



# COLORADO CRIMINAL DEFENSE BAR

## PREVENT THE EXCLUSION OF PEOPLE OF COLOR FROM JURY SERVICE BASED ON IMPLICIT BIAS SB22-128 by Sen Gonzales, Reps Bacon & Woodrow

Lawyers can strike people from juries without giving any reason, by using peremptory challenges. Too often, these challenges are used to exclude people of color, based on a lawyer's implicit bias. The controlling case, *Batson v. Kentucky*, wasn't designed to address implicit bias. Some states have created a new framework address this problem, and ensure that implicit racial bias does not exclude people from jury service. It is time for Colorado to do the same, because racial bias has no place in our legal system.

### THE PROBLEM

- If a peremptory challenge draws an objection, the lawyer must give "race neutral reasons" to explain it. But these excuses are often grounded in perceptions that are the product of implicit bias, rather than fact.
- *Batson* requires the trial court to accept even the flimsiest of "race neutral reasons," including a juror's hairstyle or supposed body language.
- And *Batson* requires the court to find that a peremptory challenge was purposefully discriminatory before it can be denied.
  - Judges are understandably reluctant to accuse a lawyer of deliberate racial discrimination
  - When a peremptory challenge is motivated by implicit bias, it is impossible to meet the *Batson* purposeful discrimination standard
  - On appeal, *Batson* makes it extremely difficult to second-guess a trial judge's ruling on a *Batson* objection. Minority community members are then often excluded from jury service without any way to remedy that exclusion.

### THE BILL

- Removes the "purposeful discrimination" requirement
- Puts guardrails around relying on nonverbal conduct to justify a peremptory challenge
- Identifies excuses that are presumptively invalid because they are historically associated with minority prospective jurors
- Creates meaningful appellate review when an objection to a peremptory challenge is denied by the trial court

**"Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."**

**-- Justice Brett Kavanaugh  
*Flowers v. Mississippi*, 139 S.Ct. 2228, 2238  
(2019)**

### WHY SUPPORT SB22-128

- Preventing implicit bias in jury selection will increase public confidence in Colorado's judicial system
- Reducing unfair barriers to jury service will allow more of Colorado's minority citizens the opportunity to participate in the democratic process
- Peremptory challenges based on reasons other than racial bias and stereotypes will remain available to all lawyers.
- The bill's framework mirrors changes adopted in Washington four years ago. Judges and lawyers in Washington report that the changes have been easily implemented and have contributed to more representative juries.

**For questions, please contact:**

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