

By: Senator(s) Simmons (12th)

To: Judiciary, Division A

SENATE BILL NO. 2211

1 AN ACT TO PROHIBIT A PARTY FROM USING A PEREMPTORY CHALLENGE
2 TO REMOVE A PROSPECTIVE JUROR ON THE BASIS OF THE PROSPECTIVE
3 JUROR'S RACE, ETHNICITY, GENDER, GENDER IDENTITY, SEXUAL
4 ORIENTATION, NATIONAL ORIGIN, OR RELIGIOUS AFFILIATION, OR THE
5 PERCEIVED MEMBERSHIP OF THE PROSPECTIVE JUROR IN ANY OF THOSE
6 GROUPS; TO AUTHORIZE A PARTY, OR THE TRIAL COURT ON ITS OWN
7 MOTION, TO OBJECT TO THE USE OF A PEREMPTORY CHALLENGE BASED ON
8 THESE CRITERIA; TO REQUIRE THE PARTY EXERCISING THE CHALLENGE,
9 UPON OBJECTION, TO STATE THE REASONS THE PEREMPTORY CHALLENGE HAS
10 BEEN EXERCISED; TO REQUIRE THE COURT TO EVALUATE THE REASONS GIVEN
11 AND, IF THE COURT GRANTS THE OBJECTION, AUTHORIZE THE COURT TO
12 TAKE CERTAIN ACTIONS, INCLUDING, BUT NOT LIMITED TO, STARTING A
13 NEW JURY SELECTION, DECLARING A MISTRIAL AT THE REQUEST OF THE
14 OBJECTING PARTY, SEATING THE CHALLENGED JUROR, OR PROVIDING
15 ANOTHER REMEDY AS THE COURT DEEMS APPROPRIATE; TO PROVIDE FOR A DE
16 NOVO STANDARD OF REVIEW BY AN APPELLATE COURT REVIEWING THE DENIAL
17 OF AN OBJECTION; TO PROVIDE THAT THE ACT APPLIES TO CRIMINAL JURY
18 TRIALS IN WHICH JURY SELECTION BEGINS ON OR AFTER JANUARY 1, 2022;
19 TO PROVIDE THAT THE ACT APPLIES TO CIVIL JURY TRIALS IN WHICH JURY
20 SELECTION BEGINS ON OR AFTER JANUARY 1, 2025; AND FOR RELATED
21 PURPOSES.

22 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

23 **SECTION 1.** (1) The Legislature finds:

24 (a) That peremptory challenges are frequently used in
25 criminal cases to exclude potential jurors from serving based on
26 their race, ethnicity, gender, gender identity, sexual
27 orientation, national origin, or religious affiliation, or



28 perceived membership in any of those groups, and that exclusion
29 from jury service has disproportionately harmed african americans,
30 latinos, and other people of color;

31 (b) That the existing procedure for determining whether
32 a peremptory challenge was exercised on the basis of a legally
33 impermissible reason has failed to eliminate that discrimination;
34 and

35 (c) That requiring proof of intentional bias renders
36 the procedure ineffective and that many of the reasons routinely
37 advanced to justify the exclusion of jurors from protected groups
38 are in fact associated with stereotypes about those groups or
39 otherwise based on unlawful discrimination.

40 (2) The intent of the Legislature is:

41 (a) To put into place an effective procedure for
42 eliminating the unfair exclusion of potential jurors based on
43 race, ethnicity, gender, gender identity, sexual orientation,
44 national origin, or religious affiliation, or perceived membership
45 in any of those groups, through the exercise of peremptory
46 challenges;

47 (b) That this act be broadly construed to further the
48 purpose of eliminating the use of group stereotypes and
49 discrimination, whether based on conscious or unconscious bias, in
50 the exercise of peremptory challenges; and



51 (c) That this act shall not, in purpose or effect,
52 lower the standard for judging challenges for cause or expand use
53 of challenges for cause.

54 (3) Therefore, this act designates several justifications as
55 presumptively invalid and provides a remedy for both conscious and
56 unconscious bias in the use of peremptory challenges.

57 **SECTION 2.** (1) A party shall not use a peremptory challenge
58 to remove a prospective juror on the basis of the prospective
59 juror's race, ethnicity, gender, gender identity, sexual
60 orientation, national origin, or religious affiliation, or the
61 perceived membership of the prospective juror in any of those
62 groups.

63 (2) A party, or the trial court on its own motion, may
64 object to the improper use of a peremptory challenge under
65 subsection (1) of this section. After the objection is made, any
66 further discussion shall be conducted outside the presence of the
67 panel. The objection shall be made before the jury is impaneled,
68 unless information becomes known that could not have reasonably
69 been known before the jury was impaneled.

70 (3) Upon objection to the exercise of a peremptory challenge
71 pursuant to this section, the party exercising the peremptory
72 challenge shall state the reasons the peremptory challenge has
73 been exercised.

74 (4) (a) The court shall evaluate the reasons given to
75 justify the peremptory challenge in light of the totality of the



76 circumstances. The court shall consider only the reasons actually
77 given and shall not speculate on, or assume the existence of,
78 other possible justifications for the use of the peremptory
79 challenge. If the court determines there is a substantial
80 likelihood that an objectively reasonable person would view race,
81 ethnicity, gender, gender identity, sexual orientation, national
82 origin, or religious affiliation, or perceived membership in any
83 of those groups, as a factor in the use of the peremptory
84 challenge, then the objection shall be sustained. The court need
85 not find purposeful discrimination to sustain the objection. The
86 court shall explain the reasons for its ruling on the record. A
87 motion brought under this section shall also be deemed a
88 sufficient presentation of claims asserting the discriminatory
89 exclusion of jurors in violation of the United States and
90 Mississippi Constitutions;

91 (b) (i) For purposes of this section, an objectively
92 reasonable person is aware that unconscious bias, in addition to
93 purposeful discrimination, have resulted in the unfair exclusion
94 of potential jurors in the State of Mississippi;

95 (ii) For purposes of this section, a "substantial
96 likelihood" means more than a mere possibility but less than a
97 standard of more likely than not; and

98 (iii) For purposes of this act, "unconscious bias"
99 includes implicit and institutional biases; and



100 (c) In making its determination, the circumstances the
101 court may consider include, but are not limited to, any of the
102 following:

103 (i) Whether any of the following circumstances
104 exist:

105 1. The objecting party is a member of the
106 same perceived cognizable group as the challenged juror;

107 2. The alleged victim is not a member of that
108 perceived cognizable group; and

109 3. Witnesses or the parties are not members
110 of that perceived cognizable group.

111 (ii) Whether race, ethnicity, gender, gender
112 identity, sexual orientation, national origin, or religious
113 affiliation, or perceived membership in any of those groups, bear
114 on the facts of the case to be tried;

115 (iii) The number and types of questions posed to
116 the prospective juror, including, but not limited to, any the
117 following:

118 1. Consideration of whether the party
119 exercising the peremptory challenge failed to question the
120 prospective juror about the concerns later stated by the party as
121 the reason for the peremptory challenge pursuant to subsection (3)
122 of this section;



123 2. Whether the party exercising the
124 peremptory challenge engaged in cursory questioning of the
125 challenged potential juror; and

126 3. Whether the party exercising the
127 peremptory challenge asked different questions of the potential
128 juror against whom the peremptory challenge was used in contrast
129 to questions asked of other jurors from different perceived
130 cognizable groups about the same topic or whether the party
131 phrased those questions differently;

132 (iv) Whether other prospective jurors, who are not
133 members of the same cognizable group as the challenged prospective
134 juror, provided similar, but not necessarily identical, answers
135 but were not the subject of a peremptory challenge by that party;

136 (v) Whether a reason might be disproportionately
137 associated with a race, ethnicity, gender, gender identity, sexual
138 orientation, national origin, or religious affiliation, or
139 perceived membership in any of those groups;

140 (vi) Whether the reason given by the party
141 exercising the peremptory challenge was contrary to or unsupported
142 by the record; and

143 (vii) Whether the counsel or counsel's office
144 exercising the challenge has used peremptory challenges
145 disproportionately against a given race, ethnicity, gender, gender
146 identity, sexual orientation, national origin, or religious
147 affiliation, or perceived membership in any of those groups, in



148 the present case or in past cases, including whether the counsel
149 or counsel's office who made the challenge has a history of prior
150 violations under *Batson v. Kentucky* (1986) 476 U.S. 79, *People v.*
151 *Wheeler* (1978) 22 Cal.3d 258, Section 231.5, or this section.

152 (5) A peremptory challenge for any of the following reasons
153 is presumed to be invalid unless the party exercising the
154 peremptory challenge can show by clear and convincing evidence
155 that an objectively reasonable person would view the rationale as
156 unrelated to a prospective juror's race, ethnicity, gender, gender
157 identity, sexual orientation, national origin, or religious
158 affiliation, or perceived membership in any of those groups, and
159 that the reasons articulated bear on the prospective juror's
160 ability to be fair and impartial in the case:

161 (a) Expressing a distrust of or having a negative
162 experience with law enforcement or the criminal legal system;

163 (b) Expressing a belief that law enforcement officers
164 engage in racial profiling or that criminal laws have been
165 enforced in a discriminatory manner;

166 (c) Having a close relationship with people who have
167 been stopped, arrested, or convicted of a crime;

168 (d) A prospective juror's neighborhood;

169 (e) Having a child outside of marriage;

170 (f) Receiving state benefits;

171 (g) Not being a native English speaker;

172 (h) The ability to speak another language;



173 (i) Dress, attire, or personal appearance;

174 (j) Employment in a field that is disproportionately
175 occupied by members listed in subsection (1) of this section or
176 that serves a population disproportionately comprised of members
177 of a group or groups listed in subsection (1) of this section;

178 (k) Lack of employment or underemployment of the
179 prospective juror or prospective juror's family member;

180 (l) A prospective juror's apparent friendliness with
181 another prospective juror of the same group as listed in
182 subsection (1) of this section;

183 (m) Any justification that is similarly applicable to a
184 questioned prospective juror or jurors, who are not members of the
185 same cognizable group as the challenged prospective juror, but
186 were not the subject of a peremptory challenge by that party. The
187 unchallenged prospective juror or jurors need not share any other
188 characteristics with the challenged prospective juror for
189 peremptory challenge relying on this justification to be
190 considered presumptively invalid.

191 (6) For purposes of subsection (5) of this section, the term
192 "clear and convincing" refers to the degree of certainty the
193 factfinder must have in determining whether the reasons given for
194 the exercise of a peremptory challenge are unrelated to the
195 prospective juror's cognizable group membership, bearing in mind
196 conscious and unconscious bias. To determine that a presumption
197 of invalidity has been overcome, the factfinder shall determine



198 that it is highly probable that the reasons given for the exercise
199 of a peremptory challenge are unrelated to conscious or
200 unconscious bias and are instead specific to the juror and bear on
201 that juror's ability to be fair and impartial in the case.

202 (7) (a) The following reasons for peremptory challenges
203 have historically been associated with improper discrimination in
204 jury selection:

205 (i) The prospective juror was inattentive, or
206 staring or failing to make eye contact;

207 (ii) The prospective juror exhibited either a lack
208 of rapport or problematic attitude, body language, or demeanor;
209 and

210 (iii) The prospective juror provided unintelligent
211 or confused answers; and

212 (b) The reasons set forth in this subsection (7) (a) are
213 presumptively invalid unless the trial court is able to confirm
214 that the asserted behavior occurred, based on the court's own
215 observations or the observations of counsel for the objecting
216 party. Even with that confirmation, the counsel offering the
217 reason shall explain why the asserted demeanor, behavior, or
218 manner in which the prospective juror answered questions matters
219 to the case to be tried.

220 (8) Upon a court granting an objection to the improper
221 exercise of a peremptory challenge, the court shall do one or more
222 of the following:



223 (a) Quash the jury venire and start jury selection
224 anew. This remedy shall be provided if requested by the objecting
225 party;

226 (b) If the motion is granted after the jury has been
227 impaneled, declare a mistrial and select a new jury if requested
228 by the defendant;

229 (c) Seat the challenged juror;

230 (d) Provide the objecting party additional challenges;
231 and

232 (e) Provide another remedy as the court deems
233 appropriate;

234 (9) (a) This section applies in all criminal jury trials in
235 which jury selection begins on or after January 1, 2022.

236 (b) This section applies in all civil jury trials in
237 which jury selection begins on or after January 1, 2025.

238 (10) The denial of an objection made under this section
239 shall be reviewed by the appellate court de novo, with the trial
240 court's express factual findings reviewed for substantial
241 evidence. The appellate court shall not impute to the trial court
242 any findings, including findings of a prospective juror's
243 demeanor, that the trial court did not expressly state on the
244 record. The reviewing court shall consider only reasons actually
245 given under subsection (3) of this section and shall not speculate
246 as to or consider reasons that were not given to explain either
247 the party's use of the peremptory challenge or the party's failure



248 to challenge similarly situated jurors who are not members of the
249 same cognizable group as the challenged juror, regardless of
250 whether the moving party made a comparative analysis argument in
251 the trial court. Should the appellate court determine that the
252 objection was erroneously denied, that error shall be deemed
253 prejudicial, the judgment shall be reversed, and the case remanded
254 for a new trial.

255 (11) The provisions of this section are severable. If any
256 provision of this section or its application is held invalid, that
257 invalidity shall not affect other provisions or applications that
258 can be given effect without the invalid provision or application.

259 **SECTION 3.** This act shall take effect and be in force from
260 and after July 1, 2021.

