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Fiscal Note

Drafting Number: LLS 22-0409 Date: June 28, 2022
Prime Sponsors: Sen. Gonzales; Lee Bill Status: Postponed Indefinitely
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Bill Topic: IMPLICIT BIAS IN JURY SELECTION

- Summary of Fiscal Impact:
State Revenue, State Expenditure, State Transfer, TABOR Refund, Local Government, Statutory Public Entity

The bill would have allowed opposing counsel or a judicial officer to object to a peremptory challenge during jury selection in trial courts on the grounds of implicit racial or ethnic bias. Starting in FY 2022-23, the bill would have increased state and local expenditures on an ongoing basis.

Appropriation Summary: For FY 2022-23, the bill would have required an appropriation of \$1.1 million to the Judicial Department.

Fiscal Note Status: The fiscal note reflects the introduced bill. This bill was not enacted into law; therefore, the impacts identified in this analysis do not take effect.

Table 1
State Fiscal Impacts Under SB 22-128

Table with 4 columns: Category, Sub-category, Budget Year FY 2022-23, and Out Year FY 2023-24. Rows include Revenue, Expenditures (General Fund, Centrally Appropriated, Total Expenditures, Total FTE), Transfers, and Other Budget Impacts (General Fund Reserve).

Summary of Legislation

Currently, peremptory challenges may be used during jury selection in criminal trials to dismiss a proposed juror without reason. This bill allows opposing counsel or a judicial officer to object to a peremptory challenge on the grounds of potential racial or ethnic bias. These objections must occur outside the presence of jurors, and must be made before a prospective juror is excused from jury service unless the objecting counsel shows new evidence after the prospective juror was excused.

Reasons for peremptory challenge. Upon objection by opposing counsel or a judicial officer, the counsel exercising a peremptory challenge must provide reasons for the court to evaluate. The bill provides a list of invalid reasons for a peremptory challenge, which include:

- having prior contact with law enforcement officers;
- 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.

If a counsel relies upon nonverbal conduct or demeanor to justify a challenge, they must provide enough notice to the court and opposing counsel to allow them to verify the behavior. If the alleged behavior is not corroborated by the court or opposing counsel, the peremptory challenge is deemed invalid.

Evaluating peremptory challenge objections. If the court determines that an objective observer could view a peremptory challenge as being driven by the prospective juror's race or ethnicity in light of the reasons provided for the challenge, the court must deny the challenge. In making its decision, the court must consider the number and type of questions asked by the challenging counsel; whether other prospective jurors answered similarly to the challenged juror but were not themselves challenged; whether reasons given for a challenge might be associated with race or ethnicity; and whether the challenging counsel has disproportionately used peremptory challenges against a given race or ethnicity in the past.

Review of objection denials. If a trial court denies an objection to a peremptory challenge that was raised on the grounds of potential racial or ethnic bias, on appeal an appellate court must review the trial court's decision de novo (i.e., a new review of the original facts without deference to the lower court's decision). If the appellate court finds the objection was incorrectly denied, it is deemed a prejudicial error, and the trial court judgment is reversed and a new trial must be held.

Background

Since the 1986 U.S. Supreme Court decision in *Batson v. Kentucky*, peremptory challenges can be objected to if the opposing counsel suspects the reason for dismissing a potential juror is because of intentional racial, ethnic, sexual, or religious bias. If the court finds merit to the objection, the counsel making the peremptory challenge must provide reasons that do not demonstrate intentional bias.

During jury selection in criminal trials, each side is allowed three peremptory challenges for misdemeanor trials and five for felony trials. According to the Colorado Demography Office, as of 2020, roughly 31 percent of the state's population is a racial or ethnic minority.

Assumptions

The fiscal note makes the following assumptions related to how the bill will affect trial courts:

- the proportion of jurors who are racial or ethnic minorities is roughly equal to the state population; therefore, on average, one-third of peremptory challenges will be used to dismiss jurors of color;
- to avoid the risk of a legal malpractice suit for negligence, an implicit bias objection will be issued whenever a peremptory challenge is made to dismiss a juror of color;
- to ensure they have sufficient justification for their positions on jurors, counsel and judicial officers will spend more time collecting and documenting information about potential jurors, approximately 30 minutes of additional time per misdemeanor trial and 60 minutes per felony trial;
- processing individual peremptory challenge objections related to implicit bias will require 30 minutes on average;
- there will continue to be approximately 1,076 felony trials and 1,287 misdemeanor trials each year; and thus
- in total, objections to peremptory challenges on the basis of implicit bias will increase the average time required for jury selection by 180 minutes in each felony trial and 90 minutes in each misdemeanor trial.

State Expenditures

The bill increases state expenditures in the Judicial Department by \$1.3 million in FY 2022-23 and \$1.4 million in FY 2023-24 and ongoing, paid from the General Fund. Expenditures are shown in Table 2 and detailed below.

**Table 2
Expenditures Under SB 22-128**

Cost Components	FY 2022-23	FY 2023-24
Judicial Department – Trial Courts		
Personal Services	\$620,592	\$930,889
Operating Expenses	\$21,375	\$21,375
Capital Outlay Costs	\$290,637	\$4,400
Centrally Appropriated Costs ¹	\$168,800	\$230,899
FTE – Personal Services	6.7 FTE	10.0 FTE
Trial Courts Subtotal	\$1,101,404	\$1,187,563
Office of the State Public Defender		
Personal Services	\$96,772	\$145,157
Operating Expenses	\$7,125	\$7,125
Capital Outlay Costs	\$52,800	\$3,200
Centrally Appropriated Costs ¹	\$23,705	\$35,058
FTE – Personal Services	1.5 FTE	2.2 FTE
Public Defender Subtotal	\$180,402	\$190,540
Total	\$1,281,806	\$1,378,103
Total FTE	8.2 FTE	12.2 FTE

¹ Centrally appropriated costs are not included in the bill's appropriation.

Trial court staffing costs. Based on the amount of additional hearing time outlined in the Assumptions section, the trial courts will require an additional 2.5 FTE for magistrates. Based on standard court staffing, an additional 7.5 support staff—including court clerks, law clerks and court reporters—is required to support the new magistrates, resulting in a total of 10.0 FTE. Costs in FY 2022-23 are prorated for the General Fund pay date shift and for an October 1, 2022, start date. Based on Judicial Department common policies, standard operating and capital outlay costs include law library materials, travel expenses, judge robe expenditures, and computer hardware and software, as well as furnishings for the judge chambers, law library, jury room, and conference room.

Additional trial days, appeals and retrials. Workload will increase for district courts if jury trials extend additional days when cases are appealed due to implicit bias challenge issues, and if any cases are remanded back to trials courts for a retrial. The fiscal note assumes this additional workload can be accomplished within existing and new appropriations in the bill to the Judicial Department. However, if necessary, the Judicial Department will request additional appropriations through the annual budget process.

Office of the State Public Defender. The Office of the State Public Defender (OSPD) and the Office of Alternate Defense Council (OADC) will have additional costs for court-appointed counsel to attend additional hearings, as well as additional time to prepare for and question potential jurors, file motions related to preemptory challenges, and document the results of preemptory challenges and objections. Costs will vary by judicial district, but the fiscal note assumes that the OSPD will require an average of 0.1 FTE per district, for a total of 2.2 FTE. Resources for the OADC will be adjusted through the annual budget request. Standard operating and outlay costs are included, and first year costs are prorated for the General Fund pay date shift and an October 1, 2022, start date.

Centrally appropriated costs. Pursuant to a Joint Budget Committee policy, certain costs associated with this bill are addressed through the annual budget process and centrally appropriated in the Long Bill or supplemental appropriations bills, rather than in this bill. These costs, which include employee insurance and supplemental employee retirement payments, are shown in Table 2.

Other Budget Impacts

General Fund reserve. Under current law, an amount equal to 15 percent of General Fund appropriations must be set aside in the General Fund statutory reserve beginning in FY 2022-23. Based on this fiscal note, the bill is expected to increase the amount of General Fund held in reserve by the amounts shown in Table 1, which will decrease the amount of General Fund available for other purposes.

Local Government

The bill will increase workload and costs for district attorneys. Impacts will vary depending on caseloads; how each office utilizes staff; how much additional time is required to prepare for jury selection; and to what extent trials are delayed by additional objections to preemptory challenges. Workload will also increase for district attorneys to review transcripts and brief the court when cases are appealed due to implicit bias challenge issues. It is expected that offices in urban districts will compensate attorneys by modifying schedules or providing compensation time, while in rural areas additional full-time or contract attorney support will likely be required. In urban districts where staffing is insufficient or where the district covers multiple counties, additional staff of 0.5 FTE may be required. Overall, the fiscal note estimates an annual additional staff requirement of 0.25 FTE to 0.5 FTE for rural districts, and a workload increase spread among larger staffs in urban districts, at a cost ranging between \$195,000 and \$390,000 per year. District attorney offices are funded by the counties in each judicial district based on their share of the district population.

Effective Date

This bill was postponed indefinitely by the Senate Judiciary Committee on March 10, 2022.

State Appropriations

For FY 2022-23, the bill would have required the following General Fund appropriations:

- \$932,604 and 6.7 FTE to the trial courts in the Judicial Department; and
- \$156,697 and 1.5 FTE to the Office of the State Public Defender in the Judicial Department.

State and Local Government Contacts

Counties
Judicial

District Attorneys
Municipalities