NEW LAW REDEFINES PEREMPTORY CHALLENGE PROCEDURES TO ERADICATE IMPLICIT BIAS

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THE NEED FOR JURY SELECTION REFORM AND THE RESULTING NEW LEGISLATION

New legislation in California promises to dramatically impact jury selection in this state starting in January 2022. Aiming to eliminate implicit bias in the use of peremptory challenges that continues despite the protections of *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] ("*Batson*") and *Wheeler v. California* (1978) 22 Cal.3d 258 ("*Wheeler*"), Assembly Bill No. 3070 ("AB 3070") replaces the traditional *Batson/Wheeler* analysis that has been in place for the past several decades.

Prior to *Batson* and *Wheeler*, the United States Supreme Court had held the use of peremptory challenges to exclude all black members of a jury panel did not violate the Fourteenth Amendment. (*Swain v. Alabama* (1965) 380 U.S. 202 [85 S.CT. 824, 13 L.Ed.2d 759].) *Wheeler* held that under the California Constitution, presuming certain jurors are biased by virtue of being members of an identifiable racial, religious, ethnic, or other group was an impermissible ground for excusing jurors. (*Wheeler*, *supra*, 22 Cal.3d at p. 276.) *Batson* expanded this concept in finding exclusion of members of cognizable groups to be discriminatory under the Fourteenth Amendment. (*Batson*, *supra*, 476 U.S. at p. 97.) In rejecting *Swain*, the *Batson* Court held that challenging potential jurors solely on account of race "or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant" violated the Equal Protection clause. (*Ibid.*) *Batson* thus set up a process requiring the court to determine if a defendant has established purposeful discrimination. (*Id.* at p. 98.)

The *Batson/Wheeler* analysis involves three steps. Step one requires the objecting party to establish a prima facie case of purposeful discrimination. The objection is overruled if the court finds the objecting party failed to state a prima facie case. Step two shifts the burden to the striking party to state a race-neutral reason for the peremptory challenge. Finally, step three requires the trial court to determine whether the objecting party has established purposeful discrimination. The objection is sustained unless the court finds the striking party's reason in step two was credible.

Unfortunately, *Batson* challenges in California state courts have been overwhelmingly unsuccessful. In the period from 2006-2018, only 2.6% of appellate cases found error and only 0.4% were remanded. (Semel, et al., *Whitewashing the Jury Box* (2020) Berkeley Law Death Penalty Clinic, at p. 24 ("*Whitewashing*").) Our state's highest court found error only three times in 142 cases, a rate of 2.1%. (*Id*. at p. 23.)

Other jurisdictions have recognized the need for reform. In 2018 Washington's highest court adopted a policy that eliminated the first *Batson* step in that state. Last year, Connecticut convened a working group to analyze racial discrimination in jury selection.

So too has California acknowledged the need for reform. Associate Justice Goodwin Liu proposed the U.S. Supreme Court prohibit trial judges from offering race-neutral reasons for a prosecutor's peremptory challenges. (*People v. Rhoades* (2019) 8 Cal.5th 393, 458 (dis. opn. of Liu, J.).) He also recommended the courts and legislature eliminate *Batson*'s first step as the State of Washington did. (*Id*. at p. 469.) Again in a lengthy statement in 2020, Justice Liu, with Associate Justice Mariano-Florentino Cuellar concurring, was of the opinion that the petition for review should be granted and urged courts to "reassess whether the law should permit the real-life experiences of our Black citizens to be devalued in this way." (*People v. Triplett* (2020) 48 Cal.App.5th 655, 693, review denied Aug. 31, 2020, dissenting statement.) In July 2020, the California Supreme Court named members to a Jury Selection Work Group. The work group will "study changes or new measures to guard

against impermissible discrimination in jury selection." (Cal. Supreme Ct., California Supreme Court Names Jury Selection Work Group (Jul. 6, 2020) <http://courts.ca.gov/supremecourt.htm> [as of June 1, 2021].)

Justices on the Courts of Appeal have also decried systemic injustice. A 2019 opinion of the First Appellate District, Division One, urged the legislature to consider taking steps to meaningfully "reduce actual and perceived bias in jury selection." (*People v. Bryant* (2019) 40 Cal.App.5th 525, 548-549, concurring opinion of Humes, P.J., and Banke, J.)

The Legislature has recently mandated implicit bias training for lawyers and judges in California beginning in 2022. (Bus. & Prof. Code, § 6070.5, subd. (a); Govt. Code, § 68088, subd. (b)(2) [application to court staff].) This training speaks to and promotes "bias-reducing strategies to address how unintended biases regarding race, ethnicity, gender identity, sexual orientation, socioeconomic status, or other characteristics undermine confidence in the legal system." (Bus. & Prof. Code, § 6070.5, subd. (a).)

On February 21, 2020, Dr. Shirley Weber introduced AB 3070. The bill supports "growing efforts in all branches of California government to reduce the impacts of implicit bias in the criminal legal system, particularly as they adversely affect African Americans." (*Whitewashing* at p. 70.)

To remedy systemic injustice in jury selection, AB 3070's newly created statute, section 231.7 of the Code of Civil Procedure ("section 231.7"), eliminates *Batson*'s step one inquiry; presumptively invalidates two classes of reasons historically associated with implicit bias; and increases the burden on the striking party to show fairness and impartiality. The bill applies in all criminal trials in which jury selection begins on or after January 1, 2022, extending to civil trials in 2026. The legislation also expands potential remedies and adds provisions for appellate review.

The remainder of this article details section 231.7's key provisions and applies the law to past cases to examine the legislation's anticipated effect.

ASSEMBLY BILL NO. 3070

The bill has three distinct sections. Section 1 explains the intent of the Legislature and the legislative findings supporting this amendment. Sections 2 and 3 set forth the text of section 231.7. Section 2 applies only to criminal cases. It becomes effective on January 1, 2021, and it will be repealed on January 1, 2026 when Section 3 becomes effective. (Code of Civ. Proc., § 231.7 (§ 231.7), subds. (k), (n); AB 3070, § 2.) Section 3 is identical, except it applies to both criminal and civil cases. (§ 231.7, subd. (m); AB 3070, § 3.)

LEGISLATIVE FINDINGS -- THE CURRENT PROCEDURE IS INEFFECTIVE BECAUSE IT FAILS TO ACCOUNT FOR UNCONSCIOUS BIAS (AB 3070, SECTION 1)

At the outset, the Legislature acknowledges that peremptory challenges are "frequently" used in criminal cases to exclude jurors based upon their race, ethnicity, gender, gender identity, sexual orientation, national origin, religious affiliation, or the perception that a juror belongs to one of these groups. As a result of this exclusion, African Americans, Latinos, and other people of color have been disproportionately harmed. (AB 3070, § 1, subd. (b).)

The Legislature found the current procedure for evaluating whether a prospective juror has been excused based on his or her membership (or perceived membership) in a protected group has failed to eliminate discrimination. The requirement that the objecting party prove "intentional bias" fails to account for unconscious (implicit) bias. In addition, many of the "race neutral" reasons commonly used to justify use of a peremptory challenge are in fact based on stereotypes of a protected group or otherwise mask unlawful discrimination. To rectify this problem, the Legislature sets forth two classes of commonly used justifications – (1) justifications based on a

juror's beliefs, status, or appearance and (2) justifications based upon a juror's behavior – and deems them presumptively invalid. In addition, the Legislature provides more expansive remedies for both conscious and unconscious bias in the use of peremptory challenges. (AB 3070, § 1, subd. (b).)

Finally, the Legislature intends this act to be broadly construed to further its stated purpose of eliminating the use of group stereotypes and discrimination, whether based on conscious or unconscious bias, in the exercise of peremptory challenges. This should give courts wide latitude in implementing section 231.7.

THE NEW FRAMEWORK OF SECTION 231.7

> A party shall not use 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**.**

(§ 231.7, subd. (a).)

OBJECTIONS – TRIAL COURT MAY NOW OBJECT & AN EXCEPTION FOR OBJECTING AFTER JURY IS IMPANELED

At the outset, the Legislature has expanded the parties who can object to the improper use of a peremptory challenge under this section. The statute provides that any party *or the trial court* on its own motion, may object. (§ 231.7, subd. (b).) Objections are to be made before the jury is impaneled, *unless* information comes to light after the jury is impaneled and the information could not have reasonably been known prior to the jury being impaneled. (*Ibid.*) Finally, any objection under this section preserves all claims related to the discriminatory exclusion of jurors under the United States and California Constitutions. (§ 231.7, subd. (d)(1).)

PROCEDURE: STEP 1 OF BATSON/WHEELER & PURPOSEFUL DISCRIMINATION REQUIREMENT ELIMINATED

The statute eliminates any requirement that the objecting party demonstrate, or the trial court find, purposeful discrimination. Upon an objection under this section, the party exercising the peremptory challenge must state his or her reasons for excluding the juror. (§ 231.7, subd. (c).)

TRIAL COURT MUST GRANT RELIEF BASED ON AN OBJECTIVELY REASONABLE PERSON STANDARD

Once the reasons are provided, the trial court must evaluate the stated reasons based upon a totality of the circumstances. (§ 231.7, subd. (d)(1).) The court is bound by the reasons provided by the party exercising the challenge and is *not* permitted to speculate on or assume the existence of other possible reasons for excluding the juror.

The objection must be sustained if:

> 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.

(§ 231.7, subd. (d)(1), emphasis added.)

The statute defines this terminology. The "objectively reasonable person" is aware that jurors have been unfairly excluded from serving on a jury because of unconscious bias and purposeful discrimination. (§ 231.7, subd. (d)(2)(A).) "Unconscious bias" includes implicit and institutional bias. (§ 231.7, subd. (d)(2)(B).) And "substantial likelihood" is more than a mere possibility, but less than a preponderance of evidence. (§ 231.7, subd. (d)(2)(C).) The statute explicitly states that the trial court does not need to find purposeful discrimination. (§ 231.7, subd. (d)(1).) The reasons for overruling or sustaining the objection must be stated on the record. (§ 231.7, subd. (d)(1).)

NEW FACTORS TRIAL COURTS MAY CONSIDER IN RULING ON THE OBJECTION, INCLUDING A PARTY'S PAST BATSON/WHEELER VIOLATIONS.

The trial court's totality of circumstances evaluation is comprehensive under this statute and can include factors such as: whether the objecting party is in the same group as the challenged juror, or whether the victim, witnesses, or other parties are not members of that protected group. (§ 231.7, subd. (d)(3)(A).) Courts can consider whether the juror's membership in a protected group bears on the facts of the case. (§ 231.7, subd. (d)(3)(B).) Other factors include the quantity and character of questioning posed to the challenged juror relative to other jurors not in the protected group and a comparative analysis of other jurors who were not a member of the protected group and not excused for similar reasons. (§ 231.7, subd. (d)(3)(C)-(D).)

In evaluating the stated reasons for excusing a juror, courts can consider whether the stated reason is disproportionately associated with the protected group and whether the reason is contrary or unsupported by the record. (§ 231.7, subd. (d)(3)(E)-(F).)

Importantly, courts are now permitted to consider whether the attorney (or the attorney's office) has in the present case or in the past used a disproportionate number of peremptory challenges against a prospective juror in a protected group. This includes whether the attorney (or the attorney's office) has past *Batson/Wheeler* violations. (§ 231.7, subd. (d)(3)(G).)

TWO CATEGORIES OF PRESUMPTIVELY INVALID REASONS

· PROSPECTIVE JUROR'S BELIEFS, STATUS, APPEARANCE, AND EMPLOYMENT

The statute lists 13 categories of reasons which are deemed invalid unless the party exercising the challenge can show by *clear and convincing evidence* that (1) an *objectively reasonable person* would view the rationale as unrelated to the prospective juror's protected group or perceived membership in a protected group, and (2) the reasons articulated bear on the prospective juror's ability to be fair and impartial in this case. (Subd. (e).) Clear and convincing is

defined as the degree of certainty the factfinder must have in determining whether the reasons given for challenging a prospective juror were unrelated to his or her membership in a protected group, bearing in mind conscious and unconscious bias. (§ 231.7, subd. (f).)

Reasons delineated in subdivision (e) generally concern the juror's belief system, status, and appearance. These reasons include citing a juror's express distrust of or negative experience with law enforcement or the criminal legal system; express belief that law enforcement officers racially profile or that criminal laws are enforced in a discriminatory manner; or close relationship with a person that has been stopped, arrested, or convicted of a crime. Reasons based on a juror's status include citing the prospective juror's neighborhood, whether they have a child outside marriage, whether they receive state benefits, and their employment or lack of employment or that of a family member. Other presumptively invalid reasons include a prospective juror being a non-native English speaker, the juror's ability to speak other languages, or the juror's dress, attire, or personal appearance. In addition, a juror's friendliness with other prospective jurors in the same protected group is a presumptively invalid reason. Finally, the statute includes a catch-all for any justification that applies to others who are not members of the same cognizable group but were not excused by the party.

The presumption of invalidity is overcome only if the trial court determines that it is *highly probable* the reasons given for challenging the prospective juror were unrelated to conscious or unconscious bias and are instead specific to the juror and bear on that juror's ability to be fair and impartial in the case. (§ 231.7, subd. (f).)

· PROSPECTIVE JUROR'S BEHAVIOR

Examples include a juror's inattentiveness, failure to make eye contact, problematic attitude, unintelligent or confused answers, and body language or demeanor. These reasons are presumptively invalid unless the trial court can confirm that the asserted behavior occurred based on the court's observations or the observations of the objecting party. The attorney striking the juror must also explain why the demeanor or behavior matters to the case. (§ 231.7, subd. (g).)

EXPANDED REMEDIES FOR THE PREVAILING PARTY

A new jury venire is not always the best remedy for a sustained objection because the objecting party could lose favorably seated jurors and risks a new venire that lacks diversity. This statute provides for additional remedies if the objecting party chooses not to excuse the entire venire, such as a mistrial (automatic upon request if the motion is granted after the jury is impaneled), seating the challenged juror, giving the objecting party additional challenges, or any other remedy the court deems appropriate. (§ 231.7, subd. (h)(1)-(5).)

APPELLATE REVIEW: STANDARD OF REVIEW, REVIEW LIMITED TO THE RECORD, COMPARATIVE ANALYSIS, AND STANDARD OF PREJUDICE

The standard of review is de novo, with the trial court's express factual findings reviewed for substantial evidence. Appellate review is expressly limited to the factual findings in the record and reasons provided by the party who challenged the prospective juror. The appellate court cannot impute to the trial court any findings that were not expressly stated on the record. As with the trial court's inquiry, the court shall only consider reasons actually given by the party exercising the peremptory challenge and shall not speculate or consider other reasons to justify the use of a peremptory challenge or the party's failure to challenge similarly situated jurors who are not members of the same cognizable group. Finally, comparative analysis can be argued for the first time on appeal. (§ 231.7, subd. (j.)

If the appellate court determines that the objection was erroneously denied, the error "shall be deemed prejudicial." The judgment shall be reversed, and the case remanded for a new trial. (§ 231.7, subd. (j).)

Case studies illustrate the broad impact of section 237.1. Previously, a prosecutor could excuse one to two jurors in a protected group with little chance a *Batson/*Wheeler motion would have success. More likely an objecting party would fail to establish a prima facie case of purposeful discrimination, and the prosecutor would never have to justify the challenge. Indeed, in *People v. Bonilla* (2007) 41 Cal.4th 313, the California Supreme Court concluded the defendant failed to establish a prima facie showing that the only two African-American jurors were challenged because of their race. The defendant relied heavily on the fact that the prospective jurors were the only African-Americans in the jury pool. (*Id*. at p. 342.) The court concluded this fact was insufficient to establish a prima facie case of purposeful discrimination, stating, "the small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible. '[E]ven the exclusion of a single prospective juror may be the product of an improper group bias. As a practical matter, however, the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion.'" (*Id*. at pp. 342-343, emphasis original, quoting *People v. Bell* (2007) 40 Cal.4th 582, 597-598, disapproved on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) With Step 1 eliminated, a prosecutor will now have to justify the exclusion of a single juror in a protected group. (§ 231.7, subd. (c).)

In addition, commonly cited "race neutral" reasons, such as expressions of distrust of or negative experience with law enforcement, will be presumptively invalid. In *People v. Gutierrez* (2002) 28 Cal.4th 1083, a potential juror, Arthur A., detailed a bad experience he had when pulled over for a traffic violation. Arthur A. said law enforcement "tried to 'rough [him] up'" and harassed him during a traffic stop. He told the court he had no ill will stemming from this altercation. Nonetheless, the prosecution used a challenge to remove him from the jury. On review, the California Supreme Court held the encounter "could alone serve as a race-neutral reason to excuse Arthur A." (*Id*. at p. 1124.) Acknowledging the role of systemic

racism in forming juror opinions, AB 3070 would presumptively invalidate a challenge to Arthur A. based on his negative experience with law enforcement. (§ 231.7, subd. (e)(1).)

Viewing past cases through the lens of section 237.1 illustrates the prospective impact of AB 3070. In *People v. Winbush*, the prosecution challenged a juror on the grounds credibility of police officers could be at issue, and a juror disclosed she and an officer had "kind of got into a thing" when she tried to help her sister leave her husband. (*People v. Winbush* (2017) 2 Cal.5th 402, 435-437.) The juror explained the officer pushed her and made some kind of remarks, she retaliated, and the situation escalated, ending with the juror's arrest but the eventual dropping of charges. The prosecutor determined the arrest report told a different tale in which the juror was more culpable and was "unfriendly" toward law enforcement. Thereafter, the court found the juror's prior arrest was a race-neutral reason because the juror had "committed substantial unlawful conduct, which she minimized during voir dire." (*Id.* at p. 436.) Challenging this juror for having had a negative experience with law enforcement is presumptively invalid and would appear to require explanation by the prosecution under section 231.7, subdivision (c). The court would have to evaluate the prosecution's stated reasons based on a totality of the circumstances, without speculating on additional or different rationale for excusing that juror. (§ 231.7, subd. (d)(1).) Query whether section 231.7 would have called for a different outcome in *Winbush*.

Another significant improvement is the elimination of a limited remand. Under *Batson/Wheeler*, an objecting party who established a prima facie case of purposeful discrimination would receive only a limited remand if the appellate court concluded that the trial court erroneously found otherwise. (*People v. Johnson* (2006) 38 Cal.4th 1096.) In such cases, the matter would be remanded to the trial court to conduct steps 2 and 3 – asking the prosecutor to provide reasons for challenging the juror and determining whether purposeful discrimination occurred. (*Id.* at p. 1099.) This seemed a futile effort, as the ability to evaluate a prosecutor's reasons likely a year or more after jury selection seemed challenging at best, and convincing a trial

court to order a new trial after conviction and sentence seemed an insurmountable task. (*Id.* at p. 1100.) Section 237.1 has eliminated these limited remands as the statute specifically provides that any error is deemed prejudicial, and the judgment shall be reversed with a new trial. (§ 231.7, subd. (j).)

These are just a few examples of how section 237.1 will provide the much needed scrutiny in the exercise of peremptory challenges. While the statute will not affect trials and hence appeals until 2022, appellate counsel should familiarize themselves with the new procedures and strictures on peremptory challenges to enable spotting potential issues once the new jury selection procedures take effect. In addition, defense counsel may want to begin tracking successful *Batson/Wheeler* objections since courts will be able to consider prior violations of a prosecutor and their office. (See § 231.7, subd. (d)(3)(G).)