

Second Regular Session
Seventy-third General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. 22-0409.01 Alana Rosen x2606

SENATE BILL 22-128

SENATE SPONSORSHIP

Gonzales and Lee,

HOUSE SPONSORSHIP

Bacon and Woodrow,

Senate Committees
Judiciary

House Committees

A BILL FOR AN ACT

101 CONCERNING ADDRESSING IMPLICIT BIAS IN JURY SELECTION IN
102 CRIMINAL PROCEEDINGS.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://leg.colorado.gov>.)

The bill allows courts and opposing counsel to raise objections to the use of peremptory challenges with the potential to be based on racial or ethnic bias in criminal cases.

The bill provides a list of presumptively invalid reasons for peremptory challenges. Presumptively invalid reasons include:

- Having prior contact with law enforcement officers;

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters or bold & italic numbers indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

- Expressing distrust of law enforcement officers or a belief that law enforcement officers engage in racial profiling;
- Having a close relationship with an individual who has been stopped, arrested, or convicted of a crime;
- Residing in certain neighborhoods;
- Having a child outside of marriage;
- Receiving state benefits; or
- Speaking English as a second language.

The bill requires appellate courts to hear peremptory challenge cases de novo and review a trial court's factual findings for substantial evidence.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1. Legislative declaration.** (1) The general assembly
3 finds and declares that:

4 (a) Impartial and representative juries selected without racial bias
5 or discrimination are essential in democracy and ensure public confidence
6 in the fairness of the legal system;

7 (b) The United States Supreme Court has repeatedly recognized
8 that an "[e]qual opportunity to participate in the fair administration of
9 justice is fundamental to our democratic system" and maintains that
10 eliminating racial bias in the selection of juries is necessary "to preserve
11 the public confidence upon which our system of criminal justice
12 depends";

13 (c) Historically, peremptory challenges have been used to
14 discriminate against qualified prospective jurors on the basis of the
15 prospective jurors' race or ethnicity; and

16 (d) Current standards require proof of purposeful discrimination
17 before a peremptory challenge can be denied.

18 (2) The general assembly finds, therefore, that the current standard
19 is insufficient to ensure that peremptory challenges based on race or

1 ethnicity do not unfairly exclude prospective jurors from juror service. A
2 new standard to resolve objections to peremptory challenges on the
3 grounds of racial or ethnic bias is intended to reduce discrimination in
4 jury selection and create an equal opportunity for individuals to
5 participate in the fair administration of justice.

6 **SECTION 2.** In Colorado Revised Statutes, 16-10-104, **add** (3)
7 as follows:

8 **16-10-104. Peremptory challenges - definitions. (3) Objections**
9 **to peremptory challenges.** (a) A PARTY MAY OBJECT TO THE USE OF A
10 PEREMPTORY CHALLENGE TO RAISE RACIAL OR ETHNIC BIAS. THE COURT
11 MAY ALSO RAISE SUCH AN OBJECTION ON ITS OWN. THE COURT OR THE
12 PARTY RAISING THE OBJECTION SHALL OBJECT BY SIMPLE CITATION TO THE
13 STATUTE. THE OBJECTION AND RELATED PROCEEDINGS MUST OCCUR
14 OUTSIDE THE PRESENCE OF THE PANEL OF JURORS. THE PARTY RAISING THE
15 OBJECTION SHALL MAKE THE OBJECTION BEFORE THE PROSPECTIVE JUROR
16 IS EXCUSED FROM JURY SERVICE, UNLESS THE OBJECTING PARTY SHOWS
17 THAT NEW EVIDENCE HAS BEEN DISCOVERED AFTER THE JUROR WAS
18 EXCUSED.

19 (b) UPON AN OBJECTION TO A PARTY EXERCISING A PEREMPTORY
20 CHALLENGE PURSUANT TO SUBSECTION (3)(a) OF THIS SECTION, THE PARTY
21 EXERCISING THE PEREMPTORY CHALLENGE SHALL ARTICULATE ALL THE
22 REASONS FOR THE PEREMPTORY CHALLENGE AND MAY NOT CITE
23 ADDITIONAL REASONS THEREAFTER. IN RULING ON THE OBJECTION, THE
24 COURT MAY NOT RELY ON ANY REASONS THAT WERE NOT ARTICULATED BY
25 THE PARTY EXERCISING THE PEREMPTORY CHALLENGE.

26 (c) THE COURT SHALL EVALUATE THE REASONS GIVEN TO JUSTIFY
27 THE PEREMPTORY CHALLENGE IN LIGHT OF THE TOTALITY OF THE

1 CIRCUMSTANCES. IF THE COURT DETERMINES THAT AN OBJECTIVE
2 OBSERVER COULD VIEW THE PROSPECTIVE JUROR'S RACE OR ETHNICITY AS
3 A FACTOR IN THE USE OF THE PEREMPTORY CHALLENGE, THE COURT SHALL
4 DENY THE PEREMPTORY CHALLENGE. THE COURT NEED NOT FIND
5 PURPOSEFUL DISCRIMINATION TO DENY THE PEREMPTORY CHALLENGE.
6 THE COURT SHALL EXPLAIN ITS RULING CONTEMPORANEOUSLY ON THE
7 RECORD.

8 (d) IN MAKING ITS DETERMINATION, THE COURT SHALL CONSIDER
9 CIRCUMSTANCES INCLUDING, BUT NOT LIMITED TO:

10 (I) THE NUMBER AND TYPE OF QUESTIONS THE PARTY EXERCISING
11 THE PEREMPTORY CHALLENGE POSED TO THE PROSPECTIVE JUROR,
12 INCLUDING WHETHER THE PARTY EXERCISING THE PEREMPTORY
13 CHALLENGE ASKED, OR FAILED TO ASK, THE PROSPECTIVE JUROR
14 ADDITIONAL QUESTIONS REGARDING AN ALLEGED CONCERN;

15 (II) WHETHER THE PARTY EXERCISING THE PEREMPTORY
16 CHALLENGE ASKED SIGNIFICANTLY MORE, SIGNIFICANTLY FEWER, OR
17 DIFFERENT QUESTIONS OF THE PROSPECTIVE JUROR ON WHOM THE
18 PEREMPTORY CHALLENGE WAS USED IN COMPARISON TO OTHER
19 PROSPECTIVE JURORS;

20 (III) WHETHER OTHER PROSPECTIVE JURORS ANSWERED
21 QUESTIONS SIMILARLY BUT WERE NOT THE SUBJECT OF A PEREMPTORY
22 CHALLENGE BY THE PARTY EXERCISING THE PEREMPTORY CHALLENGE;

23 (IV) WHETHER ANY REASON GIVEN TO JUSTIFY THE PEREMPTORY
24 CHALLENGE MIGHT BE DISPROPORTIONATELY ASSOCIATED WITH RACE OR
25 ETHNICITY; AND

26 (V) WHETHER THE PARTY EXERCISING THE PEREMPTORY
27 CHALLENGE HAS USED PEREMPTORY CHALLENGES DISPROPORTIONALLY

1 AGAINST A GIVEN RACE OR ETHNICITY IN THE PRESENT CASE OR IN PAST
2 CASES.

3 (e) THE FOLLOWING IS A LIST OF PRESUMPTIVELY INVALID
4 REASONS FOR A PEREMPTORY CHALLENGE:

5 (I) HAVING PRIOR PREVIOUS CONTACT WITH LAW ENFORCEMENT
6 OFFICERS;

7 (II) EXPRESSING DISTRUST OF LAW ENFORCEMENT OFFICERS OR A
8 BELIEF THAT LAW ENFORCEMENT OFFICERS ENGAGE IN RACIAL PROFILING;

9 (III) HAVING A CLOSE RELATIONSHIP WITH AN INDIVIDUAL WHO
10 HAS BEEN STOPPED, ARRESTED, OR CONVICTED OF A CRIME;

11 (IV) RESIDING IN CERTAIN NEIGHBORHOODS;

12 (V) HAVING A CHILD OUTSIDE OF MARRIAGE;

13 (VI) RECEIVING STATE BENEFITS; OR

14 (VII) SPEAKING ENGLISH AS A SECOND LANGUAGE.

15 (f) A PARTY RELYING ON THE PROSPECTIVE JUROR'S NONVERBAL
16 CONDUCT OR DEMEANOR TO JUSTIFY A PEREMPTORY CHALLENGE MUST
17 PROVIDE REASONABLE NOTICE TO THE COURT AND OPPOSING COUNSEL IN
18 ADVANCE OF ANY PEREMPTORY CHALLENGE SO THE BEHAVIOR CAN BE
19 VERIFIED AND, IF NECESSARY, ADDRESSED IN A TIMELY MANNER. IF THE
20 COURT OR OPPOSING COUNSEL DOES NOT CORROBORATE THE PROSPECTIVE
21 JUROR'S ALLEGED NONVERBAL CONDUCT OR DEMEANOR, THE
22 JUSTIFICATION FOR THAT PEREMPTORY CHALLENGE IS INVALID.

23 (g) PURSUANT TO THIS SUBSECTION (3), AN APPELLATE COURT
24 SHALL REVIEW THE DENIAL OF AN OBJECTION TO A PEREMPTORY
25 CHALLENGE DE NOVO. THE APPELLATE COURT SHALL REVIEW THE TRIAL
26 COURT'S EXPRESS FACTUAL FINDINGS FOR SUBSTANTIAL EVIDENCE. THE
27 APPELLATE COURT SHALL NOT IMPUTE TO THE TRIAL COURT ANY FINDINGS,

1 INCLUDING FINDINGS OF A PROSPECTIVE JUROR'S Demeanor, THAT THE
2 TRIAL COURT DID NOT EXPRESSLY STATE ON THE RECORD. THE APPELLATE
3 COURT SHALL CONSIDER ONLY THE REASONS FOR A PEREMPTORY
4 CHALLENGE STATED ON THE RECORD, AS DESCRIBED IN SUBSECTION (3)(b)
5 OF THIS SECTION. ANY OBJECTION MADE PURSUANT TO SUBSECTION (3)(a)
6 OF THIS SECTION THAT WAS ERRONEOUSLY DENIED MUST BE DEEMED
7 PREJUDICIAL ERROR AND THE APPELLATE COURT SHALL REVERSE THE
8 JUDGMENT AND REMAND THE CASE FOR A NEW TRIAL.

9 (h) FOR PURPOSES OF THIS SUBSECTION (3), "OBJECTIVE
10 OBSERVER" MEANS A PERSON WHO IS AWARE THAT IMPLICIT,
11 INSTITUTIONAL, AND UNCONSCIOUS BIAS, IN ADDITION TO PURPOSEFUL
12 DISCRIMINATION, RESULT IN THE UNFAIR EXCLUSION OF PROSPECTIVE
13 JURORS IN COLORADO.

14 **SECTION 3. Act subject to petition - effective date.** This act
15 takes effect at 12:01 a.m. on the day following the expiration of the
16 ninety-day period after final adjournment of the general assembly; except
17 that, if a referendum petition is filed pursuant to section 1 (3) of article V
18 of the state constitution against this act or an item, section, or part of this
19 act within such period, then the act, item, section, or part will not take
20 effect unless approved by the people at the general election to be held in
21 November 2022 and, in such case, will take effect on the date of the
22 official declaration of the vote thereon by the governor.