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November 30, 2020

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: A-6-20 State v. Edwin Andujar (084167)
Appellate Division Docket No. A-0930-17T1

Honorable Chief Justice and Associate Justices:

Pursuant to Rule 2:6-2(b), kindly accept this letter brief on behalf of Amicus
Curiae American Civil Liberties Union of New Jersey.

TABLE OF CONTENTS

PRELIMINARY STATEMENT..... 1
STATEMENT OF FACTS AND PROCEDURAL HISTORY 2
ARGUMENT 2
I. THE STATE’S SELECTIVE USE OF A CRIMINAL BACKGROUND
CHECK DENIED MR. ANDUJAR FOUNDATIONAL STATE AND
FEDERAL CONSTITUTIONAL PROTECTIONS..... 2

A.	Mr. Andujar Was Denied His Constitutional Right to Equal Protection of Law.	4
B.	Mr. Andujar Was Denied His Constitutional Right to Trial by Jury Comprising a Cross-Section of the Community.....	8
	CONCLUSION	12

PRELIMINARY STATEMENT

It is both an honor and a duty to participate in our judicial process as a juror. Any impediment to that participation must be viewed with alarm and skepticism, for the derogation of that duty undermines bedrock principles of fairness and due process as well as a fundamental trust in the integrity of the system itself.

When the State conducted a criminal background check on and subsequently arrested F.G. for showing up to jury duty and honestly answering questions put to him by the trial court judge, it damaged one of the most basic protections provided to criminal defendants and adulterated a foundational belief in the ethical functioning of the system itself. No longer a space of impartiality populated by representative peers, in taking this most extreme action, the State rendered jury service a pretextual step towards criminalization and rendered the courthouse into a potential threat to freedom rather than a proud locus of civic engagement.

In this brief, the American Civil Liberties Union of New Jersey (“ACLU-NJ” or “*Amicus*”) discusses how the State’s use of its law enforcement power against F.G. as a replacement for showing cause or deploying one of its preemptory challenges deprived Mr. Andujar of equal protection and his right to trial by an impartial jury. (Point I).

In light of the grave injustices done to F.G. in this case, Mr. Andujar’s conviction was properly reversed and this Court should affirm the Appellate

Division's decision. The Court should also provide a clear remedy should such actions occur again in the future, including, but not limited to: (1) reseating the wrongfully excused juror; (2) dismissing the jury panel and starting jury selection anew; or (3) ordering the forfeiture of one peremptory challenge of the party who sought to sidestep the use of a peremptory challenge through the blatant abuse of the law enforcement powers.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus accepts and incorporates the statement of facts and procedural history contained within Defendant-Respondent's Appellate Division briefs. In a published opinion, the Appellate Division reversed Defendant's conviction. *State v. Andujar*, 462 N.J. Super. 537 (App. Div. 2020). The State filed a Petition for Certification, which this Court granted. *State v. Andujar*, 244 N.J. 170 (2020). This brief accompanies a Motion for Leave to Participate as *Amicus Curiae*. R. 1:13-9(e).

ARGUMENT

I. THE STATE'S SELECTIVE USE OF A CRIMINAL BACKGROUND CHECK DENIED MR. ANDUJAR FOUNDATIONAL STATE AND FEDERAL CONSTITUTIONAL PROTECTIONS.

The essential issue around the criminal history check and subsequent arrest of F.G. does not squarely implicate a *Batson v. Kentucky* 476 U.S. 79 (1986) violation, as no preemptory strike was used here. Rather, the prosecutor's actions

sit within a matrix of *Batson*-adjacent and *Batson*-informed power abuses that lie outside “the permissible middle ground of reasonable, nondiscriminatory prosecutorial discretion.” *State v. Gilmore*, 103 N.J. 508, 538 (1986), holding modified by *State v. Osorio*, 199 N.J. 486 (2009), holding modified by *State v. Andrews*, 216 N.J. 271 (2013). Having failed to assert valid reasons for striking F.G. for cause, the prosecutor substituted her law enforcement powers for the use of a preemptory challenge and thus avoided the need to generate ““sham excuses belatedly contrived to avoid admitting acts of group discrimination.””¹ *State v. Gilmore*, 199 N.J. Super. 389, 409 (App. Div. 1985), *aff’d*, 103 N.J. 508 (1986), (quoting *People v. Wheeler*, 22 Cal.3d 258, 148 Cal. Rptr. 890, 583 P.2d 748, 765 (1978)). Rather than defend impermissible racial considerations implicated by her failure to use a preemptory strike, the prosecutor shifted the framework, from one requiring facial neutrality to one consisting of a manufactured criminality.

In circumventing a *Batson* challenge by arresting F.G. on an open warrant for an alleged infraction for which *he had not been convicted*, the prosecutor violated Mr. Andujar’s constitutional rights by purposefully making F.G.

¹ Again, while the background check and arrest of F.G. are not squarely within the four corners of a *Batson* challenge, the lack of a direct overlay is partially attributable to the fact that in having F.G. arrested, the prosecutor circumvented any analysis that would have interrogated his unavailability and applied *Batson*’s three-step methodology to his unceremonious dismissal from the jury. *See Andujar*, 462 N.J. Super. at 555; §I(A), *infra*.

“unavailable” to serve through an unjustified criminal history search and subsequent arrest.² In light of this unprecedented act and the uncharted waters this case traverses, the reversal of Mr. Andujar’s conviction should be upheld, new rules should be produced protecting jurors from the unwarranted use of criminal history checks by prosecutors, and directions should be provided to the trial courts to allow them to “choose from a broader set of remedies fashioned to respond to the circumstances of the individual case . . . [with] the twin goals of assuring a fair trial and redressing the constitutionally impermissible behavior.” *Andrews*, 216 N.J. at 273.

A. Mr. Andujar Was Denied His Constitutional Right to Equal Protection of Law.

“To establish an Equal Protection violation, a defendant must show purposeful discrimination in the decision-making process that had a discriminatory

² As the Appellate Division stated, “[t]he municipal warrant that the State uncovered is not part of the record on appeal. Nor is there any documentation to support the prosecutor’s assertion that F.G. ‘beat women.’ We emphasize New Jersey does not bar people from juries because they have been arrested, nor do we bar people who have municipal warrants or convictions for traffic violations . . . or other non-indictable offenses.” *Andujar*, 462 N.J. Super. at 554. In order to remove a juror without the need for explanation, accountability, or cause, the State abused its power by subjecting an individual entirely qualified to perform his civic duty to arrest for what could be a minor traffic infraction—infractions themselves too often used as pretexts for racial profiling. See Blake Nelson, *N.J. State Police must improve tracking possible racial profiling in traffic stops, audit says*, NJ.com (May 15, 2020), <https://www.nj.com/news/2020/05/nj-state-police-must-improve-tracking-possible-racial-profiling-in-traffic-stops-audit-says.html>.

effect on the outcome. Purposeful discrimination implies that the decisionmaker selected a particular course of action ‘at least in part ‘because of,’ not merely ‘in spite of’ its adverse effects” *State v. Timmendequas*, 161 N.J. 515, 562 (1999). Here, having failed to demonstrate, articulate, or justify unfitness for cause, the State chose to arrest F.G. rather than use a preemptory strike and simultaneously evaded scrutiny for its actions. The prosecutor’s association of intimated criminality with F.G.’s suitability to serve as a juror creates *de facto* discrimination that violated Fourteenth Amendment guarantees of equal protection.

By their own arguments, the prosecutors’ “causes” to strike F.G. were that he “has an awful lot of background in the criminal justice system with friends and family” and that it was “very concerning his close friends hustle, engaged in criminal activity . . . [t]hat draws into question whether he respects the criminal justice system, whether he respects what his role is here, and whether he is going to uphold all of the principles that he was instructed by your Honor.”³ (3T 94:11; 95:7-9; 95:13-20)⁴. These assertions were met with the trial court’s finding: “I don’t think there has been any reason at all that this juror should be excused for cause.” (*Id.* at 97:23-25).

³ It is worth noting that both prosecutors failed to credit, or even mention, F.G.’s two family associations who were police officers in Newark and Irvington. (3T 65:20-22).

⁴ 3T refers to the transcript dated May 31, 2017.

The prosecutor—based on no evidence whatsoever that F.G. was presenting false information about his own criminal history—bet on finding something in F.G.’s record that would justify his arrest. The State’s need to remove F.G. was thus not based on any particular action or proof of bias, but merely his proximity to others who had contacts with the system.

The clear effort here was to make F.G. disqualified to serve by association, not reason. While the lines between the dots to exclusion based on race are not immediately visible, the prosecutor’s repeated statements regarding F.G.’s “background” makes the implicit association explicit. In 2018, nearly half of the population of Newark consisted of Black people and there were 2.66 times more Black residents of Newark than any other race or ethnicity.⁵ In New Jersey, Black people are incarcerated at a rate twelve times higher than white people.⁶ Harsh drug laws are an important factor in creating these persistent racial and ethnic disparities given that drug crimes disparities are especially severe, due largely to the fact that Black people are nearly four times as likely as white people to be arrested for drug offenses and 2.5 times as likely to be arrested for drug possession

⁵ See Data USA: Newark, <https://datausa.io/profile/geo/newark-nj/-demographics> (last visited Nov. 27, 2020).

⁶ See Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project (June 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

despite the evidence that both groups use drugs at roughly the same rate; from 1995 to 2005, Black people comprised approximately 13 percent of drug users but 36% of drug arrests and 46% of those convicted for drug offenses.⁷

Accordingly, to be Black in New Jersey, and particularly in Newark, means to face a higher possibility of knowing someone arrested or prosecuted for drug crimes as a direct result of these over-policing discrepancies. As F.G. put it:

“I grew up in a neighborhood where it just ain’t good. You learn a lot of things from the streets . . . [but] everybody in here, jurors and everybody, got a background . . . and everybody got different perspectives about everything . . . mine’s might be a little different than the next person. The next person’s might be [a] little different according to where they grew up and how they grew up.”

[3T 79:21-23; 88:24-89:7.]

This “different perspective”, or the specificity of F.G.’s particular “background”, did not render him unable to be an impartial jurist; it merely made him a citizen in a heterogenous society. No legitimate reason existed for F.G. to be dismissed from Mr. Andujar’s jury and his dismissal harmed Mr. Andujar by denying him a competent juror on unjustified, discriminatory grounds.

⁷ *Id.*; see also *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, The Sentencing Project (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.

B. Mr. Andujar Was Denied His Constitutional Right to Trial by Jury Comprising a Cross-Section of the Community.

The discriminatory juror disqualification at the heart of this appeal also deprived Mr. Andujar of a constitutionally sound trial. A defendant has a constitutional right to an impartial jury. *State v. Harvey*, 151 N.J. 117, 210 (1997). Under the New Jersey Constitution, the right to trial by an impartial jury drawn from a representative cross-section of the community is of “exceptional significance” and “goes to the very essence of a fair trial.” *State v. Williams*, 93 N.J. 39, 60 (1983); N.J. Const. Art. 1, paras. 1, 5, 9, 10.

Of the few constraints New Jersey imposes on qualified jurors, one is simply that jurors “shall not have been convicted of any indictable offense under the laws of this [s]tate, another state, or the United States.” N.J.S.A. 2B:20-1(e). While F.G. readily and freely admitted that he had many friends from his neighborhood who had been both victims of crime and charged (and in some instances convicted) with crimes, he never stated that he had been convicted of an indictable offense because he had not been convicted one. Yet, based on his forthright answers, the prosecutor argued he should be excused for cause simply for knowing people who had been in the criminal justice system or had been victims of crime.

As this court noted in *Gilmore*, “the representative cross-section rule not only promotes the overall impartiality of the deliberative process but also enhances the legitimacy of the judicial process in the eyes of the public by serving the

following ‘other essential functions’: ‘legitimizing the judgments of the courts, promoting citizen participation in government, and preventing further stigmatizing of minority groups.’” *Gilmore*, 103 N.J. at 525 (emphasis added) (quoting *Wheeler*, 583 P.2d at 755 n. 6.). The State Constitution, in providing, where appropriate, more expansive, sources of protections than the Federal Constitution, requires this Court to ensure that these other essential functions are reinforced, and not eroded by the behavior exhibited by the State. *State v. Ramseur*, 106 N.J. 123, 190 (1987).

If Mr. Andujar’s conviction is allowed to stand, serious concerns arise that the State’s actions—arresting a juror with a municipal warrant—will become commonplace.⁸ In attempting to end racial disparities in the criminal justice system, courts must identify the inflection points at which those disparities appear, or may be encouraged by the action, and identify possible ways to dispel the root causes. This sort of abuse of law enforcement powers is one such cause. Here, the threat of arrest for jurors whose social and familial circles exist in places where there are higher incidents of arrest and incarceration will have a disparate impact on people of color whose communities already bear the brunt of over-policing; it certainly has already likely chilled citizen participation in government, and it has

⁸ Indeed, the Essex County Prosecutor’s Office’s interest in such a practice can be seen in its earlier, unsuccessful attempt to obtain authorization to conduct blanket criminal history checks on jurors. *In re State ex rel. Essex County Prosecutor’s Office*, 427 N.J. Super. 1 (Law. Div. 2012).

most certainly contributed to further stigmatizing minority groups. *See e.g.* § I(A). Accordingly, this action should be seen for the egregious overreach it is.

What constitutes a representative cross-section of fair and impartial jurors, while not reduced to a mathematical formula, should not exclude particular life experiences that do not easily fit into a single, blinkered view of “normalcy.”⁹ This Court has long upheld the basic principle that the New Jersey Constitution guarantees a defendant the right to a jury that is drawn from a representative cross-section of the community, in large part *because* of the “opinions, preconceptions, or even deep-rooted biases derived from their life experiences . . .” *Gilmore*, 103 N.J. at 524–25, quoting *Wheeler*, 583 P.2d at 755. An “overall impartiality” is thus created through the resulting interplay “of diverse beliefs and values the jurors bring from their group experiences.” *Id.* at 525. By having F.G. arrested and removed from this amalgam of communities and experience, the prosecutor interrupted the achievement of “overall impartiality.” The unnatural exclusion that occurred here “interdicted the mix of group experience thereby obstructing the goal of impartiality . . . [and] suppress[ing] the contribution of [F.G.’s] experience to

⁹ Recognizing this, the New Jersey Legislature recently proposed legislation expanding the prohibition of preemptory strike juror disqualification based on various attributes of specific lived experiences, from the well-worn classes of race, sex, marital status, *etc.*, to sexual orientation and gender identity, noting that none of those realities prevented an individual from being fair and impartial in carrying out the duties of a juror. S. 1920 (2018).

the jury’s deliberative process.” *State v. Townes*, 220 N.J. Super. 38, 45–46 (App. Div. 1987).

Further, as the Judiciary¹⁰ has itself acknowledged, historic conditions of discrimination have resulted in the imposition of inequitable and discrepant punishment upon certain communities by the criminal justice system and law enforcement.¹¹ These conditions directly feed the overrepresentation of people of color in New Jersey’s jails and prisons and should not now be used against jurors as “proof” of their inability to carry out their civic duties merely through association.¹²

¹⁰ See, e.g., Statement of the New Jersey Supreme Court, June 5, 2020, available at <https://www.njcourts.gov/pressrel/2020/pr060520a.pdf>.

¹¹ See New Jersey Criminal Sentencing & Disposition Commission Annual Report, 4-5 (2019) (“[t]he Commission acknowledges a long and complicated history involving racial bias within New Jersey’s criminal justice system. That history, and the evidence of racial disparity in New Jersey’s incarceration of minorities, requires a serious, sustained examination that spans a range of issues from policing and *prosecution* to prison and parole.”) (emphasis added), available at https://www.njleg.state.nj.us/OPI/Reports_to_the_Legislature/criminal_sentencing_disposition_ar2019.pdf; see also Danielle Zoellner, *New Jersey Cop Charged After Bodycam Footage Shows Him Using Pepper Spray on Young Black Men*, The Independent (June 12, 2020), <https://www.independent.co.uk/news/world/americas/new-jersey-police-pepper-spray-black-men-bodycam-assault-a9563181.html>.

¹² While the ACLU-NJ recognizes that this issue is not raised directly in this case, it should be noted that New Jersey is an outlier with regard to its restrictions on who may serve on juries based upon their criminal histories. See N.J.S.A. 2B:20-1(e) (requiring that jurors “shall not have been convicted of any indictable offense under the laws of this State, another state, or the United States”). Many states do not require a total, lifetime ban on jury service where a juror may have been

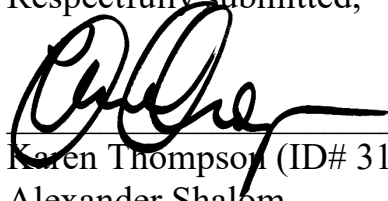
CONCLUSION

For all the aforementioned reasons, this Court should affirm the holding of the Appellate Division reversing Mr. Andujar's conviction and remanding the matter for a new trial.

To prevent this tactic from becoming a routine abuse of power that would have a lasting chilling effect on communities particularly effected by racial disparities in New Jersey's criminal justice system, the Court should also provide a remedy should such actions occur again in the future, including, but not limited to: (1) reseating the wrongfully excused juror; (2) dismissing the jury panel and starting jury selection anew; or (3) ordering the forfeiture of one peremptory challenge from the party abusing the law enforcement powers.

convicted of an indicatable offense within either the criminal or civil context. *See* Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U.L. REV. 65, 150-57 (2003) (detailing jury exclusion statues from around the nation). In fact, between 1995 and 1997, New Jersey allowed people with felony convictions to serve on juries after they had completed their sentences. *See id.* Regardless, criminal history restrictions—based in the idea that those with felony convictions are, by default biased—have been shown to be unsupported in fact. A recent mock-jury experiment included people with felony convictions and people without convictions. The participants with felony convictions displayed greater engagement and the quality of deliberations for all involved was not affected by the presence of members with convictions; furthermore, participants with felony convictions were also as likely to convict as those without. James M. Binnall, *Jury diversity in the age of mass incarceration: an exploratory mock jury experiment examining felon-jurors' potential impacts on deliberations*, Psych., Crime & Law (2018), available at <https://www.motherjones.com/wp-content/uploads/2019/05/Psychology-Crime-and-Law-Article.pdf>.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Thompson', written over a horizontal line.

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