SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	SB 213	**Hearing Date:**	April 21, 2015
Author:	Block		
Version:	February 11, 2015		
Urgency:	No	**Fiscal:**	No
Consultant:	MK		

Subject: ***Juries: Criminal Trials: Peremptory Challenges***

HISTORY

Source: California Judges Association

Prior Legislation: SB 794 (Evans) not heard in Assembly Public Safety
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: Unknown

Opposition: California Public Defenders Association; California Public Defenders Association; Legal Services for Prisoners with Children

PURPOSE

The purpose of this bill is to reduce the number of peremptory challenges 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 imprisonment of 90 days 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).)

This bill provides that in any criminal case where the offense is punishable with a maximum term of imprisonment of one year or less, the defendant is entitled to six preemptory challenges. If two or more defendants are jointly tried their challenges shall be exercised jointly but each defendant shall also be 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 the defendants.

This bill sunsets these changes on January 1, 2021.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity."(Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for the bill

According to the author:

> California currently ranks among the states with one of the highest number of peremptory challenges in misdemeanor trials. High number of peremptory challenges cost more in terms of additional volumes of jury summons as well as the need for high-capacity jury rooms and infrastructure to support those jurors. And while peremptory challenges are an important aspect of our justice system, greater numbers of peremptory challenges have been correlated with large numbers of potential jurors being dismissed for improper reasons. 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.
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> By modestly reducing the number of peremptory challenges to six and additional challenges to two when there is multiple parties, California would continue to rank above most states while making a huge impact on reducing workload, increasing juror satisfaction, and maximizing fairness. Reducing the number of challenges will reduce the number of jurors who must be called for services. Fewer people appearing for jury service will shorten trial permitting judges and court personnel to be redeployed in areas where layoffs and furloughs have severely hampered court operations. Furthermore, a more efficient jury selection process results in people getting back to work faster, significantly increasing community cost savings and juror satisfaction. Finally, modestly reducing peremptory challenges will decrease the number of potential jurors being dismissed for improper reasons, increasing fairness in the jury selection process and preserving justice.

2. The Jury Selection Process

The current jury selection 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 available to each side is:

- 20 in capital and life imprisonment cases;

- 10 in criminal cases where the sentence may exceed 90 days in jail;
- 6 in criminal cases with sentences less than 90 days in jail; and
- 6 in civil cases.

In addition, if one or more defendant is tried, the peremptory challenges shall be exercised jointly but each individual defendant is given five additional challenges or four additional challenges if the maximum term is less than 90 days, and the prosecutor is entitled to a proportional number of challenges.

This bill would change the number of peremptory challenges in misdemeanors punishable by one year or less to six with an additional two per defendant in cases where two or more defendants are tried together.

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, in *Batson v. Kentucky* (1985) 471 U.S. 1052, 85 L. Ed. 2d 476, 105 S. Ct. 2111, recognized 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 the 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.

4. Misdemeanors Included in This Bill

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, DUI, assault, battery, molestation and domestic violence would be covered under this legislation.

5. Additional Cost and Strain Upon the System/Danger of Retrials

Prosecuting attorneys have the burden of proving to a unanimous jury that a defendant is guilty of the charges beyond a reasonable doubt. When a criminal jury cannot reach a unanimous verdict, the prosecution may retry the case and attempt to achieve a unanimous verdict with another trial. There is no limit to the number of trials the prosecution can bring. Every retrial strains the system and requires the cost of a trial. By reducing peremptory challenges available to the prosecution, the likelihood of a non-unanimous jury increases because the prosecutor

cannot use their instincts to remove a juror the prosecutor believes may prejudice the jury. Each non-unanimous verdict increases the chances of costly retrials.

6. 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 of unbiased, but who the attorney suspects may be biased or incompetent.

a. 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 or proof. Some 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 and thus won't be dismissed for cause although an attorney may wish to dismiss the juror with a peremptory challenge.

b. 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.

c. 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.

7. Argument in Support

The sponsor believes that reducing the number of peremptory challenges will save the courts money without reducing justice. Specifically, the California Judges Association states that this bill is important for the following reasons:

- Cost savings: While savings are difficult to quantify precisely, reducing peremptory challenges by one-half will greatly reduce the number of jurors who must be called for service. This is because sufficient potential jurors must be present in case the full numbers of potential jurors are dismissed. Fewer juror summons' result in less paper, less postage, fewer jurors to pursue for not appearing, less physical infrastructure to hold potential jurors, etc.

- Personnel efficiencies: Fewer people appearing for jury service will permit personnel resources involved in calling jurors for service to be redeployed in areas where layoffs and furloughs have severely hampered court operations.

- Shorter trials: Fewer peremptory challenges will mean shorter jury selection and thus shorter trials, allowing judges and overburdened staff to handle more matters.

- Improved juror satisfaction: Judges report that potential jurors frequently express frustration when they watch otherwise eligible jurors be dismissed for no apparent reason. The willingness of potential jurors to serve is critical to the constitutional right to jury, and judges are convinced that this simple change will help improve juror attitudes.

- More productive employees in work force: Calling fewer potential jurors means that more people will be working productively in their jobs, benefitting private businesses which we ask to pay for jury service and public agencies as well. In the public sector, for example, having police officers in court for shorter periods of time while jury selection unfolds will permit officers to spend more productive time in police work. The Judicial Council estimates that the one change proposed in SB 794 could result in community and employer savings of between $30 million and $60 million annually.

8. Arguments in Opposition

The California Public Defenders Association opposes this bill stating:

> For one accused of a crime, the Sixth Amendment guarantees the right to a fair and impartial jury. This is a fundamental right not only for those facing serious charges, but those accused of misdemeanors as well. Peremptory challenges are a critical tool used by prosecutors and defense attorneys and give both the opportunity to weed out biased jurors and protect this constitutional guarantee.
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> The Supreme Court has often held that peremptory challenges are an essential means for ensuring fairness. The purpose of the peremptory challenge, the Court said, is "to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." In Holland v. Illinois, Justice Scalia wrote that "peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of eliminating extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury."
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> Prior to the passage of Proposition 115 in 1990, both attorneys and judges conducted the questioning of jurors, commonly referred to as "voir dire."

Sections 6 and 7.5 of Proposition 115 repealed then existing code provisions governing the conduct of voir dire in criminal cases so that attorney-conducted voir dire was essentially eliminated unless there was a showing of good cause. What seemed to be a key rationale for the changes was that it would achieve some economy in time. While it is unclear whether this objective was achieved, what is clear is that the measure has affected trial counsel's ability in criminal cases to effectively assess the prospective jurors' capacity for fairness and the absence of bias.

In 2000, the Legislature realized the excesses of Proposition 115 and passed AB 2406 (Migden). AB 2406 amended the Proposition 115 to instead require the court to conduct an initial examination and thereafter give the counsel for each party the right to examine, by oral and direct questioning, any or all of the prospective jurors. But since AB 2406 did not specify any particular length of time to be accorded to counsel to conduct their examination, while some judges accord a reasonable length of time for the examination of jurors, empirical evidence suggests that the time accorded for the examination of jurors in many misdemeanor cases is still very brief.

SB 749 again attempts yet another assault on the effective selection of jurors by counsel. As noted in the Assembly Public Safety Committee analysis of AB 2406 for the hearing on that legislation on April 4, 2000, the authors of that bill noted, among other things, "Judges are not in a position to know the nuances of a case or case-specific issues related to juror bias. The attorneys are." Yet, as noted, AB 2406 did not truly restore the right to attorney-conducted voir dire in a meaningful way, because time constraints often lead to the perfunctory acknowledgement of the right sought to be granted by that legislation.

The fact is, given the contraction of the voir dire process in California, attorneys in criminal cases are left with little recourse but to use peremptory challenges in doubtful situations where a fuller examination of a prospective juror might have unquestionably qualified the juror or disqualified the juror "for cause." Thus a reduction in the number of peremptory challenges – as proposed by SB 749 – would work to further erode fairness in our jury system. Experienced criminal lawyers know that one result of truncating the juror selection process in the wake of Proposition 115 has been an increase in the number of mistrials occasioned by "hung juries," which is really no time savings at all. As noted by Alexander Hamilton during the drafting of our fundamental charter, "The friends and adversaries of the plan of the convention . . . concur . . . in the value they set upon the trial by jury; the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government."

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