

**AB 3070:
THE NEW PEREMPTORY
CHALLENGE LAW**

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JANUARY 20, 2021 AT HIGH NOON

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**DR. STRANGE VOIRDIRE, OR HOW I LEARNED
TO STOP WORRYING & LOVE AB 3070**

* (Not Quite)



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**OFFERED REMOTELY, BY:
A PANDEMIC PRODUCTION,
IN ASSOCIATION WITH
SHELTER-IN-PLACE FILMS**



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NOT EFFECTIVE TILL JANUARY 1, 2022

- But note that AB 2542, effective 1-1-2021, did have a version that allowed case dismissal if race “was a factor in the exercise of peremptory challenges”;
- However, CDAA believes that version is inapplicable, and a version w/o that provision will apply, because AB 3070 did become effective (tho not operative) in 2021

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OLD SCHOOL: COGNIZABLE CLASSES, ORIGINALLY, AND AS PER CCP 231.5 (AS OF 2016)

- | | |
|----------------------|----------------------------------|
| • Race | • Age |
| • Ethnicity | • Color |
| • Gender | • Disability |
| • Sexual Orientation | • Genetic Information |
| • Religion | • National Origin (see GC 11135) |

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AB 3070: ADDS NEW CCP 231.7 TO COVER THESE SAME CATEGORIES, PLUS:

- Gender Identity
- Or the perceived membership of the prospective juror in any such group

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**BASIC STARTING ASSUMPTION OF PAST LAW:
PURPOSEFUL DISCRIMINATION OF ANY SUCH
GROUP IS TO BE CONDEMNED**



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**OLD SCHOOL INTRODUCTORY HYPOTHESIS:
CASE OF FELONY BATTERY AGAINST COP BY PERSON OF COLOR;
MEET JUROR #1:**

- 25 year old White male
- Recent social worker program graduate
- Currently unemployed
- Hair in ponytail, beard; wearing "Defund the Police" tee shirt to court
- Lives in Marin City
- Recent victim of pretext stop by traffic cop, which made him distrustful
- Believes crim justice system stacked against persons of color

Keep or Kick?

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AB 3070: LEGISLATIVE FINDINGS

- Peremptory challenges frequently used to exclude jurors based on race, etc.
- Such historic exclusion has disproportionately harmed communities of color
- Existing procedure for determining if challenge done on impermissible reason has failed to eliminate discrimination
- Requiring proof of intentional bias ineffective
- Many routine reasons for challenges are associated w/stereotypes
- So several such justifications are presumptively invalid

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**OLD SCHOOL VOIR DIRE:
PROCEDURE: THE 3 PRONGS**



- Prong One: party objecting to a challenge must make a prima facie case
- Standard pretty low, but still requires some showing
- Only if make (low) showing, must challenger justify challenges by stating reasons for them

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AB 3070: NO MORE PRONG ONE!



- Upon objection to the exercise of a challenge... the party exercising the peremptory challenge shall state the reasons the challenge has been exercised.

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**OLD SCHOOL VOIR DIRE:
PURPOSEFUL DISCRIMINATION MUST BE
SHOWN FOR THE COURT TO SUSTAIN AN
OBJECTION TO A CHALLENGE**



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AB 3070: THE NEW COURT STANDARD TO EVALUATE REASONS

- Court shall consider only reasons given, & may not speculate on other possible justifications
- If substantial likelihood that an objectively reasonable person would view race, etc. as a factor in the challenge, then the objection shall be sustained
- The court need not find purposeful discrimination to sustain an objection

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AB 3070: BREAKING DOWN THE STANDARD



- An “objectively reasonable person” is aware that unconscious bias has resulted in unfair exclusion of jurors
- Unconscious bias includes implicit & institutional bias
- “Substantial likelihood” means more than a mere possibility but less than a standard of more likely than not”

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AB 3070: CIRCUMSTANCES FOR COURT TO CONSIDER (SIMILAR TO OLD SCHOOL)

- Is objecting party member of same cognizable group as challenged juror
- Is victim **NOT** a member of that group
- Are witnesses **NOT** members of that group
- (So far, similar, except written anti-prosecution)

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AB 3070: CIRCUMSTANCES FOR COURT TO CONSIDER (SIMILAR TO OLD SCHOOL) #2

- Does race, etc. bear on case facts
- Number & types of questions posed to challenged juror, including only cursory or no questioning; and differential questions to different cognizable class jurors (*Miller-EI, USSC*)
- Comparative analysis

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AB 3070: CIRCUMSTANCES FOR COURT TO CONSIDER (SIMILAR TO OLD SCHOOL) #3

- Is reason for challenge contrary to trial record
- Has counsel/that office used peremptory challenges disproportionately in past against a given race, etc.
- **NEW (& VAGUE):** Is a reason for challenge "disproportionately associated with a race, etc."

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OLD SCHOOL VOIR DIRE: WHEELER WORDS WHICH WORK



A Three For Steph!

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OLD SCHOOL VOIR DIRE: WHEELER WORDS WHICH WORK

- Distrust of Law Enforcement
- Dress, attire, or personal appearance
- Stupid/Ineffective Juror
- Demeanor/Body Language
- Other jury Experience
- Limited Life Experience (but not age)
- Occupation
- Next at Bat Looks Better
- Playing Race Card Lawfully

Invalid, I presume!



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OLD SCHOOL VOIR DIRE:

Distrust of Law Enforcement



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AB 3070: A PEREMPTORY CHALLENGE IS PRESUMED INVALID FOR "EXPRESSING DISTRUST OF OR HAVING A NEGATIVE EXPERIENCE WITH LAW ENFORCEMENT OR THE CRIMINAL LEGAL SYSTEM"

- Presumed invalid unless party exercising the challenge can show by clear & convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, etc., and that the reason stated bears on the juror's ability to be fair & impartial in the case.

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AB 3070: A PEREMPTORY CHALLENGE IS PRESUMED INVALID FOR "HAVING A CLOSE RELATIONSHIP W/PEOPLE WHO HAVE BEEN STOPPED, ARRESTED, OR CONVICTED OF A CRIME"

- Presumed invalid unless party exercising the challenge can show by clear & convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, etc., and that the reason stated bears on the juror's ability to be fair & impartial in the case.

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(NOTE AB 3070'S ANTI-PROSECUTION BIAS)

- A DA kicking a juror of color for distrust of/negative experience with law enforcement is presumptively invalid
- A defense atty kicking a white juror for positive experience with law enforcement is apparently fine (e.g., in battery against an officer case)

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OLD SCHOOL VOIR DIRE:

Dress, Attire, & Personal Appearance



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AB 3070: A PEREMPTORY CHALLENGE IS PRESUMED INVALID FOR "DRESS, ATTIRE, OR PERSONAL APPEARANCE"

- Presumed invalid unless party exercising the challenge can show by clear & convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, etc., and that the reason stated bears on the juror's ability to be fair & impartial in the case.

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OLD SCHOOL VOIR DIRE:

Stupid or Inattentive Juror



A cartoon illustration showing a juror standing at a podium with a gavel, addressing a group of people seated at a table. The text 'Stupid or Inattentive Juror' is written above the juror.

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OLD SCHOOL VOIR DIRE:

Juror's Appearance/demeanor/ body language



Excessive Perspiration and Offensive Odors
arising from armpits, feet or other parts of the body, cause discomfort, embarrassment, humiliation, and frequently form a barrier to social and business success.

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AB 3070: A PEREMPTORY CHALLENGE IS PRESUMED INVALID FOR "INATTENTIVENESS/STARING/FAILING TO MAKE EYE CONTACT/LACK OF RAPPORT/PROBLEMATIC ATTITUDE/BODY LANGUAGE/DEMEANOR/ OR PROVIDING UNINTELLIGENT ANSWERS"

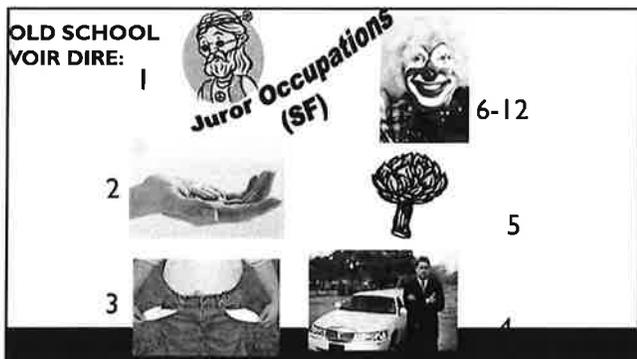
- Presumed invalid unless trial court able to confirm the behavior occurred (on ct own observations), AND reason explained to show why such behavior matters to the case to be tried

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AB 3070: A PEREMPTORY CHALLENGE IS PRESUMED INVALID FOR "A PROSPECTIVE JUROR'S APPARENT FRIENDLINESS W/ANOTHER PROSPECTIVE JUROR OF THE SAME [COGNIZABLE] GROUP"

- Presumed invalid unless party exercising the challenge can show by clear & convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, etc., and that the reason stated bears on the juror's ability to be fair & impartial in the case.

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AB 3070: A PEREMPTORY CHALLENGE IS PRESUMED INVALID FOR "EMPLOYMENT IN A FIELD DISPROPORTIONATELY OCCUPIED BY MEMBERS OF [A COGNIZABLE CLASS] OR THAT SERVED A POP. DISPROPORTIONATELY COMPRISED OF SUCH MEMBERS"

- Presumed invalid unless party exercising the challenge can show by clear & convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, etc., and that the reason stated bears on the juror's ability to be fair & impartial in the case.

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AB 3070: A PEREMPTORY CHALLENGE IS PRESUMED INVALID FOR "RECEIVING STATE BENEFITS/LACK OF EMPLOYMENT OR UNDEREMPLOYMENT OF THE JUROR OR FAMILY MEMBER"

- Presumed invalid unless party exercising the challenge can show by clear & convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, etc., and that the reason stated bears on the juror's ability to be fair & impartial in the case.

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OLD SCHOOL VOIR DIRE:

Juror's Neighborhood (Unless Whole Neighborhood a Proxy for Race)



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AB 3070: A PEREMPTORY CHALLENGE IS PRESUMED INVALID FOR "A PROSPECTIVE JUROR'S NEIGHBORHOOD"

- Presumed invalid unless party exercising the challenge can show by clear & convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, etc., and that the reason stated bears on the juror's ability to be fair & impartial in the case.

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OLD SCHOOL VOIR DIRE:

Juror's Foreign Language Ability,
(Unless a Proxy for Race)



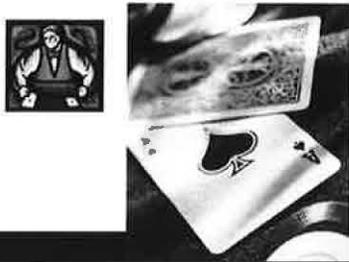
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AB 3070: A PEREMPTORY CHALLENGE IS PRESUMED INVALID FOR "NOT BEING A NATIVE ENGLISH SPEAKER/THE ABILITY TO SPEAK ANOTHER LANGUAGE"

- Presumed invalid unless party exercising the challenge can show by clear & convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, etc., and that the reason stated bears on the juror's ability to be fair & impartial in the case.

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PLAYING THE RACE CARD (LAWFULLY & NOT)



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AB 3070: A PEREMPTORY CHALLENGE IS PRESUMED INVALID FOR "EXPRESSING A DISTRUST OF OR HAVING A NEGATIVE EXPERIENCE WITH ...THE CRIMINAL LEGAL SYSTEM"

- Presumed invalid unless party exercising the challenge can show by clear & convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, etc., and that the reason stated bears on the juror's ability to be fair & impartial in the case.

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OLD SCHOOL VOIR DIRE:



Limited Life Experience;
But now, with AGE a protected category, be careful!

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AB 3070: A PEREMPTORY CHALLENGE IS PRESUMED INVALID FOR "HAVING A CHILD OUTSIDE OF MARRIAGE"

- Presumed invalid unless party exercising the challenge can show by clear & convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, etc., and that the reason stated bears on the juror's ability to be fair & impartial in the case.

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OLD SCHOOL VOIR DIRE: NEXT AT BAT LOOKS BETTER...



(Barry Bonds' dog)

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AB 3070 silent here; but watch out for 2015's *People v. Cisneros* from the 2nd DCA! (234 CA 4th 111)

'NEXT AT BAT LOOKS BETTER' NOT A GREAT REASON, UNLESS YOU STATE WHY THE PERSON KICKED IS NO GOOD!

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PEOPLE V. CISNEROS

- LA stat. rape, crim. threats, use of knife case, by sex offender against his teenage wife, baby; got 11 1/3 yrs SP
- DA kicked 4 men (replacing them w/other men) off jury, which had 2 men at end
- Defense Wheeler found successful on appeal, as DA only said next juror looked better, not why the juror kicked was less acceptable!

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OLD SCHOOL

VOIR DIRE: OK TO KO: JUROR ON PAST HUNG JURY; P.V. FARNAM (02 CAL.S.CT.)



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AB 3070: A PEREMPTORY CHALLENGE IS PRESUMED INVALID FOR "EXPRESSING A DISTRUST OF OR HAVING A NEGATIVE EXPERIENCE WITH ...THE CRIMINAL LEGAL SYSTEM"

- Presumed invalid unless party exercising the challenge can show by clear & convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror's race, etc., and that the reason stated bears on the juror's ability to be fair & impartial in the case.

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AB 3070: TO DETERMINE THAT A PRESUMPTION OF INVALIDITY HAS BEEN OVERCOME...

- "The factfinder shall determine that it is highly probable that the reasons given for ... a peremptory challenge are 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."

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AB 3070: REMEDIES IF OBJECTION GRANTED

- Quash venire & restart jury selection (*Wheeler*)
- Seat the challenged juror (*Willis*)
- Declare a mistrial & select new jury if requested by defendant (new)
- Provide the objecting party additional challenges (new)
- Provide another remedy as the court deems appropriate (new)

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AB 3070: TIMING & APPELLATE ISSUES (NEW)

- Objection to be made before jury empaneled, *unless info becomes known that could not have reasonably known before empanelment*
- Appellate court may not impute findings that trial court did not state (such as demeanor), and may only consider reasons for challenge given on record and not speculate on other unstated reasons

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THE PROSECUTION'S BURDEN HAS CLEARLY SHIFTED:

- Defense had to initially make a prima facie case to move forward their objection
- Now defense needs only make objection to trigger our justifications
- Our justifications were presumed constitutional, unless purposeful discrimination shown
- Now no purposeful discrimination is required; & if an objectively reasonable (woke) person would view the challenge as based in part on race, etc. (by a showing less than preponderance), then the defense objection prevails
- We had many case-based categories of valid justifications we could utilize fairly
- Now, most of them are presumptively invalid unless we show by clear & convincing evidence (i.e. highly probable) that a reasonable person would view our justification unrelated to race, etc., & such justification bears on juror's ability to be fair

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**LEARNING TO LIVE WITH AB 3070
(AS OPPOSED TO NO PEREMPTORIES AT ALL)**

- You still get 6-20 challenges per case; it's how you use that matters
- Loss of prong one no big deal, as such a low bar; stating your reasons earlier (which I always taught) just speeds up voir dire
- The new trial/appellate standards of review, while anti-prosecution, are still legal esoteria; courts will likely not be reversed when our challenges are righteous, based on the trial record, and grounded in standard litigation practice

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**LEARNING TO LIVE WITH AB 3070 (2)
(AS OPPOSED TO NO PEREMPTORIES AT ALL)**

- Some presumptively invalids are vague or won't bother competent DA's: who ever asks about children born out of wedlock or welfare?
- Occupation as a presumptive invalid hardly a big blow: only applies to social workers/teachers/psychiatric professionals/ministers; & CDAA can maybe supply list of statewide employment stats by race
- Presumptive invalidity of neg exper w/ LE means we must ask more questions to see if bias for cause challenge, or juror promise to evaluate LE credibility same as all wits

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**LEARNING TO LIVE WITH AB 3070 (3)
(AS OPPOSED TO NO PEREMPTORIES AT ALL)**

- Presumptive invalidity on demeanor really no diff than now: still need judge to note it on record
- State of Washington enacted this same law in recent past, and Washington prosecutors haven't seen the sky fall
- If you are over-cautious (& worried about your bar card), just use less peremptory challenges

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**TODAY'S APPARENT MORAL:
OLD SCHOOL AIN'T WHAT IT CRACKED UP TO BE**



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QUESTIONS?



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**WE'RE DONE FOR TODAY;
DRIVE HOME SAFELY!**



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