdemeanor cases ranged from 2.1 to 5.4 days in study courts prior to the reduction in peremptory challenges. While after the reduction in challenges the in-session time ranged from 2.5 to 5.4 days. That's actually a slight increase in time. The report pointed to the passage of Proposition 47 in 2014 as the possible reason for the slight increase in court time.

What isn't made clear in the report is whether the increase in time may be attributable to prosecutors and defense attorneys having to spend more time to probe jurors that they would have formerly used a peremptory challenge on in order to determine if the juror should be excused for cause.

7. Proposed amendment in Committee

Instead of deleting the sunset, this bill will be amended in Committee to extend the sunset provision 3 years to January 1, 2024.

8. Argument in Support

According to the California Judges Association

> SB 843 (Stats. 2016, ch. 33) temporarily reduced the number of peremptory challenges legal counsel may utilize in criminal misdemeanor cases, from 10 to 6, when defendants were tried alone. If defendants are tried together, additional challenges were reduced from 4 to 2. This provision is set to sunset January 1, 2021.
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> Pursuant to SB 843, the Judicial Council conducted a study on the impact of the reduction of peremptory challenges. This report, published in January 2020, made the following findings:
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> • On average, fewer peremptory challenges were employed.

[2] https://www.courts.ca.gov/documents/lr-2020-peremptory-challenges-ccp23_1.pdf

• Plaintiffs' counsel averaged 5.2 peremptory challenges per case prior to the passage of SB 843 and 3.9 challenges after its passage. Defendants' attorneys used an average of 5.7 challenges before SB 843 and 4.0 after its passage.

• Jury panels decreased in size from an average of 50.1 prospective jurors to 47.1.

By applying these findings statewide, the reduction in the number of jurors sent to the courtroom for voir dire can be inferred to be in the thousands.

8. Argument in Opposition

The California Public Defenders Association states:

> The Sixth Amendment guarantees Americans accused of a criminal offense the right to a trial by a fair and impartial jury. To ensure that the jury consists of fair-minded men and women, California law permits the prosecution and defense to "challenge" jurors they believe are unable to fairly and impartially serve.
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> Vitally, if a trial judge refuses to dismiss a patently biased juror, the law also grants both sides ten "peremptory" challenges, through which the parties can challenge and remove a biased juror without judicial consent.
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> From the defense perspective, this authority is vital because it ensures that a busy or hostile judge cannot simply deny every defense challenge and thereby stack the jury with jurors hostile to the defense.[3]
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> SB 1133, however, proposes to reduce the number of peremptory challenges by 40% (from 10 to 6) in the name of "judicial efficiency." In essence, the theory appears to be that jury trials will "go more quickly" if defendants are not permitted to challenge and remove biased jurors.
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> However, the Judicial Counsel's own recent study of this proposal disagreed, finding that reducing the number of peremptory challenges had a negative effect on the rapidity with which criminal trials were completed.[4]
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> Even were this not the case, CPDA finds it simply unacceptable to sacrifice the rights of indigent Californians facing significant, lifelong consequences if convicted, all in the name of speed. The goal of a jury trial, after all, is not to do it *quickly* -- it is to do it *right*, and SB 1133's misguided prioritization of efficiency over accuracy represents a meaningful threat to that goal.

-- END –

[3] See, e.g., *Colorado v.Pena Rodriguez* (2017) 137 S.Ct. 155 [trial court refused new trial even after juror expressed anti-Hispanic bias, including stating "I think he did it because he's Mexican"].)

[4] https://jcc.legistar.com/View.ashx?M=F&ID=7991707&GUID=A10C186E-F29C-4E89-ADFF-B4EE48F8FCD5, p. 15 [finding that, on average, trial lengths *increased* after a reduction in peremptory challenges].