

AB 3070 – New Jury Voir Dire & Wheeler-Batson Rules

Effective January 1, 2022

AB 3070 is new jury selection (*voir dire*) legislation that goes into effect in 2022. It codifies some *Wheeler-Batson*¹ precedent, but also goes much further by eliminating the *prima facie* showing, creating a new objective standard that incorporates implicit bias, abolishing the requirement for purposeful discrimination, creating a list of presumptively invalid reasons, and instituting a “clear and convincing” standard to overcome the presumption. The legislation is based on a recently enacted Washington State court rule, but goes much farther.

The goal of the legislation is laudable: “to put into place an effective procedure for eliminating the unfair exclusion of potential jurors based on race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, through the exercise of peremptory challenges.” AB 3070 contains the following “Intent of the Legislature” language:

- Peremptory challenges are frequently used in criminal cases to exclude potential jurors from serving based on their race, etc.
- Current framework disproportionately harms African Americans, Latinos, and other people of color, and has failed to eliminate discrimination.
- Requiring proof of intentional bias renders the current procedure ineffective as many of the reasons routinely advanced to justify the exclusion of jurors from protected groups are in fact associated with stereotypes or otherwise based on unlawful discrimination.

AB 3070 includes the following significant elements and changes from existing law/practice:

- Eliminates the first prong of *Wheeler-Batson* precedent by no longer requiring a *prima facie* showing.
 - “Upon objection to the exercise of a peremptory challenge pursuant to this section, the party exercising the peremptory challenge *shall* state the reasons the peremptory challenge has been exercised.” (CCP § 231.7(c), emphasis added.)
- Expressly states that the court need not find purposeful discrimination, upending decades of decisional law to the contrary.
 - Creates a new standard where an “objectively reasonable person” would view race, etc. as a “factor” in the peremptory challenge [“If the court determines there is a substantial likelihood that an objectively reasonable

¹ *People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79

person would view race [etc.] as a factor in the use of the peremptory challenge, then the objection shall be sustained.”] (CCP § 231.7((d)(1), emphasis added.)

- “Substantial likelihood” means more than a mere possibility but less than a standard of more likely than not. This would permit a court to find a challenge improper even when the judge determines it is more likely than not that there was no discrimination.
 - Defines “objectively reasonable person” as someone who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors. Unconscious bias includes implicit & institutional bias
- Creates a list of presumptively invalid reasons, including many common sense reasons that seem legitimate on their face (expressing a distrust of or having a negative experience with law enforcement, having a close relationship with a criminal, dress/attire/appearance, employment in certain fields, etc.).
 - Requires the court to verify juror physical behavior (inattentive, failing to make eye contact, etc.) if that is a stated reason; unless corroborated by the judge, it is presumptively an invalid reason.
 - Establishes a burden of “clear and convincing evidence” to overcome the presumption referenced above.
 - Prevents a court from considering its own observations or reasons not articulated by the prosecutor (“The court shall consider only the reasons actually given and shall not speculate on, or assume the existence of, other possible justifications.”)
 - Codifies comparative analysis and disparate questioning as tools that the court should use when ruling on an objection (this is essentially already law in California, at least for appellate review).
 - Allows for an objection after jeopardy has attached [“The objection shall be made before the jury is sworn, *unless information becomes known that could not have reasonably been known before the jury was impaneled.*”] (CCP § 231.7(b).)