FILED, Clerk of the Supreme Court, 05 Feb 2021, **084167**

SUPREME COURT OF NEW JERSEY
DOCKET NO. 084167

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Petitioner,	:	On Certification from a Judgment of the Superior Court of New
v.	:	Jersey, Appellate Division
EDWIN ANDUJAR,	:	Sat Below:
Defendant-Respondent.	:	Hon. Ellen L. Koblitz, P.J.A.D.; Hon. Mary G. Whipple, J.A.D.;
	:	Hon. Hany A. Mawla, J.A.D.
	:	

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT-RESPONDENT

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PRELIMINARY STATEMENT

It has been more than three decades since the United States Supreme Court held in Batson v. Kentucky that the use of peremptory challenges to remove potential jurors from the jury pool based on race violates the Fourteenth Amendment's Equal Protection Clause. Batson's promise of addressing racial discrimination in our courts has, however, proven to be illusory. Indeed, Batson's procedure for determining whether a juror was removed due to discriminatory bias has largely failed at eradicating racism from the jury selection process, particularly with respect to implicit bias. The State's actions here -- selectively investigating and removing a Black prospective juror after the trial court found him competent to serve -- are an illustration of Batson's shortcomings in addressing racial bias in the jury selection process.

After failing to have F.G., a prospective juror for Mr. Andujar's trial and a young, Black man from Newark, New Jersey, dismissed for cause, the State arranged for his arrest on a two-year-old municipal warrant to render him unavailable to serve as a juror. Prior to his pretextual arrest, F.G. had spoken openly and honestly during voir dire about his life and associations in response to the prosecutors' extensive interrogation about what they perceived to be deficiencies in his character. The trial court had found F.G. forthright, fair, and competent to serve on the jury, despite the prosecutors' vehement arguments to the contrary.

In spite of the trial court's assessment, however, the State remained convinced that F.G. should be stricken.

Instead of accepting the judge's determination, or simply using a peremptory challenge, the State took the extraordinary step of conducting an outside, independent background investigation on F.G., fishing to uncover a way to exclude him from the case. Although their search failed to reveal the extensive drug and weapon convictions they assumed F.G. must have, it did unearth a two-year old municipal court warrant. This municipal court warrant provided the State with its opportunity to ensure that F.G. would not serve on Mr. Andujar's jury.

The following morning, armed with the municipal warrant for a minor offense, the prosecutors returned to court claiming that their assumption had been correct: F.G. was a liar and a criminal. By orchestrating F.G.'s immediate arrest, the State was able to achieve its desired outcome.

The State's actions in this case raise significant and troubling issues. Why did the trial prosecutors aggressively maintain that F.G. was a liar and a criminal despite the trial court having found him truthful and competent? Why did the State remain adamant that F.G. was not fit to serve on the jury even after their unauthorized background check revealed nothing more than a two-year-old municipal court warrant he was clearly unaware of? And, most worrying, why did the State almost immediately

distrust F.G. during the very early stages of questioning when it hardly knew anything about him? The answers appear, at least in part, to stem from the fact that F.G. was a young Black man from Newark.

The disturbing events surrounding F.G.'s orchestrated dismissal demonstrates why the State is not and should not be permitted to conduct independent criminal background investigations into prospective jurors. The responsibility for jury selection sits firmly with the trial court, and the State must not be permitted to usurp that authority in pursuit of the unnecessary criminalization of our state's residents. Permitting this practice would jeopardize the integrity of the jury selection process by allowing the State to target jurors it perceives as undesirable. The risk that these background investigations will disproportionately be used against non-white jurors from low-income areas is undeniable and intolerable.

PROCEDURAL HISTORY

Defendant-respondent Edwin Andujar respectfully refers this Court to the procedural history set forth in his appellant brief, (Dab1 - Dab3),[1] and adds the following:

On February 24, 2020, the Superior Court, Appellate Division issued a published opinion reversing Mr. Andujar's convictions and remanding the matter for a new trial based on the State's improper criminal investigation of a potential juror. State v. Andujar, 462 N.J. Super. 537 (App. Div. 2020) .

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[1] Dab = Mr. Andujar's Appellate Division brief
Pca = State's petition for certification appendix
Pcb = State's supplemental brief
Dsa = Mr. Andujar's supplemental appendix
Dsca = Mr. Andujar's confidential supplemental appendix
1T = pretrial motion hearing dated May 9, 2017
2T = R. 104 hearing dated May 16, 2017
3T = jury selection transcript dated May 31, 2017 (A.M. session)
4T = motion transcript dated May 31, 2017 (P.M. session)
5T = jury selection transcript dated June 1, 2017
6T = trial transcript dated June 6, 2017 (A.M. session)
7T = trail transcript dated June 6, 2017 (P.M. session)
8T = trial transcript dated June 7, 2017 (Vol. 1)
9T = trial transcript dated June 7, 2017 (Vol. 2)
10T = trial transcript dated June 8, 2017 (Vol. 1)
11T = trial transcript dated June 8, 2017 (Vol. 2)
12T = trial transcript dated June 12, 2017
13T = trial transcript dated June 13, 2017
14T = trial transcript dated June 14, 2017
15T = rulings transcript dated June 16, 2017
16T = trial transcript dated June 20, 2017
17T = trial transcript dated June 21, 2017
18T = trial transcript dated June 22, 2017 (Vol. 1)
19T = trial transcript dated June 22, 2017 (Vol. 2)
20T = trial transcript dated June 23, 2017
21T = sentencing transcript dated August 17, 2017

The State filed a petition for certification on March 26, 2020, arguing: (1) no prima facie case for discrimination was met by the circumstances of F.G.'s removal; (2) if there was a prima facie showing of discrimination, the matter should be remanded for a Batson/Gilmore hearing rather than reversing Mr. Andujar's convictions; and (3) the State is permitted under N.J.A.C. 13:59-2.1(a) to conduct independent criminal background investigation into prospective jurors. (See generally Pcb).

On September 9, 2020, this Court granted the State's petition for certification. (Dsa1).

STATEMENT OF FACTS

I. THE VOIR DIRE OF F.G.

On May 31, 2017, F.G., a young Black man from Newark and a prospective juror in Mr. Andujar's trial, arrived at the Essex County courthouse to fulfill his jury service obligation. F.G., like the other prospective jurors, was brought into court to be questioned by the trial judge on the record regarding any issues which might preclude him from serving as an unbiased juror. (3T65-6 to 94-6). When asked in his questionnaire and then again by the trial judge whether he had any relationships with people in law enforcement, people who had been accused of crimes, or people who had been victims of crimes, F.G. admitted truthfully that he did. (3T65-13 to 66-11). Specifically, F.G. indicated that he had two cousins who were police officers in Essex County and that he knew a "host" of people who had been accused of crimes as well as a "host" of people who had been victims of violent crimes. (3T65-13 to 66-11). The trial court decided to elicit additional information from F.G., and both parties agreed. (3T66-20 to 67-5).

The trial court questioned F.G. about the specific number of people he knew who had been accused of a crime, and F.G. estimated it to be five or six close friends. (3T67-10 to 23). F.G. also estimated that three people close to him were victims of crimes. (3T67-24 to 68-3). When asked by the court whether the manner in which any of these people were treated by the criminal justice

system would preclude him from being fair and impartial, F.G. responded "No. No." (3T69-7 to 12). F.G. said that one of his friends was "locked up" and accused of selling "CDS", but that he believed his friend had been "treated fairly." (3T68-4 to 17, 69-13 to 24). F.G. also stated he was not that familiar with the details of his friend's case. (3T69-18). The State, apparently already suspicious of F.G., asked F.G. how he could know his friend was "locked up" if he was not that familiar with the case. (3T70-11 to 16). F.G. responded that his friend was detained after his arrest. (3T70-17 to 19).

F.G. went on to explain that he had several friends who had legal issues related to "CDS," but that he had no impression of whether they were treated fairly or unfairly and, in general, he "stay[s] out of it." (3T72-12 to 73-11, 74-13 to 17). F.G. also indicated that his friends never relayed to him that they felt treated unfairly by the criminal justice system. (3T73-15 to 17, 74-18 to 21). As with the first friend, F.G. stated he did not have intimate details of the proceedings. (3T73-18 to 21, 74-22 to 24). The State attempted to question F.G. about whether his friends displayed grievances towards the criminal justice system, a question F.G. had already answered, but the repetitive line of questioning was cut-off by the trial court. (3T73-24 to 74-4).

The State then began questioning F.G., despite his previous answer that he did not know much regarding his friend's case, about

intimate details of the proceedings. (3T75-17 to 20). F.G. responded that he knew that his friend was prosecuted by the Essex County Prosecutor's Office and again explained that he did not know significant details about the case. (3T75-23 to 25). When the State distrustfully asked how F.G. could know the prosecuting agency without being intimately familiar with the matter, F.G. provided the obvious response: that his friend had been arrested in Newark, Essex County. (3T to 76-16).

The final person F.G. discussed was a friend who had a gun possession charge. (3T77-7 to 15). Because he could not remember any more specific friends and cases, F.G. modified his previous answer to only four friends. (3T77-7 to 15). F.G. again, as with the other cases, stated he did not know many details but assumed his friend was found guilty because he went away for a substantial period of time. (3T78-1 to 6). When the court explained that sometimes that happens even if the person is not found guilty, F.G. said that all he knew was that his friend was "trigger-locked" and went away. (3T78-7 to 11). F.G. again stated that this case would not bias his perception and that his friend did not express to him any resentment towards the criminal justice system. (3T78-12 to 21). F.G. further indicated he did not speak with the friend much about the case. (3T78-16 to 18, 78-22 to 79-5). In follow-up questions, the State asked F.G. how he came to know the term "trigger-locked." (3T79-10 to 23). F.G. replied, "I grew up in a

neighborhood where it just ain't good. You learn a lot of things from the streets." (3T79-21 to 23).

F.G. was then called upon to explain the circumstances of his relationships with people who had been victims of crime, including two cousins who were murdered, one by shooting and one by stabbing, as well as a friend who was robbed. (3T80-3 to 83-19). F.G. repeatedly indicated that his relationships with these victims, and his knowledge of the proceedings, would not bias him as a juror. (3T80-22 to 81-7, 83-20 to 84-1). F.G. stated that he knows a lot of people who live the "lifestyle," and that becoming a victim yourself is something inherent to that lifestyle. (3T83-18 to 19). When asked if his background would influence his participation in the case, F.G. responded only "the same as anybody else . . . ." (3T84-2 to 8). Defense counsel asked some follow-up questions regarding the cases, but F.G. again assured the court that they would not negatively impact his partiality. (3T86-18 to 25).

The State, fixating on F.G.'s statement that his experiences would impact his jury participation "the same as anybody else," pressed F.G. about this response. (3T87-6 to 88-21). F.G. replied:

> I think you took the answer a little wrong like. What I was saying was, like, everybody in here, jurors and everybody, got a background. And, you know, this is different, that is why you getting judged by what 14, 13, and everybody got different perspectives about everything.

> So, you know, what I'm saying, mine's might be a little different than the next person. The next person's might be little different according to where they grew up and how they grew up.
>
> [(3T88-23 to 89-7).]

The trial court foreclosed any further questioning on that issue. (3T89-8).

That avenue of questioning being cut off, the State then began asking F.G. about what he meant about having friends who lived the "lifestyle." (3T89-9 to 23). F.G. explained that he meant "the streets," and that because of the neighborhood he grew up in, he had a lot of relationships with people who "hustle" and sell drugs. (3T89-24 to 90-1). The State started asking F.G. what his friend who was a victim of a robbery had been doing when he was robbed (presumably implying the friend was engaged in illicit activity at the time), and the trial court again had to stop the State's questioning, indicating it "went too far." (3T90-2 to 17).

At the conclusion of F.G.'s voir dire, the State moved to dismiss F.G. for cause. (3T94-10 to 11). The State speculated that F.G. was lying about the number of people he knew who had been accused of a crime and about the number of people he knew who were victims of crimes. (3T94-16 to 20). The assistant prosecutor also argued that F.G.'s "extensive background" with people involved in the criminal justice system precluded his involvement in the case,

going so far as to question whether F.G. had any respect for the criminal justice system at all. (3T95-3 to 96-21). The State concluded by reiterating their position that F.G. was a liar and proposing that F.G. might have involvement in the criminal justice system of his own that he did not disclose. (3T95-21 to 96-4).

Defense counsel replied that refusing jury participation to anyone who had associations with people involved in the criminal justice system would mean "no [B]lack man in Newark would be able to sit on this jury." (3T96-7 to 10). The State called defense counsel's statement "unfair" and "baseless" and defense counsel retracted the remark with respect to race. (3T96-11 to 15). The trial court, however, noted that it took defense counsel's point. (3T96-18 to 19). Defense counsel explained her position further, stating:

> The people that [F.G.] is around, because of where he lives, the socioeconomic status of those people, their interactions with the criminal justice system, it is not a hidden fact that living in certain areas you are going to have more people who are accused of crimes, more people who are victims of crime. I think he was very patient with us and went through the people that he could remember.
>
> The fact that he said things like you get picked up, uhmm, that is just a fact of his life. He was the one who volunteered the word or the term "trigger locked." He explained that he knew that term. It is not that he is part of this milieu if we will use that term.
>
> And he also mentioned that, a lot of my friends live that lifestyle. But he also, you know,

> when he was explaining that, he says that he likes to stay out of it, he doesn't like to involve himself in that. So I think to hold it against him that these things have happened around him to happen to people that he knows is not a position that I think your Honor should entertain, because I think it would mean that a lot of people from Newark would not be able to serve.
>
> [(3T96-22 to 97-19).]

The trial court denied the State's application to remove F.G. for cause, stating:

> Listen carefully, I'm not making any decision about all of the people in Newark. I'm making a decision as to whether or not this particular juror should be excused for cause. I don't think there has been any reason at all that this juror should be excused for cause.
>
> . . .
>
> Everything he said and the way he said it leaves no doubt in my mind that he's not expressed or does not have any bias towards the State nor the defense for anything. What he said, how he said it. I think he would make a fair and impartial juror. I don't have any reason to doubt it, so that application is denied.
>
> [(3T97-20 to 98-8).]

Although numerous other prospective jurors admitted to having connections to law enforcement, relationships with victims of crime, and relationships with people involved in the criminal justice system, none were the subject of any for-cause challenge by the assistant prosecutor, who many times did not even ask a follow-up question. (See 3T55-1 to 56-7 (prospective juror has

"very close friend" who is police officer and friend who was victim of sexual assault; no follow-up questions by prosecutor); 5T111-8 to 119-10 (prospective juror has children whose friends are police officers, is friends with former investigator for prosecutor's office, and has daughter who was charged with marijuana possession; no follow-up questions from prosecutor); 5T124-10 to 133-25 (prospective juror has husband who is a police officer and cousin who was accused of sexual assault; no follow-up questions by the prosecutor); 5T145-5 to 156-25 (prospective juror has cousin in a sheriff's department and son imprisoned on narcotics offenses; no follow-up questions by the prosecutor)).

II. THE ARREST OF F.G.

The morning after the State's extensive questioning of F.G. and the trial court's denial of the State's motion to excuse for cause, the assistant prosecutors returned to court and announced that they had conducted an independent criminal background investigation into F.G. (5T48-24 to 49-4). The State indicated that they had uncovered an open municipal court warrant for F.G. as well as two past domestic violence arrests, and the State renewed their motion to dismiss F.G. for cause.[2] (5T48-24 to 49-

[2] Although failing to describe the warrant and arrests in detail on the record, the trial court incorporated the documents pertaining to those incidents into the record. (5T93-11 to 20). F.G.'s warrant, issued a year and a half earlier on October 28, 2015, stemmed from a simple assault allegation which was dismissed a couple of months after his arrest. (Dsca 1).

9). Confronted with the State's plan to arrest F.G., defense counsel indicated that she did not oppose the motion to dismiss F.G. but requested that he not be arrested in the presence of the jury.[3] (5T49-20 to 24).

At sidebar, the trial judge and the State discussed the logistics of having F.G. arrested while he was at court without the other jurors becoming aware. When defense counsel asked if F.G. could simply be noticed regarding his municipal court issue, the State responded: "I can't just notice him. He has a warrant for his arrest. He can't just notice him. I can't do that. That is never going to happen." (5T63-1 to 3). Defense counsel lamented what was taking place and noted concern about the entire jury pool, stating: "I have to say I'm very concerned about this tainting the entire jury that we have. I think coming to court for jury service no one expects they are going to be looked up to see if they have warrants." (5T64-25 to 65-4). Nonetheless, the State was permitted to proceed with their plan to arrest F.G. As the trial court explained, "[a]nd when he walks out of this courtroom, it will not be to the first floor that he returns. It will be into the grasp of your law enforcement officer." (5T65-9 to 11).

[3] Defense counsel later clarified that she did not consent to F.G.'s removal but "deferred" in light of what appeared to be an unavoidable arrest. (5T94-1 to 13).

The assistant prosecutor attempted to explain her actions, indicating that although they are not in the habit of conducting background checks on prospective jurors, they took issue with "[F.G.'s] background and his acknowledgment that he hangs out with people that are in a lifestyle and hustling drugs and getting arrested . . . ." (5T65-20 to 22). The State again commented on the issue of potential racial bias, stating:

> what counsel said yesterday, that I was making a move for cause on this juror based on racial bias and that I was trying to exclude him because he is a young black male in Newark is totally out of the realm of possibilities. It was a personal and professional attack on me, and wasn't even close to the basis for the reasons that I placed on the record and [the other prosecutor] placed on the record.
>
> [(5T66-12 to 23).]

Defense counsel clarified her position and reiterated her concerns about the State's actions, stating:

> It was never intended as a personal or professional attack. It was the nature of the State's argument that led to that rationale argument that I made regarding, if this person was to be struck for cause, what would that mean in terms of jury selection in general.
>
> I also now want to place on the record my concern that the State doesn't typically check people out, but in this case, they did single someone out to check for warrants. I think that is a concern, and I don't know what the remedy is for that. But it is troubling that this person, this potential juror was singled out.
>
> [(5T66-24 to 67-11).]

The State responded by insisting that it has the authority to conduct whatever investigation it chooses into potential jurors, at which point the trial court intervened to stop the arguing. (5T67-12 to 68-5). The trial court went on to conclude that: "[t]he only thing that I know is the prosecutor, based on new information, made an application, applied to excuse the juror for cause. Defense counsel did not disagree or consented to it. So they were excused for cause." (5T68-4 to 12).

In discussing the implications of the State's renewed motion to dismiss F.G. for cause, defense counsel argued that because the State was able to avoid using a peremptory challenge by conducting improper background investigation with resources not available to the defense, Mr. Andujar should be afforded an additional peremptory strike. (5T72-2 to 73-7). However, defense counsel qualified the request, noting that an additional peremptory challenge would only "partially address [her] concerns." (5T72-20 to 73-1). The State responded that the defense could have conducted their own background investigation if it so desired. (5T73-9 to 25).

The parties went on to have an extended argument with the court about whether there was legal precedent for the State's selective use of background checks or precedent for the imposition

of a remedy. (5T76-12 to 79-11, 86-20 to 93-25). During this exchange, defense counsel pointed out

> what the State did do was selectively target one potential juror and look up information about that potential juror. They didn't have to do that. They chose to do that. They targeted that juror. I think it implicates due process concerns. It implicates constitutional concerns regarding that person's rights to sit on a jury. That person came up, didn't have any criminal convictions. There is nothing that says that that person couldn't sit on a jury in New Jersey. A person is over 18 years old. They are a citizen. They speak English.
>
> [(5T90-1 to 13).]

When asked by the court whether the evidence that was uncovered by the State tended to show F.G. had been dishonest in his voir dire, defense counsel replied:

> If he knew he had a bench warrant, why would he be here? I really honestly think that he didn't know. And you have no evidence before you to know that he did know about those charges. All the evidence you have before you, the fact that he was here, that he continued to show up at jury duty indicates he didn't know he had an active bench warrant, indicates that he didn't know about the existence of this.
>
> So I don't have any evidence to indicate that he did. And I think that it is somewhat unfair to come to that conclusion when you haven't been provided with evidence that he did know.
>
> [(5T91-10 to 24).]

The trial court agreed with defense counsel's point. (5T91-25 to 92-2). The prosecutor retorted that it was irrelevant because his

arrest had now made it too inconvenient to let him serve on the jury. (5T92-13 to 93-2).

Before the jury was brought in again, defense counsel requested that the trial court dismiss the empaneled jury or voir dire each prospective juror with respect to F.G.'s removal to ensure that F.G.'s arrest would not impact the proceedings. (5T95-3 to 95-13). The trial court denied the application. (5T96-9 to 13).

Lastly, the parties dealt with the issue of awarding any additional challenges. Defense counsel argued:

> I think that [selective criminal background investigation into prospective jurors] is improper. It is an unfair advantage to the State they can do that. I don't think that the -- the State essentially avoided having to use a peremptory challenge by going and doing a search and finding out more information that the defense was not able to find out. So I think that that is an unfair advantage, and to mitigate the harm to the defense, the defense should get another peremptory challenge.
>
> [(5T134-25 to 135-8).]

The State countered that it had "particularized reasons for running a criminal background check in this case. That was made very clear by the juror's responses to questions that he had close friends that were involved in criminal activity." (5T136-1 to 5). Ultimately, the trial court's ruling with respect to F.G.'s removal was as follows:

> I would first note that defense did not object to that juror being excused for cause. The bottom line is they did not object. They can say they deferred, but one thing they did not do: They did not object to that juror being excused for cause. That is number one.
>
> Number two is the defense has not put forth, nor am I aware of, any controlling authority that applied to the circumstances that exist in our case here that would dictate the defense should receive an extra challenge. That is my ruling. It is a very narrow ruling and I have ruled. So that application is denied.
>
> [(5T140-1 to 14).]

III. MR. ANDUJAR'S TRIAL AND CONVICTION

The day of F.G.'s arrest marked the final day of jury selection, and Mr. Andujar proceeded to trial on June 6, 2017. (6T). At the conclusion of the eleven-day trial, Mr. Andujar was found guilty of first-degree murder, fourth-degree unlawful possession of a weapon, and third-degree possession of a weapon for an unlawful purpose. (20T46-3 to 48-18). On August 17, 2017, Mr. Andujar was sentenced to forty-five years imprisonment, as well as a concurrent eighteen-month term. (21T63-4 to 63-25).

In a decision published on February 24, 2020, the Appellate Division vacated and remanded Mr. Andujar's convictions. State v. Andujar, 462 N.J. Super. 537 (App. Div. 2020). In that decision, the appellate panel found that the record raised sufficient question as to whether the State's investigation into F.G. and his eventual removal from the jury panel were spurred by race-based

discrimination. Critical to the opinion's analysis was the panel's observation that "[t]he prosecutor presented no characteristic personal to F.G. that caused concern, but instead argued essentially that because he grew up and lived in a neighborhood where he was exposed to criminal behavior, he must have done something wrong himself or must lack respect for the criminal justice system." Id. at 562. The panel found that in the face of a potentially racially motivated, selective background check, "[t]he trial court should have engaged in a Batson/Gilmore analysis." Id. at 561. Had the analysis determined the investigation and removal was discriminatory, the trial court "could have dismissed the empaneled jury members and begun jury selection anew; it could have ordered the prosecutor to forfeit her remaining peremptory challenges; or it could have granted additional peremptory challenges to the defense." Id. at 563. The appellate panel also found that the trial court should not have granted the State's motion to dismiss F.G. for cause without more, stating, "[t]he court should have allowed F.G. to explain the alleged municipal warrant, and if satisfied by his responses, the judge could have refused to grant a dismissal for cause even in the face of the juror's potential arrest." Ibid.

The panel ultimately ruled that the failure of the trial court to conduct an appropriate Batson/Gilmore analysis when it should have, as well as the failure to grant any relief at all to Mr.

Andujar in light of F.G.'s improper investigation and removal, required the reversal and remand of Mr. Andujar's convictions. Ibid. The decision did not definitively address the broader issue of whether the State is entitled to conduct independent criminal background checks on certain prospective jurors, but "questioned" whether the State had the authority to do so. Id. at 554.

LEGAL ARGUMENT

POINT I

PROSECUTORS DO NOT, AND SHOULD NOT, HAVE THE AUTHORITY TO CONDUCT INDEPENDENT CRIMINAL BACKGROUND INVESTIGATIONS INTO PROSPECTIVE JURORS.

As all parties and the Appellate Division have acknowledged, the ability of the State to perform independent criminal background investigations into prospective jurors is an unsettled question. The State asserts that N.J.A.C. 13:59-2.1(a) permits them to conduct such investigations because the State's participation in jury selection is part of the "administration of criminal justice." (Pcb21 – Pcb22). The Appellate Division appeared skeptical, questioning whether the State had such authority. Andujar, 462 N.J. Super. at 554. The Appellate Division's skepticism is well-founded, as prosecutorial criminal background checks on prospective jurors are problematic for three reasons: (1) they are contrary to New Jersey's placement of the responsibility of jury investigation on the trial court and thereby not authorized by N.J.A.C. 13:59-2.1(a), (2) they are damaging to the facilitation of public trust and faith in the judicial system, and (3) they are most likely to be wielded against young, Black prospective jurors from urban communities like F.G.

A. Jury Selection and Investigation Cannot Constitute "Purposes of the Administration of Criminal Justice" Within the Meaning of N.J.A.C. 13:59-2.1(a) Because Our Court Rules and Case Law Expressly Place that Responsibility on the Courts.

Jury selection is within the sole province of the trial court. The State seeks to subvert this judicial authority by interpreting the Administrative Code in a way that would completely undercut the litany of precedent vesting the trial court with this responsibility. Because the State's use of criminal background checks on prospective jurors encroaches upon the well-established role of judicial authority in jury selection, it cannot be countenanced.

No New Jersey case has directly resolved the issue of whether the State has the authority to independently conduct criminal background investigations on prospective jurors. However, in In re State ex rel. Essex Cty. Prosecutor's Office, 427 N.J. Super. 1 (Law Div. 2012), Assignment Judge Patricia Costello engaged in an in-depth analysis of judicial and prosecutorial authority with respect to jury selection. The case arose out of an application by the Essex County Prosecutor's Office to force the court to turn over the birthdates of certain potential jurors so the State could perform independent criminal background checks. Id. at 4. In denying the State's application, Judge Costello detailed at length the development of New Jersey's jury selection process and the vesting of that responsibility with the trial court, explaining

that these developments are inconsistent with the State's attempts to independently investigate jurors.

In the opinion, Judge Costello noted that in response to attorneys' questioning of jurors getting "out of hand," Rule 1:8-3(a) was enacted to specifically place the role of jury questioning on the trial judge. Id. at 12. Given this history, Judge Costello went on to conclude that the State's request for birth dates of potential jurors to perform criminal background investigations represented "an acute departure from even the evolving nature of the Judiciary's examination into the qualifications of potential jurors." Id. at 13.

Indeed, our case law has been unequivocal in recognizing that the responsibility of jury selection and qualification rests with the trial court, rather than the party attorneys. See State v. Wagner, 180 N.J. Super. 564, 567 (App. Div. 1981) ("the chief responsibility for conducting jury selection rests with the trial judge"); accord Pellicer ex rel. Pellicer v. St. Barnabas Hosp., 200 N.J. 22, 40-41 (2009) ("In implementing the process of screening and selection, the trial judge is vested with discretion to decide whether to conduct questioning of particular jurors in open court, while the prospective juror is seated in the jury box, or to conduct the examinations of each of them, or any of them, separately at sidebar."); see also State v. Tinnes, 379 N.J. Super. 179, 184 (App. Div. 2005) ("The trial judge plays a critical

'gatekeeping' role [in regards to jury selection], which has been described as vesting the trial judge with a 'high responsibility' that includes taking 'all appropriate measures to ensure the fair and proper administration of a criminal trial'" (citations omitted)).

N.J.A.C. 13:59-2.1(a), the provision upon which the State relies, permits criminal justice agencies to obtain criminal record information for "purposes of the administration of criminal justice."[4] However, given that we have placed the responsibility of jury selection and investigation on the trial court, it cannot be that such investigation by the prosecutor's office qualifies as

[4] N.J.A.C. 13:59-1.1 defines "administration of criminal justice" and "criminal justice purpose" as:

> 1. The detection, apprehension, detention, pretrial and post-trial release, prosecution, adjudication, correctional supervision or rehabilitation of accused persons or criminal offenders;
>
> 2. The hiring of persons for employment by criminal justice agencies or the granting of access to a criminal justice facility; or
>
> 3. Criminal identification activities, including the accessing of the New Jersey Criminal Justice Information System, the National Law Enforcement Telecommunications System (NLETS), National Crime Information Center (NCIC) or other states' computerized repositories containing criminal history record information, by criminal justice agencies for the purposes set forth in paragraphs 1 and 2 of this definition.

"purposes of the administration of criminal justice" within the meaning of the Administrative Code. To interpret otherwise would allow the Administrative Code to contradict a long line of well-established case law regarding this issue; what is explicitly made a Judiciary responsibility cannot qualify as a criminal justice agency's "purpose." In fact, the State's position is completely contrary to New Jersey's efforts to curtail exactly this kind of conduct: unnecessary and excessive questioning by attorneys into the lives and histories of potential jurors.

It is true that of the handful of jurisdictions which have directly addressed this issue, most have held that prosecutors may conduct criminal background investigations on prospective jurors. See Tagala v. State, 812 P.2d 604, 611-12 (Alaska Ct. App. 1991) (citing cases that have dealt with the issue and noting "in most cases, courts have upheld the practice [of prosecutors conducting criminal background checks on prospective jurors]" (citations omitted)); but see State v. Bessenecker, 404 N.W.2d 134 (Iowa 1987) (requiring a court order for prosecutors to conduct criminal background checks). However, as Judge Costello noted, "states in which courts have permitted the prosecution to conduct record checks on jurors are largely distinguishable because under the jury selection procedures in those states, juror qualification checks are historically or statutorily done by the prosecution.

That is not the practice in New Jersey." In re State ex rel. Essex Cty. Prosecutor's Office, 427 N.J. Super. at 16-17.

It is also worth noting that in the New Jersey cases mentioned by Judge Costello where background checks had been conducted on jurors, they failed, like here, to confirm the State's suspicions and did not reveal any disqualifying information. Id. at 20-21. Thus, there is no showing that such background checks are even effective at improving judicial economy and disqualifying jurors who might lie about their qualifications.

Accordingly, because the State's overbroad interpretation of N.J.A.C. 13:59-2.1(a) is plainly at odds with New Jersey's placement of the responsibility for overseeing jury selection on the trial judge, see Andujar, 462 N.J. Super. at 563, there is no basis for subverting the trial courts' domain of determining juror qualifications by permitting independent, State-run criminal background investigation into potential jurors.

B. Criminal Investigation and Prosecution of Prospective Jurors Will Discourage Jury Service and Damage Trust in the Judicial Process.

In addition to being legally improper, independent State background checks against potential jurors will have a chilling effect on public response to jury service, and potentially on public trust in the criminal justice system more generally.

It is well known that there is a widespread negative perception of jury duty. Ashish S. Joshi and Christina T. Kline,

"Lack of Jury Diversity: A National Problem with Individual Consequences," American Bar Association (Sept. 1, 2015)[5] ("It comes as no surprise that Americans typically hold negative attitudes when it comes to jury duty." (citation omitted)). As a 2007 study by the National Center for State Courts noted, "[c]ourts across the country have been increasingly challenged by citizens who fail to return their qualification questionnaires or who fail to appear . . . for jury service." Gregory E. Mize et al., The State of the States Survey of Jury Improvement Efforts: A Compendium Report 24 (Apr. 2007).[6] The rates of people who fail to appear for jury service are significantly higher in urban areas than in areas with lower populations. Id. at 22; see also Joshi and Kline, American Bar Association (describing how lower-income, urban residents are less likely to respond to, be reached for, or have the flexibility to appear for jury duty). Importantly, the study also stated that among those who do respond to jury service requests, there is an expectation that they retain some privacy in their personal histories, and that any information collected "will only be used

[5] Available at: https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences/

[6] Available at: http://www.ncsc-jurystudies.org/__data/assets/pdf_file/0016/5623/soscompendiumfinal.pdf

for the purposes of jury administration and jury selection." Id. at 25.

As the Appellate Division in this case aptly noted, "[t]he compulsion to appear [for jury service] should not include the threat of arrest if we seek to convincingly assure the citizenry that jury service is an honor and a duty." Andujar, 462 N.J. at 563. The State's actions here -- which it has indicated it is inclined to repeat -- will lessen the public's already tepid willingness to serve on juries. It will be difficult, if not impossible, to maintain public trust in jury service when those who respond will be subjected both to interrogation and covert State investigation which may ultimately lead to their arrest for minor, unrelated offenses. Service in juries should be encouraged as a venerable civic duty; conducting background checks on prospective jurors and using that information to arrest and prosecute them will instead turn jury duty into something to be feared and avoided.

C. Selective Criminal Investigation and Prosecution of Prospective Jurors Will Likely Disproportionately Impact Black Americans.

Finally, selective criminal background checks on prospective jurors are most likely to be used against young, Black Americans like F.G. The State maintains that it is not in the habit of performing criminal background checks on prospective jurors, but when it did, it was on a young Black man. In the United States,

Black Americans are more likely to have interactions with law enforcement, more likely to be incarcerated, more likely to be charged with more serious crimes which carry heavier offenses compared to similarly situated white Americans, and more likely to receive a heavier sentence. Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance, The Sentencing Project (Mar. 2018).[7] It is this reality which caused this Court to earlier this year develop an action plan for addressing racial inequity in our Judiciary. New Jersey Supreme Court, New Jersey Judiciary -- Commitment to Eliminating Barriers to Equal Justice: Immediate Action Items and Ongoing Efforts (July 16, 2020).[8]

Regardless of any overt animus on the part of the State, it would be naïve to think that the weight of these criminal background checks would not fall more heavily on Black Americans. Indeed, this issue has already arisen in jurisdictions where criminal background checks on jurors are more commonplace. Keith L. Alexander, "Questions arise over criminal background searches

[7] PDF available at: https://www.sentencingproject.org/publications/un-report-on-racial-disparities/

[8] Available at: https://njcourts.gov/public/assets/supremecoutactionplan.pdf

of jurors in D.C. Superior Court," Wash. Post (Dec. 8, 2013),[9] (describing issues regarding racial disparity in DC-area criminal background checks on prospective jurors). Because people of color are already underrepresented in juries nationally, see Joshi and Kline, American Bar Association, criminal background checks are only likely to compound these issues.

Accordingly, because jury qualifications are within the purview of the Judiciary and there is no demonstrative need to move that responsibility to the State, because it would negatively impact public faith in jury service and the criminal justice system, and because this policy would most likely disproportionately affect Black Americans and damage jury diversity, the State should not be permitted to conduct criminal background checks on prospective jurors.

D. Should this Court Conclude that the State Lacks the Authority to Freely Conduct Criminal Background Checks on Prospective Jurors, Mr. Andujar's Convictions Must Be Reversed and Remanded Because his Right to a Fair Trial by an Impartial Jury Was Violated.

Given that the State improperly investigated and removed a juror from Mr. Andujar's jury panel, the proper remedy for that harm is a reversal of Mr. Andujar's convictions and remand for a new trial.

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[9] Available at: https://www.washingtonpost.com/local/crime/questions-arise-over-criminal-background-searches-of-jurors-in-dc-superior-court/2013/12/08/fa612fec-4e13-11e3-be6b-d3d28122e6d4_story.html

Criminal defendants are afforded the right to a fair trial by our Federal and State Constitutions. U.S. Const. amends. V, VI; N.J. Const., art. I, ¶ 1. Additionally, both the Federal and State Constitutions grant to an accused the right to public trial by an impartial jury. U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10. Within the context of these rights, "[j]ury selection is an integral part of the process to which every criminal defendant is entitled." Wagner, 180 N.J. Super. at 567 (citation omitted). When the integrity of the process is at stake, prejudice is not required to show that the process was improperly tainted. Ibid. Upon a showing that there has been such an impairment on the "sensitive process of jury selection," it "cannot be condoned." Id. at 568. "[T]he right to have a properly selected jury is so fundamental that a reversal is required to vindicate any infringement of that right." Ibid.

Here, the jury process was irreparably tainted by the State improperly conducting an unauthorized criminal background investigation into F.G. in order to secure his removal from the jury. Because the State is not authorized to conduct such investigations, the trial court erred in failing to provide any remedy at all in the face of that misconduct, especially as this misconduct led to the wrongful exclusion of a juror. As indicated in Wagner, when a jury selection is conducted in a manner not

consistent with our laws, the appropriate remedy on appeal is reversal and remand. Id. at 567-68.

Instead, the trial court erroneously granted the State's motion to excuse F.G. for cause. The only statutory qualifications for jury service are that the individual: (1) be over eighteen years of age; (2) be able to read and write in English; (3) be a United State citizen; (4) be a resident of the county where the individual was summoned; (5) not have been convicted of any indictable offense; and (6) not have any physical or mental disability that would prevent service. N.J.S.A. 2B:20-1. The State's background check into F.G. failed to reveal any information that was statutorily disqualifying.

Indeed, in its renewed for-cause motion, the State did not argue any disqualifying information, but instead stated that F.G.'s arrest on the open municipal court warrant made it too inconvenient to permit him to serve on the jury. (5T92-13 to 93-2). Mere inconvenience, however, is not an appropriate basis for a for-cause removal. State v. Simon, 161 N.J. 416, 465 (1999) ("The test [for for-cause removal] is whether, in the trial court's discretion, the juror's beliefs or attitudes would substantially interfere with his or her duties." (internal quotations and citations omitted)). Moreover, F.G.'s arrest on a municipal warrant did not necessarily render him unavailable. As the appellate panel noted, the trial court "should have allowed F.G.

to explain the alleged municipal warrant, and if satisfied by his responses, the judge could have refused to grant a dismissal for cause even in the face of the juror's potential arrest." Andujar, 462 N.J. Super. at 563. Indeed, given that the warrant was nearly two years old and for a minor offense and F.G. was released the following day after posting a small bail (Dsca 1), there appears no reason why the issue would have mandated F.G.'s removal.

It is true that defense counsel at the time requested a remedy of an additional peremptory challenge for this issue, and that Mr. Andujar had remaining peremptory challenges at the conclusion of jury selection. However, this does not constrain this Court's ability to fashion a remedy for the jury selection violations on appeal. First, this was not the only remedy requested by trial counsel, who initially moved to either dismiss the empaneled jury or conduct a new voir dire of the empaneled jurors over concerns regarding F.G.'s removal. (5T95-3 to 95-13). Second, an additional peremptory challenge would not have been an adequate remedy in the face of the State's misconduct, and Mr. Andujar's remedies on appeal should not be limited by this request. Trial counsel made the conservative request for Mr. Andujar to receive one additional peremptory challenge following the trial court's denial of the previously requested remedies and without the benefit of concrete precedent regarding the impropriety of the State's actions and what remedies might be appropriate. This request was made, then,

not because it adequately addressed the harms caused by the State, but rather out of the hope that Mr. Andujar might receive any remedy at all following the State's actions, however small. Indeed, trial counsel noted during the request that an additional peremptory challenge would only "partially address [her] concerns." (5T72-20 to 73-1).[10]

The issue here is not whether the trial court erred in denying trial counsel's request for an additional peremptory challenge,[11] but that the trial court committed reversible error by permitting the State's unauthorized background investigation to result in the improper dismissal of a prospective juror. Once F.G. was improperly excluded from the jury, a wrong was committed for which there was few adequate remedies other than dismissing the panel and starting again. Because of the supreme importance placed on the propriety of jury selection, and because no remedy whatsoever was provided at the trial level, reversal is required. Wagner, 180 N.J. Super.

[10] A far more adequate remedy would have been striking the remainder of the State's challenges (the State used an additional peremptory challenge after the trial court's final decision regarding F.G.'s removal (5T183-13 to 15)) or dismissing the empaneled jury and starting anew.

[11] A contrastable situation would be one in which the judge improperly denied a for-cause challenge by the defense, forcing the defendant to use a peremptory challenge. Under such circumstances, where the issue is limited to a forced defense challenge, exhaustion of peremptory challenges would impact defendant's remedy on appeal. State v. DiFrisco, 137 N.J. 434, 466-73 (1994).

at 568. Mr. Andujar is not required to show that the result would have been different had F.G. remained on the jury, given the affront to the jury selection process exhibited by the State. Id. at 567.

E. Regardless of Whether the State has the Authority to Conduct Independent Criminal Background Investigations of Prospective Jurors, Reversal is Still Required Because the State's Actions Violated N.J.A.C. 13:59-2.4(a).

Even if this Court were to conclude that the State is permitted to conduct independent criminal background investigation into prospective jurors generally, the State's actions in this instance nonetheless violated the Administrative Code. N.J.A.C. 13:59-2.4(a) states that "[c]riminal justice agencies shall limit their use of criminal history record information solely to the authorized purposes for which it was obtained." Here, however, the information the State uncovered about F.G. was not used strictly for purposes of determining his qualifications for serving on the jury, but instead was used to further his prosecution on an unrelated municipal court matter. Accordingly, even affording the State the benefit of their interpretation of the Administrative Code, their actions in removing F.G. were still improper.

As noted above, when jury selection is conducted in a manner inconsistent with our laws, reversal is the required remedy for the impairment of that process. Wagner, 180 N.J. Super. at 568. The end result of the State's conduct is that an individual was

illegally denied the opportunity to serve on a jury, a broad harm with few adequate remedies. Thus, whatever the decision of this Court is with regard the State's authority to conduct the background check at issue, the State's actions were still improper and reversal is nonetheless required.

POINT II

THE STATE'S ACTIONS BELOW AMOUNTED TO A COLORABLE CLAIM OF DISCRIMINATION UNDER BATSON/GILMORE. IN THE FACE OF THAT POTENTIAL RACIAL DISCRIMINATION, AND IN THE ABSENCE OF ANY OTHER MEANINGFUL, AVAILABLE REMEDY, REVERSAL AND REMAND OF MR. ANDUJAR'S CONVICTIONS ARE REQUIRED.

Reversal is additionally required in this case because the State's conduct in investigating and removing F.G. runs afoul of Batson v. Kentucky, 476 U.S. 79 (1986) and State v. Gilmore, 103 N.J. 508 (1986). Thus, even if this Court upholds the State's ability to conduct selective background checks on potential jurors, or otherwise rules that such a violation does not require reversal, the issue remains as to whether the State had a discriminatory purpose in conducting a criminal background check on F.G. Furthermore, because no remedy was provided below, no record of the issue made, and no realistic possibility of adequately addressing the issue on remand exists, Mr. Andujar's convictions must be reversed and remanded.

A. Application of the *Batson/Gilmore* Framework to the State's Actions Here Raises a Colorable Claim of Discrimination.

As an initial matter, the Batson/Gilmore framework applies to the State's discriminatory selective background check that occurred below. Under this analysis, (1) the party claiming discrimination must first make a prima facie showing of discrimination, (2) the burden is shifted to the striking party to provide non-discriminatory reasons for removing the juror, and (3) the evidence of discrimination is weighed against the non-discriminatory reasons provided. State v. Osorio, 199 N.J. 486, 492-93 (2009). The State agrees that the Batson/Gilmore analysis applies to selective background checks. (Pcb 24). Additionally, although voicing concerns that it was not a perfect translation to criminal background checks, the Appellate Division ultimately utilized this framework in examining the investigation and exclusion of F.G. from the jury. Andujar, 462 N.J. Super. at 561-63. This application follows New Jersey's broad understanding of the constitutional right to a cross-representative jury as not limited only to peremptory challenges, but as applicable to any racial discrimination in jury selection. See Gilmore, 103 N.J. at 526-27 ("[The representative cross-section rule] must apply not merely to methods of selection of the jury venire but as well to methods of selecting the petit jurors from the jury venire, and so

to the stage of exercising challenges for cause and peremptory challenges.").

Applying the Batson/Gilmore framework to the facts of this case, a colorable claim of discrimination was raised below. First, the facts below present a prima facie case of discrimination to satisfy the first prong of the test. In Osorio, this Court modified the first prong of the Gilmore framework to reflect the change to Baston made by the Supreme Court in Johnson v. California, 545 U.S. 162 (2005), lowering the bar for presenting a prima facie case of discrimination. Osorio, 199 N.J. at 492-93. Under this low bar, the burden on the party alleging discrimination is "slight." Id. at 492. The burden is satisfied by only providing evidence "sufficient to draw an inference that discrimination has occurred." Osorio, 199 N.J. at 502 (citing Johnson, 545 U.S. at 170). Since Osorio, this Court has held that the striking of a single juror can satisfy a prima facie instance of discrimination if the circumstances surrounding the challenge permit the inference. See State v. Pruitt, 430 N.J. Super. 261, 271-73 (App. Div. 2013), cert. denied, 221 N.J. 287 (2015).

Here, the circumstances surrounding F.G.'s dismissal are sufficient to present an "inference" that discrimination occurred. F.G. dutifully responded to his jury summons, submitted himself to extensive questioning in court, and was determined to be forthright and competent to serve on a jury by the trial court. Nonetheless,

knowing nothing more about F.G. than what the trial court had just heard, the State determined that F.G. was not forthright and not qualified for jury service, but in fact a liar and a criminal. The State then, notwithstanding the judge's ruling denying its for-cause challenge, performed its own criminal background check on F.G. and had him arrested in an attempt to circumvent the judge's decision. This arrest and re-argument of the State's challenge came despite the fact that no disqualifying information, or as far as can be discerned any evidence of dishonesty, was uncovered by the background check. Such hostility to F.G.'s sitting on a jury,[12] in the face of the trial court's assessment finding him qualified, permits an "inference" that F.G.'s race was partially responsible for the State's aggressive conviction that he was a liar and a criminal and unfit for jury service.

Although the State below and on appeal has put forward various "race neutral" reasons for striking F.G. as required by the second prong of the test, none of the proffered reasons satisfactorily rebut the inference of discrimination. First, the State references the fact that F.G. indicated he knew a "host" of people who had been victims of violent crimes and had family who were law enforcement, and that this might have a significant capacity to bias Mr. Andujar. (Pcb7 – Pcb8). While neutral jurors are indeed

[12] A hostility that presented itself from the beginning of the State's questioning of F.G. (See 3T70-11 to 16).

a benefit to our courts, that the State took such an aggressive stance regarding supposed juror biases against the defendant, as opposed to focusing solely on biases against the State, suggests that there is more to the State's motive to remove F.G. than the proffered reasons.

Next, the State points to F.G.'s responses indicating that he had numerous acquaintances involved in the criminal justice system and to his use of criminal justice "terms of art" like "trigger locking" and "CDS." (Pcb8 – Pcb10). While this may have provided an adequate basis for bringing a legitimate challenge below,[13] they certainly provided no basis for the State's conviction that F.G. must have drugs and weapons charges of his own, an assertion that proved entirely unfounded. F.G. indicated that his knowledge of the term "trigger locking" came from his relationships with people from the neighborhood where he grew up who were involved in the system. (3T79-10 to 23). Indeed, after the State's improper background check on F.G., his explanation proved to be truthful since he had no such charges of his own.

[13] It should be noted, however, that perceived disrespect for the criminal justice system and close association with people involved in the system, both raised by the State here, are often cited by prosecutors as bases for striking Black jurors. Equal Justice Initiative, Racial Discrimination Persists in California Jury Selection (June 29, 2020), https://eji.org/news/racial-discrimination-persists-in-california-jury-selection/.

That the State's "neutral" reasons for the background check are suspect is further reinforced by the fact that numerous other jurors in the transcript admitted to having connections to law enforcement, relationships with victims of violent crime, and relationships with people involved in the criminal justice system like F.G., but were not subject to any background check, any for-cause challenge, or often even follow-up questions by the State. (See 3T55-1 to 56-7 (prospective juror has "very close friend" who is police officer and a friend who was victim of sexual assault; no follow-up questions by prosecutor); 5T111-8 to 119-10 (prospective juror has children whose friends are police officers, is friends with former investigator for prosecutor's office, and has daughter who was charged with marijuana possession; no follow-up questions from prosecutor); 5T124-10 to 133-25 (prospective juror has husband who is police officer and cousin who was accused of sexual assault; no follow-up questions by prosecutor); 5T145-5 to 156-25 (prospective juror has cousin in a sheriff's department and son imprisoned on narcotics offenses; no follow-up questions by prosecutor)).

It should also be noted that despite supposed concerns over F.G.'s reliability as a juror now expressed by the State, the State at one point argued during jury selection that the selective background investigation had actually nothing to do with removing F.G. from the jury at all, but was instead conducted because it

had a "duty" to conduct an independent investigation into F.G. for suspected criminal activity because of his voir dire answers. Specifically, the prosecutor stated: "[w]e weren't using our system to try to get him kicked off. We had a duty [to conduct an investigation] based on what he said and the people that he indicated he has close ties to." (5T76-5 to 7). Thus, the State's rationale for investigating F.G. swings from a supposed unfitness to serve on the one hand, to the alarming assertion on the other that a juror acknowledging an association with an individual who has had involvement with the criminal justice system merits an independent criminal investigation into that prospective juror.

Finally, the State touts the results of F.G's background check as vindication of their suspicions, but nothing was uncovered that would have made F.G. ineligible for jury service. As the Appellate Division noted, only a felony conviction would have rendered F.G. unqualified for service with respect to his criminal history, Andujar, 462 N.J. Super. at 554 (citing N.J.S.A. 2B:20-1(e)), and F.G. had no such convictions. Additionally, there was no showing that either of the supposed domestic violence cases were criminal matters, nor that F.G. had any knowledge of the two-year old municipal court matter, and thus, no supported basis for concluding F.G. had not been forthcoming in his questionnaire responses.

The proliferation of municipal court warrants, oftentimes issued without the knowledge of the individual and remaining

outstanding for years, are something of an epidemic in New Jersey. It is this crisis which prompted this Court, subsequent to F.G.'s arrest, to dismiss over three-quarters-of-a-million such warrants statewide because of an astounding 2.5 million municipal warrant backlog (some dating back as far as thirty years) and evidence that such warrants were either improper or failing to service the public interest. Colleen O'Dea, "NJ Supreme Court Dismisses Massive Backlog of Municipal Cases and Warrants," NJ Spotlight News (Jan. 22, 2019).[14] The fact that F.G.'s warrant was nearly two years old and was dismissed for lack of prosecution only a couple of months after his arrest tends to show that this warrant was one which was not actively serving the public interest. F.G. was not a fugitive in hiding but a public employee who also coached football part-time in Newark (3T92-25 to 93-23), and the warrant was an issue which no one cared to pursue until almost two years later when the State decided to put it to use here to keep F.G. from serving on the jury. The State's vehemently expressed concerns over this warrant, as with the rest of the proffered reasons, make its actions only more suspicious, and the inference of racial discrimination only more apparent.

[14] Available at: https://www.njspotlight.com/2019/01/19-01-21-nj-supreme-court-dismisses-massive-backlog-of-municipal-cases-and-warrants/.

Accordingly, there being evidence for an inference of discrimination in the State's aggressive actions, and the stated reasons for F.G.'s background check being tenuous at best, a colorable Baston/Gilmore challenge was presented below.

B. In the Face of Potential Racial Discrimination, and Because No *Batson/Gilmore* Analysis Was Engaged in Below and No Remedy was Provided for F.G.'s Removal, the Only Viable Remedy Now is Reversal of Mr. Andujar's Convictions and a New Trial.

Given the colorable Batson/Gilmore challenge raised below, and the fact that no adequate record of the issue was made and no remedy was provided by the trial court, the Appellate Division was correct in concluding that the only way to safeguard Mr. Andujar's rights to a fair trial is for his convictions to be reversed and the matter remanded for a new trial. Andujar, 462 N.J. Super. at 563.

The State contends that if a prima facie case of discrimination is met here, the remedy would be to remand the case only for a Batson/Gilmore hearing, not to vacate Mr. Andujar's convictions and hold a new trial. (Pcb 15). However, prior cases show that belated Batson/Gilmore hearings held several years later on remand are generally not effective at dealing with a state-of-mind centered issue that happened much earlier. In Osorio, the trial court overseeing the remand hearing three years after the fact had no recollection of the initial jury selection process and no notes from the time, causing the trial attorney to remark that

if they had a hearing when the issue arose, the court's "recollection would have been better of what was occurring in that jury panel, my recollection would have been better, and we could have hashed it out right there." 199 N.J. at 496-97. In State v. Thompson, the defendant was represented by new counsel at the belated remand hearing, the original trial counsel was practicing in Colorado and had no existing notes or significant recollection of the jury selection, and the trial court denied the defense attorney access to the State's notes. 224 N.J. 324, 335-37 (2016). Thus, while remand Batson/Gilmore hearings might appear to be a more economic means of dealing with these issues, they are rarely useful in dealing with discrimination which happened years prior.

The State also places significant emphasis on the language found in Thompson cautioning against "extreme" remedies for Batson/Gilmore violations. (Pcb 19 – Pcb 20). However, in Thompson, the Appellate Division reversed and remanded convictions where a trial court actually engaged in a complete Batson/Gilmore analysis and that analysis was ignored in favor of their own combing of the record on review. 224 N.J. at 348-49. Here, no such analysis and findings were completed by the trial court. Rather, the trial court summarily dismissed the juror for cause, deeming the State's renewed motion unopposed by the defense, and indicating that there was an absence of binding authority to support Mr. Andujar's request for an additional challenge. (5T68-4 to 12, 140-1 to 7).

Inasmuch as findings of fact were made with respect to the State's conduct that warrant deference, it was that the State's reasons initially provided for F.G.'s removal were without merit. (3T07-20 to 98-8).

The facts of this case mirror that of Osorio more so than Thompson. In Osorio, this Court noted that although it could not determinatively conclude from the record that the State's challenges were discriminatory, the insufficient record warranted vacation of the convictions and a new trial. 199 N.J. at 508-09. Specifically, this Court stated,

> Coupled with the passage of more than seven years since jury selection, the effect of that delay on the recollection of the participants, and the incompleteness of the record resulting therefrom, the absence of a searching judicial review of those factors forecloses the meaningful examination of any contest of the State's exercise of peremptory challenges in this case. In those circumstances, and given the precious constitutional rights at stake, we eschew any intermediate measures. In the end, because the scant record before us does not instill confidence that the trial court properly exercised its discretion in assessing the propriety of the contested peremptory challenges, we are left with no reasonable or significant alternative to the remedy aptly ordered by the Appellate Division: vacating defendant's convictions and remanding the case for a new trial.
>
> [Ibid.]

This conclusion applies with equal force in this case. The initial jury selection took place more than three-and-a-half years ago, no

adequate record was made as to the removal of F.G. by the trial court even though potential racial bias was raised several times by both defense counsel and the prosecutor, and the significance of the issue at stake bars any adequate remedial remedy. While issues of judicial economy are important, they should not substantially outweigh the violation of constitutional rights and the hampered perception of our courts that comes with unaddressed discrimination. See Tinnes, 379 N.J. Super. at 204-05 ("Our judicial system does not permit the employment of a process that exalts economy over fairness.").

While trial counsel for Mr. Andujar did not push for a Batson/Gilmore hearing on the issue of potential racial discrimination, counsel repeatedly stated on the record the obvious issues presented by the State's conduct in a novel situation, at one point noting "I think that is a concern, and I don't know what the remedy is for that." (5T67-8 to 9). Additionally, the issue of potential racial discrimination was raised initially by the defense and then again more explicitly by the prosecutors themselves, making it incumbent upon the trial court to, if not engage in a complete, sua sponte Batson/Gilmore analysis, at least build a detailed record with respect to the removal of F.G. See Thompson, 224 N.J. at 350 ("The development of [a detailed] record requires that all strikes by the State and defendant be documented in sufficient detail to facilitate

appellate review; it is the trial court's burden to see that this is done."). The trial court did not do so.

The State also makes repeated notice of the fact that defense counsel initially retracted the claim of racial bias upon a heated response by the prosecutor. (Pcb1, Pcb13). This, unfortunately, is a problem that occurs frequently due to the sensitive nature of the issues involved in raising Batson/Gilmore challenges. See Equal Justice Initiative, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy 6, 43 (Aug. 2020)[15] (finding that because of the sensitivity of racial issues, defense attorneys are often uncomfortable or reluctant to raise Batson challenges). The case here makes clear why, given that the prosecutor accused defense counsel of making a "personal and professional attack" (5T66-17 to 18), and an exchange between defense counsel and the prosecutor became so heated that the trial court was forced to intervene, (5T65-17 to 68-4). While an instinctive emotional reaction from the prosecutor might be understandable, such responses make it difficult to address Batson/Gilmore issues at the trial level. Given these problems, and without obviating a defendant's responsibility to raise jury striking objections, the issues put before the trial court were sufficient to require it to

[15] Available at: https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf

build a more detailed record for F.G.'s removal, particularly with respect to potential racial discrimination. Now, the time for addressing the issue at the trial level has passed.

Accordingly, for all the above-mentioned reasons, the only recourse in this case is to vacate Mr. Andujar's convictions and hold a new trial. While the remedy may seem "extreme," it is a small price to pay for addressing issues of racial discrimination, maintaining the integrity of the jury selection process, safeguarding the constitutional right to a fair trial, and ensuring such incidents do not occur in the future.

POINT III

IF THIS MATTER WERE TO BE REMANDED FOR A BASTON/GILMORE HEARING, THE COURT SHOULD MODIFY THE BATSON/GILMORE FRAMEWORK TO INCORPORATE THE MORE EFFECTIVE "OBJECTIVE OBSERVER" STANDARD FOUND IN STATE V. JEFFERSON, 429 P.3D 467 (2018).

What the facts below and the litany of scholarship and cases following the Batson and Gilmore decisions make clear is that the existing framework fails to fully address racial discrimination and disparities in jury selection. Accordingly, if this matter is remanded for a Batson/Gilmore hearing, this Court should modify prong three of the existing Batson/Gilmore analysis to include the more effective "objective observer" test articulated in State v. Jefferson, 429 P. 3d 467 (2018).

A. It is Well Settled that our Constitution Provides Broader Protections than the Federal Constitution with Respect to the Right to Fair Trial by an Impartial Jury and Equal Protection Issues.

As detailed in Gilmore, New Jersey's constitutional right to an impartial jury drawn from a cross-section of the community is greater than that of the Federal Constitution. 103. N.J. at 522-24. The purpose of this right is "to achieve an overall impartiality by allowing the interaction of diverse beliefs and values the jurors bring from their group experiences." Id. at 525 (citation omitted); see also Joshi and Kline, American Bar Association (noting that "diverse juries had longer deliberations, discussed more case facts, made fewer inaccurate statements, and were more likely to correct inaccurate statements." (citation omitted)).[16] Accordingly, the Court should act under the State constitution to modify the Batson/Gilmore framework to strengthen the guarantee of a fair jury selection process.

[16] Importantly, this is exactly what F.G. indicated he would contribute to jury deliberations by stating that his background would not bias him but rather provide a unique perspective, just as everyone's background influences the way they approach a trial, to provide for a diverse and complete deliberation. (3T88-13 to 89-7). The State argues that this explanation rendered F.G. unfit for jury service (Pcb 13, Pcb 15), despite the fact that it plainly furthers the goal of an impartial jury.

B. The *Batson/Gilmore* Framework is Inadequate in Dealing with Racial Discrimination in Jury Selection.

Although Batson, thirty-five years ago, represented a substantial step forward in addressing racial discrimination and disparities in our courts, it ultimately has not proven to be effective at achieving that goal. In the wake of Batson, substantial scholarship has both described and condemned its shortcomings. See, e.g., Lonnie T. Brown, Jr., Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy, 22 Rev. Litig. 209, 250-51 (2003)[17] (". . . Batson, despite its undeniable importance, may currently be little more than a procedural hurdle that can readily be overcome, particularly by prosecutors."); see generally Equal Justice Initiative, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy (studying the continuing problems of racial discrimination in jury selection after Batson). As Judge Mark W. Bennett bluntly observed, "it ought to be obvious that the Batson standards for ferreting out lawyers' potential explicit and implicit bias during jury selection are a shameful sham." Mark W. Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge Dominated Voir Dire, the Failed Promise of *Batson*, and Proposed Solutions, 4 Harv. L. & Pol'y Rev.

[17] Available at: https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1636&context=fac_artchop

149, 165 (2010).[18] Indeed, these shortcomings in the framework can be seen in our recent cases playing out these exact faults. See State v. Amaker, No. A-5068-17T1, 2020 N.J. Super. Unpub. LEXIS 2387 (App. Div. Dec. 14, 2020)[19] (failing to reverse a trial court's decision that there was no discrimination where significant and disproportionate number of Black jurors were excused for reasons including juror's "potential to not believe the police officer's testimony" based on previous negative experience he had with law enforcement and another juror's supposed failure to make adequate eye contact with prosecutor); see also Racial Discrimination Persists in California Jury Selection (noting that Black jurors are disproportionately excluded for perceived distrust of the criminal legal system and having had previous negative experiences with law enforcement); Illegal Racial Discrimination in Jury Selection: A Continuing Legacy at 24-25 (calling proffered reason for removal of Black jurors for failing to make eye contact with prosecutor in Mississippi case "highly dubious").

The reasons for Batson's failures are multifold, but two of the most significant factors are the ease with which "race neutral" reasons are thrown about and accepted and the failure to account

[18] Available at: https://www.iadclaw.org/assets/1/7/19.1-_Bennett-_harvardfinal_gordian.pdf

[19] Pursuant to R. 1:36-3, counsel is not aware of any contradictory, unpublished opinion from this jurisdiction. (Dsa2 – Dsa8).

for the nuances of racial discrimination and implicit bias. Thomas Ward Frampton, The Jim Crow Jury, 71 Vanderbilt Law Review 1593, 1626-27 (2018)[20] (describing how under the current framework it is "painfully easy to cloak even the most overt forms of racism through pretextual race-neutral justifications," and Batson only ferrets out one "narrow type of racially discriminatory action"). Implicit bias, or discrimination that is not conscious and intentional, is a concrete facet of human interaction but often either poorly addressed or not addressed at all by our legal system. See generally Bennett, 4 Harv. L. & Pol'y Rev. 149. Efforts to eradicate discrimination thus far have focused instead almost exclusively on overt discrimination. Id. at 152. However, where efforts to address discrimination focus entirely on overt, purposeful discrimination, it may in fact exacerbate implicit bias issues. Id. at 158 (describing how Batson challenges "may create further implicit bias in jury selection by 'sanitizing' or providing 'cover' for the biased selections that it is purportedly designed to detect and eliminate."). Thus, not only does Batson fail to adequately address purposeful discrimination, but it may also even be exacerbating a more pernicious form of discrimination.

Indeed, Justice Marshall, in his powerful concurring opinion, noted these shortcomings of the Batson framework at the time.

[20] Available at: https://scholarship.law.vanderbilt.edu/vlr/vol71/iss5/4/

Specifically, Justice Marshall raised concerns about the difficulty of assessing a prosecutor's true motives in striking a juror, stating:

> [a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, or seemed 'uncommunicative,' or 'never cracked a smile' and, therefore 'did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case'? If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.
>
> [Batson, 476. U.S. at 106 (Marshall, J., concurring) (citations omitted).]

Justice Marshall then went on to describe the more insidious dangers of implicit biases, stating,

> A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.
>
> [Id. at 107.]

The progress of time and development of social science has only confirmed the issues sought to be addressed here. See Bennett, 4 Harv. L. & Pol'y Rev. at 165 ("The rapid growth of social science

knowledge about implicit biases has only affirmed Justice Marshall's prediction that Batson would become 'irrelevant' and that 'racial discrimination in jury selection . . . would go undeterred.' (citation omitted)).

With split decisions being made about an individual based on first impressions and minimal information, the danger of implicit bias to taint the jury selection process is severe. It is well understood that "the process of selecting fair and impartial jurors in both civil and criminal cases goes to the very heart of the principle of trial by jury that the founders enshrined in the Sixth and Seventh Amendments." Id. at 158. Having diverse jury pools provides for more diverse points of view, which in turn "leads the jury as a whole to perform their fact-finding tasks more effectively by helping eliminate or lessen individual biases or prejudices." Joshi and Kline, American Bar Association. Accordingly, diverse juries help further the lofty goal of a trial by a fair and impartial jury. Ibid. Implicit bias in jury selection, on the contrary, threatens this ideal, risking violation of these guarantees by presenting a jury that cannot adequately be said to be of the defendant's "peers" and denying a defendant's right to a fair jury. Ibid. It is for good reason that diverse juries are perceived as more representative of fair process. Ibid. (noting that "jury verdicts are perceived as more

fair by outsiders when they are rendered by diverse versus homogenous juries" (citation omitted)).

Justice Marshall's and Judge Bennett's proposed remedy for addressing the issue of implicit racial bias in jury selection was somewhat extreme: removing peremptory challenges altogether. Batson, 476. U.S. at 107-08 (Marshall, J., concurring); Bennett, 4 Harv. L. & Pol'y Rev. at 166. But this Court need not go so far. This case presents an opportunity for the Court to align its analysis with a contemporary understanding of racial bias by adopting the "objective observer" standard utilized in Washington State for addressing racial bias in jury selection.

C. The Objective Observer Test More Effectively Deals with Racial Discrimination and Better Serves the Aim of Diverse Juries.

In State v. Jefferson, the Washington Supreme Court recognized the need to modify the Batson standard in order to better address racial discrimination in jury selection which, despite Batson's ruling being nearly thirty-five years old, continues to proliferate. Jefferson, 429 P.3d at 480. The Jefferson Court's step forward in addressing this was to modify the third prong of the Batson analysis so that the inquiry is not focused on overt, purposeful racial animus by the party striking the juror, but instead on "whether an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge. If so, then the peremptory strike shall be denied." Jefferson, 429

P.3d at 480 (internal quotations omitted). The so-called "objective observer" standard is "based on the average, reasonable person—defined here as a person who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision-making in nonexplicit, or implicit, unstated, ways." Ibid.[21] As noted by the Washington Supreme Court, the test does not alter the basis for a Batson challenge because "[t]he evil of racial discrimination is still the evil this rule seeks to eradicate." Ibid. The modification seeks simply to bring the test up to date.

Washington State codified the objective observer test shortly before Jefferson was decided in Washington General Rule 37, a groundbreaking court rule cementing the state's commitment to reducing bias in jury selection. Under subsection (g), the rule provides a non-exclusive list of various factors to consider when applying the objective observer test, including:

> (i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;
>
> (ii) whether the party exercising the peremptory challenge asked significantly more

[21] The court in Jefferson also modified the standard of review for this prong to "de novo," explaining that the third prong under the "objective observer" standard would now be objective, rather than a question of fact. Jefferson, 429 P.3d at 480.

> questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;
>
> (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;
>
> (iv) whether a reason might be disproportionately associated with a race or ethnicity; and
>
> (v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.
>
> [Wash. Gen. R. 37(g).]

Wash. Gen. R. 37 also provides a list of purported reasons for striking a juror which, due to the fact that they are disproportionately associated with non-white jurors, are presumptively invalid, including:

> (i) having prior contact with law enforcement officers;
>
> (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
>
> (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;
>
> (iv) living in a high-crime neighborhood;
>
> (v) having a child outside of marriage;
>
> (vi) receiving state benefits; and
>
> (vii) not being a native English speaker.

[Wash. Gen. R. 37(h).]

Under the lens of this modified approach, the Jefferson Court held that the prosecutor's misrepresentation of the juror's responses in providing justification for his removal, as well as the prosecutor's unaccounted for hostility and derision towards the juror, could cause an objective observer to view race as a motivating factor in the juror's removal. Jefferson, 429 P.3d at 480.

Although no other state appears to have formally adopted the Jefferson modifications to the Batson standard, judges and justices from a variety of jurisdictions have praised the decision and recommended its implementation to rectify Batson's shortcomings. See State v. Porter, 460 P.3d 1276, 1290-91 (Ariz. Ct. App. 2020) (McMurdie, J., dissenting) (recommending that Arizona adopt a rule mirroring Wash. Gen. R. 37); People v. Bryant, 253 Cal. Rptr. 3d 289, 310 (Ct. App. 2019) (Humes, P.J., concurring) (citing the "objective observer test" with approval in advocating for reform to California's Batson framework); State v. Holmes, 221 A.3d 407, 434-37 (Conn. 2019) (engaging in an in-depth analysis of the need to reform the Batson framework and describing with approval Washington's enactment of Wash. Gen. R. 37); State v. Veal, 930 N.W.2d 319, 361-62 (Iowa 2019) (Appel, J., concurring in part and dissenting in part) (advocating an incorporation of

the Jefferson test in modifying Iowa's approach to Batson challenges); Tennyson v. State, No. PD-0304-18, 2018 Tex. Crim. App. LEXIS 1206 at 19* n.6, 20 (Crim. App. Dec. 5, 2018)[22] (Alcala, J., dissenting from refusal for discretionary review) (citing with approval the Jefferson decision and noting that the Batson framework "must be reformed to provide more than illusory protections against racial discrimination"). By taking a leap forward, Jefferson's test has become the gold standard by which other jurisdictions are now addressing their own approach to explicit and implicit bias in jury selection.

The benefits of Washington State's approach are clear, as it works to actively remedy the various deficiencies of the Batson framework which have been repeatedly pointed out. By moving the inquiry into how an objective observer would perceive the juror's removal, rather than probing a prosecutor's mind for overt racial animus, the test more effectively deals with the issue of implicit bias, an issue largely ignored by the existing framework despite being a much more commonplace form of discrimination. See Bennett, 4 Harv. L. & Pol'y Rev. at 153 (noting the statistical prevalence of implicit bias). Additionally, Wash. Gen. R. 37(g) and 37(h) delegitimize so-called "race neutral" explanations for jurors'

[22] Pursuant to Rule 1:36-3, counsel is not aware of any contradictory, unpublished opinion from this jurisdiction. (Dsa9 – Dsa15).

removal which are often used to disparately exclude various minority groups from juries, yet frequently offered and accepted to the detriment of jury diversity.

Modifying our Batson/Gilmore framework in this way will also help to avoid the challenges in raising these issues illustrated by what happened below. With a standard that does not involve probing the prosecutor's mind for racial animus, prosecutors are less likely to respond emotionally to such challenges, and defense attorneys and judges will be less averse to addressing them. As noted by Judge Bennett, because a successful Batson challenge under the current framework essentially requires the court to make a finding that the prosecutor is both lying and an overt racist, the courts are often reluctant to grant such challenges. Bennett, 4 Harv. L. & Pol'y Rev. at 162-63. The modified standard, then, will make it easier to address racial bias and lack of diversity issues at the trial level.

Diverse juries are integral to the constitutional right to an impartial jury and provide for more effective and fairer juries. Indeed, this Court recognized this, as well as the importance of combatting racial discrimination and implicit bias in our courts more generally, in its action plan for addressing these issues released earlier this year. See generally New Jersey Judiciary -- Commitment to Eliminating Barriers to Equal Justice: Immediate

Action Items and Ongoing Efforts. Part of that plan called for "supporting juror impartiality," offering as possible solutions

> (a) expanded juror orientation content regarding implicit and explicit bias; (b) model jury charges on impartiality and implicit bias; (c) new and revised mandatory model jury selection questions on recognizing and counteracting bias in the jury process; and (d) examining options for changes to the Court Rules relating to impartiality in the juror selection process.
>
> [Id. at 2.]

This directive in turn spurred Acting Administrative Director Glenn A Grant, J.A.D., to write to the Supreme Court Committees on Model Civil Jury Charges and Model Criminal Jury Charges to request assistance in "reviewing model jury charges designed to raise awareness and seek to address the consequences of implicit bias in jury selection." (Dsa16 – Dsa17).

Improving the Batson/Gilmore framework to move away from probing a prosecutor's mind for purposeful discrimination and instead focus on a more objective standard facilitates the goals for equal justice expressed by this Court. The object of this change is not to make it easier for the defense to finger-point at the State to allege discrimination, but to have our legal standards comport with the realities of social science, human psychology, and racial disenfranchisement and discrimination in the United States. Ensuring fairer and stronger juries by recognizing the

very real limitations of Batson is an outcome that benefits defendants, the State, our Judiciary, and the public.

CONCLUSION

Accordingly, this Court should hold that the State is not permitted to run independent background checks on prospective jurors, affirm the reversal of Mr. Andujar's convictions, and remand the matter for a new trial. Additionally, this Court should uphold the Appellate Division's decision finding that a colorable claim of discrimination was made in excluding F.G. from the jury which likewise requires the reversal of Mr. Andujar's convictions. Finally, this Court should modify the Batson/Gilmore framework to incorporate the more effective "objective observer" test and rectify Batson's failures.

Respectfully submitted,

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DATED: January 29, 2021

* We acknowledge and appreciate the hard work and dedication of Assistant Deputy Public Defender John Douard, who unfortunately passed away prior to the resolution of this matter.

SUPREME COURT OF NEW JERSEY
C-16 September Term 2020
084167

State of New Jersey,
Plaintiff-Petitioner,

v.

ORDER

Edwin Andujar,
Defendant-Respondent.

A petition for certification of the judgment in A-000930-17 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is granted; and it is further

ORDERED that the appellant may serve and file a supplemental brief on or before October 29, 2020, and respondent may serve and file a supplemental brief thirty days (30) after the filing of appellant's supplemental submission, or, if appellant declines to file such a submission, on or before November 30, 2020.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 9th day of September, 2020.

CLERK OF THE SUPREME COURT

State v. Amaker

Superior Court of New Jersey, Appellate Division

November 4, 2020, Submitted; December 14, 2020, Decided

DOCKET NO. A-5068-17T1

Reporter
2020 N.J. Super. Unpub. LEXIS 2387 *; 2020 WL 7329827

STATE OF NEW JERSEY, Plaintiff-Respondent, v. JALIYL AMAKER, a/k/a JAMALL BROWN, JALIL BROWN, JAYLIL AMAKER, JALIYL S. AMAKER, JALIVI S. AMAKER, JAVLIL AMAKER, JAYLIL TAYLOR, and JOLLI, Defendant-Appellant.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 17-04-0256.

Counsel: Joseph E. Krakora, Public Defender, attorney for appellant (Laura B. Lasota, Assistant Deputy Public Defender, of counsel and on the brief).

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Erin M. Campbell, Assistant Prosecutor, on the brief).

Judges: Before Judges Yannotti, Mawla, and Natali.

Opinion

PER CURIAM

Following a jury trial, defendant was convicted of second-degree unlawful possession of a weapon and other offenses. Defendant appeals from his judgment of conviction dated May 21, 2018. For the following reasons, we affirm defendant's convictions and sentence.

I.

In January 2017, a 9-1-1 caller reported that there was a man flashing a gun on a street in Jersey City and threatening to shoot people. The responding officers observed a group of men at the identified location but only the defendant matched the description provided by the 9-1-1 caller. As the defendant approached the officers, one of the responding officers saw a handgun protruding from his waistband.

Defendant then grabbed the handgun from his waistband, turned, and ran from the responding officers followed by Reonte **[*2]** Oliver. One officer testified that Oliver yelled out "throw the gun, throw the gun" to defendant. Defendant threw the gun from his waistband and discarded it as he crossed the street. The handgun was later described by one of the officers as "gigantic," and had a magazine loaded with eight .45 caliber bullets with an additional bullet in the chamber.

Defendant was ultimately tackled and during a search incident to arrest, the police seized a handgun magazine loaded with eight bullets in defendant's jacket. The officers also arrested Oliver.

Defendant was later charged with second-degree unlawful possession of a weapon, *N.J.S.A. 2C:39-5(b)(1)* (count one); fourth-degree possession of a defaced firearm, *N.J.S.A. 2C:39-3(d)* (count two); fourth-degree obstruction of the administration of law, *N.J.S.A. 2C:29-1(a)* (count three); fourth-degree resisting arrest by flight, *N.J.S.A. 2C:29-2(a)(2)* (count four); fourth-degree possession of a large capacity magazine, *N.J.S.A. 2C:39-3(j)* (count five); third-degree hindering

his own apprehension, N.J.S.A. 2C:29-3(b)(1) (count six); and second-degree certain persons not to possess a firearm, N.J.S.A. 2C:39-7(b)(1) (count eight). Oliver was charged with third-degree hindering the apprehension of another, N.J.S.A. 2C:29-3(a)(4).

The morning of jury selection, defendant moved to sever his case from Oliver's. Defendant **[*3]** argued that trying the cases together would be unfairly prejudicial because the State intended to introduce Oliver's statement directing defendant to "throw the gun" which was averse to his interests. When asked by the court why defendant's counsel waited so long to make the motion, counsel stated she thought "there [wa]s no co-defendant in this case." The State opposed the motion as untimely and noted that defendant's counsel was fully aware of Oliver's status as a co-defendant, having received previous orders of the court which identified Oliver as such.

The court noted that the motion practice in the case included Oliver's application to dismiss the indictment and the State's motion to admit the 911 call, which were "filed, heard, [and] ruled upon" and as such, defendant's counsel would have received notifications of the court's rulings which confirmed Oliver's status as a co-defendant. The court accordingly denied defendant's motion and characterized it as "terribly out of time" as all motions were to be filed no later than June 5, 2017, approximately nine months prior to the date on which defendant filed his severance application. The court also found that defendant had "ample **[*4]** opportunity" to make a timely application and that there was no newly discovered evidence unavailable to defendant prior to making the motion.

During jury selection, the prosecutor used his peremptory challenges to excuse four African-American jurors. The first excused juror stated he had previously testified in court when "somebody claimed to be [him], got a ticket, didn't pay it, [and the court] sent out a bench warrant." He explained that he offered proof about the mistaken identity issue, but the officer refused to state whether he recognized him. When the prosecutor sought clarification as to how this affected his views of the justice system and police, the juror stated, "I just didn't appreciate the way he didn't acknowledge that I wasn't the person."

A second excused juror stated she was a probation officer, had a degree in social work, and had a cousin incarcerated for attempted murder. A third juror explained how he had previously served as a juror in a civil case in the Bronx. Finally, the fourth juror, when explaining his views on gun control, stated "I don't think guns are the problem, guns have never been the problem, it's stupid people with guns."

The court, sua sponte, **[*5]** addressed the State's challenges with the prosecutor who offered non-race-based reasons for dismissing each juror. Regarding the juror who was issued an erroneous bench warrant, the prosecutor explained he was "afraid that [the juror] would not believe the officer's testimony" which was significant as the evidence was "completely officer-based." With respect to the juror who was employed as a probation officer, the prosecutor noted that because a family member was incarcerated and she served as a probation officer, he "didn't want somebody who was dealing with criminals on a daily basis" serving as a juror. As to the juror who had previously served on a jury in the Bronx, the prosecutor explained that he "attempted to make eye contact with him more than once" and the juror "looked back towards the defense a number of times." Finally, the prosecutor stated the fourth juror was excused because "[t]he stupid people with guns comment bothered" him and he was concerned regarding potential jury nullification.

The court denied defendant's motion for a mistrial and explained that it "recall[ed] the comment about stupid people carrying guns" and that the juror who experienced mistaken identity **[*6]** seemed "a bit annoyed." The court also found the probation officer "ha[d] much contact with criminal defendants" and "could lead one to believe that she may be a little bit softer or more lenient" on defendant. The court concluded that the prosecutor's decision to strike the four African-American jurors was "simply coincidental" and "not an effort to purge the jury of African-Americans."

At trial, defendant stipulated that he did not have a permit to carry a firearm. A detective for the State Police Ballistics Unit testified that the gun was operable, the magazine held .45 caliber ammunition which fit into defendant's gun, was capable of being fired with the magazine, and the serial number had been grinded off. On the State's application, the court dismissed count five because the ballistics expert concluded the gun only carried fourteen bullets, not fifteen as required by N.J.S.A. 2C:39-3(j).

After the State rested, Oliver moved for a judgment of acquittal, which the court granted. The court determined that Oliver's statement was not admissible against

defendant because "the prejudice far outweigh[ed] any relevance." The court then instructed the jury as follows:

> I've struck those statements from the record. **[*7]** They are not evidence. When you return to deliberate at the end of this case, you cannot consider those statements as evidence.
>
> Now I don't expect that you can erase that from your mind. I know the mind is not a tape recorder. In instructing you on that, what I'm telling you is, you have to remember those statements and remember that you cannot use [them]. They can't come up during the deliberations, they can play no role.
>
> They had only been admitted as they related to Mr. Oliver. As you know, he's not here, so the statements play no role in this case and the case against Mr. Amaker.

During the jury charge, the court again instructed the jury that Oliver's statement was not evidence and could not "be considered by you in your deliberations in this matter." The jury found defendant guilty of counts one, two, three, four, and six. Defendant subsequently pled guilty to count eight, which was bifurcated from the trial.

At sentencing, the State made an application for an extended term pursuant to N.J.S.A. 2C:43-6(c), and defendant conceded his prior conviction for aggravated assault with a firearm, N.J.S.A. 2C:12-1(b)(4), subjected him to a mandatory extended term which converted his sentencing exposure for his second-degree charge **[*8]** from five to ten years to the range for a first-degree crime, or ten to twenty years. *See* N.J.S.A. 2C:43-6(a). The court reviewed defendant's prior arrests and convictions and noted "a history that is replete with violent behavior."

After concluding that the aggravating factors substantially outweighed the nonexistent mitigating factors, the court imposed the following prison term for each count: 1) sixteen years subject to eight years of parole ineligibility, pursuant to N.J.S.A. 2C:43-6(c) for count one; 2) separate eighteen-month sentences for counts two, three, and four; 3) five years for count six; and 4) ten years subject to five years of parole ineligibility for count eight. The court found the sixteen-year sentence imposed on count one "sufficient" and ordered the remaining sentences to run concurrent to the sentence imposed on count one.

On appeal, defendant raises the following contentions:

> I. THE TRIAL COURT ERRED WHEN IT HELD THAT DEFENDANT'S SEVERANCE MOTION WAS UNTIMELY AND REFUSED TO CONSIDER THE MERITS OF THAT MOTION.
>
> A. [THE TRIAL COURT ERRED WHEN IT REFUSED TO CONSIDER DEFENDANT'S SEVERANCE MOTION AND INSTEAD FOUND THAT IT WAS MADE OUT OF TIME.]
>
> B. [THE SEVERANCE MOTION SHOULD HAVE BEEN GRANTED.]
>
> C. [THE TRIAL **[*9]** COURT'S ERRORS IN FAILING TO SEVER THE CASES WAS COMPOUNDED WHEN JUDGMENT OF ACQUITTAL WAS GRANTED FOR THE CO-DEFENDANT AFTER HIS PREJUDICIAL AND INADMISSIBLE STATEMENT HAD ALREADY BEEN ADMITTED AT TRIAL.]
>
> D. [THE TRIAL COURT'S CURATIVE INSTRUCTION WAS INSUFFICIENT TO CURE THE TAINT CAUSED BY THE FORMER CO-DEFENDANT'S PREJUDICIAL STATEMENT.]
>
> II. THE TRIAL COURT ERRONEOUSLY RULED THAT THE STATE'S USE OF PEREMPTORY CHALLENGES TO EXCUSE FOUR AFRICAN-AMERICAN JURORS WAS BASED UPON LEGITIMATE NON-DISCRIMINATORY REASONS.
>
> III. DEFENDANT'S SENTENCE IS MANIFESTLY EXCESSIVE AND MUST BE REDUCED.

II.

In his first point, defendant challenges the court's severance decision on both procedural and substantive grounds. Procedurally, he contends the court abused its discretion in denying the motion as untimely as good cause existed for the court to consider the merits of his application. Substantively, he maintains that the severance application should have been granted as he was prejudiced by the jury considering then co-defendant Oliver's statement to "throw the gun, throw the gun," notwithstanding the court's limiting instructions. We disagree with both of these arguments.

The applicable law of severance **[*10]** is clear. "Two or more defendants may be tried jointly 'if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.'" *State v. Brown, 170 N.J. 138, 159-60, 784 A.2d 1244 (2001)* (quoting *R. 3:7-7*). Courts generally prefer to try co-defendants jointly, "particularly when 'much of the same evidence is needed to prosecute each defendant.'" *Id. at 160* (quoting *State v. Brown, 118 N.J. 595, 605, 573 A.2d 886 (1990)*). "That preference is guided by a need for judicial efficiency, to

accommodate witnesses and victims, to avoid inconsistent verdicts, and to facilitate a more accurate assessment of relative culpability." *Ibid.*

A single joint trial, however, may not take place at the expense of a defendant's right to a fair trial. *State v. Sanchez, 143 N.J. 273, 290, 670 A.2d 535 (1996)*. When considering a motion for severance, a trial court should "balance the potential prejudice to defendant's due process rights against the State's interest in judicial efficiency." *Brown, 118 N.J. at 605* (quoting *State v. Coleman, 46 N.J. 16, 24, 214 A.2d 393 (1965)*).

Courts apply a rigorous test for granting severance. *Brown, 170 N.J. at 160*. A mere claim of prejudice is insufficient to support a motion to sever. *State v. Moore, 113 N.J. 239, 274, 550 A.2d 117 (1988)*. A defendant also does not have the right to severance simply because he or she believes that a separate trial "would offer defendant a better chance of acquittal." *State v. Johnson, 274 N.J. Super. 137, 151, 643 A.2d 631 (App. Div. 1994)* (quoting *State v. Morales, 138 N.J. Super. 225, 231, 350 A.2d 492 (App. Div. 1975)*).

"A motion **[*11]** for separate trial of counts of an indictment or accusation must be made pursuant to [*Rule*] 3:10-2, unless the court, for good cause shown, enlarges the time." *R. 3:15-2(c)*. Typically, post-indictment motions must be made by the initial case disposition conference and a pre-trial motion should be determined before the trial memorandum is prepared and the trial date is fixed "unless the court, for good cause, orders it deferred for determination at or after trial." *R. 3:10-2(b)*.

Our scope of review on this issue is limited. The decision to sever rests within the trial court's discretion. *State v. Weaver, 219 N.J. 131, 149, 97 A.3d 663 (2014)*. An appellate court will defer to the trial court's decision on a severance motion unless it constitutes an abuse of discretion. *Ibid.*

In this matter, the court did not abuse its discretion in refusing to consider the defendant's severance application. The motion was made the morning of jury selection, well after the deadline imposed by the *Rules*. Further, while defendant offered lack of notice about the joint trial as a reason for the delay, the court's conclusion that defendant's explanation did not establish good cause under *Rule 3:10-2* was amply supported by the record as defendant would have been aware of his status as a co-defendant **[*12]** with Oliver based on the motion practice in the case, at a minimum.

Citing *State v. McLaughlin, 205 N.J. 185, 206-08, 14 A.3d 720 (2011)* and *Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)*, defendant also contends that by failing to consider the severance motion, defendant's constitutional right to confront Oliver about his statement was violated. Defendant argues allowing the statement was prejudicial because it created the inference that "defendant was, in fact, in possession of a gun." Defendant also contends: 1) the statement's prejudice to defendant was "compounded" when a judgment of acquittal was granted for Oliver, 2) the statement was inadmissible hearsay, and 3) the court's curative instruction to the jury was "meaningless," citing *State v. Vallejo, 198 N.J. 122, 134, 965 A.2d 1181 (2009)*, because the instruction was not "firm" or "clear."

We conclude these arguments are substantively meritless as they ignore the practical effect of the court's dismissal of the charge against Oliver, its subsequent multiple limiting instructions, and the overwhelming evidence of defendant's guilt independent of Oliver's statement.

First, as noted, when the court granted Oliver's motion for a judgment of acquittal, it effectively severed it from defendant's trial prior to the jury's deliberations. Second, the court provided two strongly worded limiting instructions **[*13]** that directed the jury to give no consideration to Oliver's statement. We assume and have no reason to doubt based on the record, that the jury heeded the court's instructions. *See State v. Burns, 192 N.J. 312, 335, 929 A.2d 1041 (2007)* ("One of the foundations of our jury system is that the jury is presumed to follow the trial court's instructions." (citing *State v. Nelson, 155 N.J. 487, 526, 715 A.2d 281 (1998)*)).

Additionally, the evidence of defendant's guilt was overwhelming. *See State v. Sterling, 215 N.J. 65, 104, 71 A.3d 786 (2013)* (affirming defendant's conviction despite improper joinder because of "the strong, independent proof of defendant's guilt"). Indeed, one of the responding officers who arrested defendant testified that he clearly saw a gun protruding from defendant's waistband, that defendant "grabbed at the handgun" before running from him, that he subsequently "discarded [the gun] on the street," and he heard the gun "ma[k]e a loud clanking noise when it hit the ground." The officer also identified the gun and the loaded magazine that defendant discarded, and a gun magazine and bullets found on defendant when he was arrested. A second responding officer similarly testified

to observing defendant in possession of the gun.

Finally, the 9-1-1 call which the jury considered described an individual resembling defendant as in possession **[*14]** of a gun. The responding officers identified defendant as the only person who matched the description provided by the 911 caller. Thus, even if the court's joinder decision was incorrect, the overwhelming evidence against defendant supports the conclusion that any error was harmless. *See* R. 2:10-2; *see also* State v. Prall, 231 N.J. 567, 588, 177 A.3d 755 (2018) ("[W]hen evaluated in light of the vast evidence against defendant, . . . errors [by the trial court] were not 'sufficient to raise a reasonable doubt as to whether [they] led the jury to a result it otherwise might not have reached.'" (alteration in original) (quoting State v. Daniels, 182 N.J. 80, 95, 861 A.2d 808 (2004))).

III.

In his second point, defendant challenges the prosecutor's exercise of peremptory challenges. Defendant, an African-American, specifically claims the prosecutor improperly used preemptory challenges to exclude prospective African-American jurors from the jury panel, in violation of defendant's constitutional right under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (1986), as explained in State v. Osorio, 199 N.J. 486, 973 A.2d 365 (2009). We disagree.

"[T]he determination of whether the prosecution has exercised peremptory challenges in a discriminatory manner involves a three-step procedure." State v. Clark, 316 N.J. Super. 462, 468, 720 A.2d 632 (App. Div. 1998). It begins with a "rebuttable presumption that the prosecution has exercised its peremptory challenges on" permissible **[*15]** grounds. State v. Thompson, 224 N.J. 324, 340, 132 A.3d 1229 (2016) (quoting Gilmore, 103 N.J. at 535). To rebut this presumption, the defense must show "that the prosecution exercised its peremptory challenges on constitutionally-impermissible grounds." Id. at 341 (quoting Gilmore, 103 N.J. at 539).

As the party objecting to a peremptory challenge, defendant bears the burden to prove purposeful discrimination based on the "totality of the relevant facts." Batson, 476 U.S. at 94. "The opponent of the strike bears the burden of persuasion regarding racial motivation . . . ." Thompson, 224 N.J. at 334 (quoting Davis v. Ayala, 576 U.S. 257, 271, 135 S. Ct. 2187, 192 L. Ed. 2d 323 (2015)). "That burden is slight, as the challenger need only tender sufficient proofs to raise an inference of discrimination." Osorio, 199 N.J. at 492.

After the defense has made this showing, the burden shifts to the State to "articulat[e] 'clear and reasonably specific' explanations of its 'legitimate reasons' for exercising each of the peremptory challenges." Thompson, 224 N.J. at 341 (quoting Gilmore, 103 N.J. at 537). The party exercising the peremptory challenge must provide evidence "that the peremptory challenge[] under review [is] justifiable on the basis of concerns about situation-specific bias." Gilmore, 103 N.J. at 537.

The trial court must determine whether counsel provided a "reasoned, neutral basis for the challenge or if the explanations tendered are pretext." Osorio, 199 N.J. at 492. The party "must satisfy the court that [it] exercised such peremptories **[*16]** on grounds that are reasonably relevant to the particular case on trial or its parties or witnesses." Gilmore, 103 N.J. at 538 (alteration in original) (quoting People v. Wheeler, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748, 760-61 (Cal. 1978)).

In the third step, if the court is satisfied that the State has advanced legitimate nondiscriminatory grounds in response to the objection, it must then determine "whether, by a preponderance of the evidence, the party contesting the exercise of a peremptory challenge has proven that the contested peremptory challenge was exercised on . . . impermissible grounds of presumed group bias." Osorio, 199 N.J. at 492-93. The court must consider whether the party exercising the peremptory challenge:

> has applied the proffered reasons for the exercise of the disputed challenges even-handedly to all prospective jurors. A nondiscriminatory reason for exercising a peremptory challenge which appears genuine and reasonable on its face may become suspect if the only prospective jurors with that characteristic who the [party exercising the peremptory challenge] has excused are members of a cognizable group.
>
> In addition, the court must consider the overall pattern of the [party exercising the peremptory challenge]'s use of its peremptory challenges. Even if the reasons for each individual challenge **[*17]** appear sufficient when considered in isolation from the . . . other challenges, the use of a disproportionate number of peremptory challenges to remove members of a cognizable group may warrant a finding that those reasons are not

> genuine and reasonable.
>
> Finally, the court must consider the composition of the jury ultimately selected to try the case. Although the presence on the jury of some members of the group alleged to have been improperly excluded does not relieve the trial court of the responsibility to ascertain if any prospective juror was peremptorily challenged on a discriminatory basis, this circumstance may be highly probative of the ultimate question whether the . . . proffered nondiscriminatory reasons for exercising peremptory challenges are genuine and reasonable.
>
> [*Id. at 506* (alterations in original) (quoting *Clark, 316 N.J. Super. at 473-74*).]

We will uphold the trial court's ruling on whether the prosecution has exercised its peremptory challenges on constitutionally impermissible grounds unless it is clearly erroneous. *Thompson, 224 N.J. at 344*. The standard of review "necessarily applies to the trial court's assessment of the prosecutor's candor and sincerity in the presentation of reasons for exercising peremptory challenges." *Id. at 345* **[*18]** (citing *State v. Williams, 113 N.J. 393, 411, 550 A.2d 1172 (1988)*).

We are satisfied from a review of the record that the court's decision was not clearly erroneous. Even assuming that defendant made a prima facie showing under the first step of the *Osorio* analysis based on the court's sua sponte raising of the issue, the prosecutor provided a reasoned, neutral basis for excluding each African-American juror that was supported by the record thereby satisfying step two of the *Osorio* test. Those reasons included: 1) one juror's potential to not believe the police officer's testimony, 2) a second juror who worked as a probation officer and the prosecutor's concerns regarding purported bias, 3) a third juror's failure to make eye contact with the prosecutor, and 4) the fourth juror's comment about "stupid people with guns." After considering the prosecutor's explanations, the court explicitly found that "the State ha[d] provided sufficient information to establish that the striking of these jurors [wa]s simply coincidental."[1]

As to step three, the court considered the arguments of both the State and defendant's counsel and found no constitutional violation. The court further explained:

> I do find that the State has provided . . . sufficient **[*19]** information to establish that the striking of these jurors is simply coincidental, it was not a pattern, not an effort to purge this jury of African-Americans.
>
> . . . .
>
> There has been a large number of African-Americans excused by the court for cause. I would say that when the panel came up it was a true reflection of the community in terms of various sexes, races, ethnic backgrounds . . . . It[is just that] to this point . . . we have had numerous African-Americans that were excused for cause without objection.
>
> So the fact that it is now a limited number is not as a result of the actions of the State it has been for reasons that we [have] had jurors come to sidebar, victims of crimes, opinions on guns, and things of that nature.[2]

In sum, there was ample evidence that the prosecutor had offered a credible, "reasoned, neutral basis for [each] challenge," and that defendant had failed to "prove[] that the contested peremptory challenge was exercised on unconstitutionally impermissible grounds of presumed group bias." *Osorio, 199 N.J. at 492-93*. That evidence rebutted the apparent satisfaction of defendant's prima facie claim, and defendant offered the trial court no evidence, argument, or complaint to the contrary. **[*20]** "[I]f . . . the trial court believes the prosecutor's nonracial justification, and that finding is not clearly erroneous, that is the end of the matter." *Thompson, 224 N.J. at 340* (alteration in original)(citation omitted).

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[1] While the court did not make a specific finding as to the juror who the prosecutor contended failed to make eye contact, defendant points to no authority to suggest he is entitled to a reversal of his conviction because of this failure. We have previously acknowledged that "[i]t is not unimportant for an attorney to establish eye contact with a potential juror." *State v. Clark, 324 N.J. Super. 558, 571-72, 737 A.2d 172 (App. Div. 1999)* (upholding the strike of a potential juror who "refused to look at" the prosecutor). Further, the reasons offered by the prosecutor were strong and undisputed. In this regard, defense counsel did not dispute that the excused juror refused to make eye contact with the prosecutor while repeatedly looking at defense counsel. *Cf. Osorio, 199 N.J. at 496-97* (trial counsel contested whether potential jurors high-fived each other). Finally, the trial court's statements detailed *supra*, and its resumption of jury selection, established that the court credited the prosecutor's non-discriminatory reasons and rejected any claim of discrimination.

[2] We note that defendant did not renew his motion for a mistrial at the conclusion of jury selection.

IV.

In defendant's final argument, he contends that the sentencing court erred by finding aggravating factors three and six, failing to "find specific deterrence as it relates to aggravating factor nine," refusing to "apply mitigating factors two and eleven," and imposing "an excessive sentence in light of the aggravating factors." We disagree with all of these arguments.

Sentencing determinations are reviewed on appeal with a highly deferential standard. *State v. Fuentes, 217 N.J. 57, 70, 85 A.3d 923 (2014)*.

> The appellate court must affirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
>
> [*Ibid.* (quoting *State v. Roth, 95 N.J. 334, 364-65, 471 A.2d 370 (1984)*).]

Once the trial court has balanced the aggravating and mitigating factors set forth in *N.J.S.A. 2C:44-1(a)* and -1(b), it "may impose a term within the permissible **[*21]** range for the offense." *State v. Bieniek, 200 N.J. 601, 608, 985 A.2d 1251 (2010)*; *see also State v. Case, 220 N.J. 49, 65, 103 A.3d 237 (2014)* (instructing that appellate courts may not substitute their judgment for that of the sentencing court, provided that the "aggravating and mitigating factors are identified [and] supported by competent, credible evidence in the record").

Here, the court found aggravating factors three, "[t]he risk that . . . defendant will commit another offense," *N.J.S.A. 2C:44-1(a)(3)*; six, "[t]he extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted," *N.J.S.A. 2C:44-1(a)(6)*; and nine, "[t]he need for deterring the defendant and others from violating the law," *N.J.S.A. 2C:44-1(a)(9)*. We are satisfied from our review of the record that the court based its findings on these aggravating factors on the seriousness of the offenses, defendant's criminal history, and the need for deterrence. These findings were all supported by competent and credible evidence in the record.

Further, any possible mitigating factor was clearly outweighed by the well-supported aggravating factors. As the court observed, defendant has an extensive juvenile and adult criminal history, that was "replete with violent behavior." This criminal history supports a finding that there was a need for specific **[*22]** deterrence. *See State v. Thomas, 188 N.J. 137, 153-54, 902 A.2d 1185 (2006)*.

The fact that defendant attempted to evade the responding officers while in possession of a defaced and loaded gun supports the court's decision not to apply mitigating factor two. *See N.J.S.A. 2C:44-1(b)(2)* ("The defendant did not contemplate that his conduct would cause or threaten serious harm."). Nor does the record contain evidence of excessive hardship establishing the applicability of mitigating factor eleven. *See N.J.S.A. 2C:44-1(b)(11)* ("The imprisonment of the defendant would entail excessive hardship to himself or his dependents."); *State v. Dalziel, 182 N.J. 494, 505, 867 A.2d 1167 (2005)*.

In sum, the sentence is well within the permissible range, is supported by credible evidence in the record, and does not shock the judicial conscience. Accordingly, we discern no abuse of discretion. *State v. Fuentes, 217 N.J. at 70*.

To the extent we have not addressed any of the defendant's arguments, it is because we conclude they are without sufficient merit to warrant discussion in a written opinion. *R. 2:11-3(e)(2)*.

Affirmed.

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Tennyson v. State

Court of Criminal Appeals of Texas

December 5, 2018, Filed

NO. PD-0304-18

Reporter
2018 Tex. Crim. App. LEXIS 1206 *; 2018 WL 6332331

GREGORY DEWAYNE TENNYSON, Appellant v. THE STATE OF TEXAS

Notice: PUBLISH

Prior History: [*1] ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW. FROM THE TWELFTH COURT OF APPEALS SMITH COUNTY.

Tennyson v. State, 2018 Tex. App. LEXIS 1711 (Tex. App. Tyler, Mar. 7, 2018)

Counsel: Gregory Dewayne Tennyson, Appellant, Pro se, Beaumont, TX.

For State: Matt Bingham, District Attorney Smith County, Tyler, TX.

Judges: ALCALA, J., filed a dissenting opinion. OPINION DISSENTING FROM REFUSAL OF APPELLANT'S PETITION FOR DISCRETIONARY REVIEW.

Opinion

On this day, the Appellant's Pro Se petition for discretionary review has been refused. JUDGE NEWELL AND JUDGE RICHARDSON WOULD GRANT; JUDGE ALCALA DISSENTED

Dissent by: ALCALA

Dissent

ALCALA, J., filed a dissenting opinion.

OPINION DISSENTING FROM REFUSAL OF APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

Gregory Dewayne Tennyson, appellant, has demonstrated that the State's use of peremptory strikes removed all prospective African American jurors and that the State's use of at least one of these strikes was not race neutral. I would hold that appellant has satisfied his burden to show purposeful discrimination in this case, and I would accordingly grant appellant's petition for discretionary review challenging the decision of the court of appeals that had found no persuasive evidence of purposeful racial discrimination. I, therefore, respectfully dissent from this Court's refusal to address the merits of appellant's petition for discretionary review.

I. Background

In describing the background of **[*2]** this case, I will review the trial proceedings and the court of appeals's opinion.

A. Trial Proceedings

Appellant pleaded not guilty to aggravated assault on a public servant and, at his jury trial, the attorneys participated in jury selection. After the attorneys conducted their voir dire examinations and the judge

heard challenges for cause, the attorneys turned in the lists of their peremptory strikes. The State struck prospective jurors numbered 3, 4, 14, 15, 17, 19, 26, 27, 30, and 36. Of these ten stricken prospective jurors, three were African American: prospective jurors 14, 15, and 30, and these three comprised one-hundred percent of the African Americans who potentially could have served on the jury that were within the "zone of strikes."

Trial counsel for appellant challenged the State's attempt to remove all the African American potential jurors from the panel. In his *Batson* motion, trial counsel argued to the court that appellant is an African American man who would be improperly tried by "an all white jury." *See* Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The trial court determined that appellant had made a prima facie case of purposeful discrimination and asked the prosecutor for his race-neutral reasons for striking **[*3]** the only three African Americans within the strike zone.

Prospective Juror Number 14

The State prosecutor observed that prospective juror number 14 was a manager at McDonald's with a two-year degree. The prosecutor explained, "This is unskilled labor that we're familiar with, in our experience as prosecutors in cases like this, that lend—type of work experience that would lend itself to be sympathetic toward criminal defendants." The prosecutor noted that, regardless of the prospective juror's college degree, in his "experience and [his] impression of that is that it's unskilled labor." Also, the prosecutor said that the prospective juror favored rehabilitation over punishment when assessing a sentence. Furthermore, a relative of the prospective juror had been prosecuted for murder in Smith County. The prosecutor stated, "That would lead me to believe she might carry a bias against the Smith County District Attorney's Office in a subsequent criminal prosecution." Defense counsel responded to the State's explanation by arguing that this prospective juror had indicated, when asked by the State, that she did not have a bias against the Smith County District Attorney's Office. The prosecutor **[*4]** then responded that he believed that "she might harbor a bias nonetheless," and that in his training and experience, "folks that have family members who have been previously prosecuted for the offense of first-degree murder would harbor ill will towards my office and could not be fair jurors in our cases." He also said that "no other potential juror had a family member prosecuted by my office for murder."

Prospective Juror Number 15

The State explained that prospective juror number 15 is a custodian "which is also unskilled labor with a two-year degree." The prosecutor said that the prospective juror indicated that he favored "rehab over punishment in terms of assessing sentences in criminal cases." The prosecutor asserted that the prospective juror "served previously on a Smith County jury and assessed a sentence on the lower end of the punishment range" in that drug case against a person who had prior felony convictions.

Prospective Juror Number 30

The State explained that prospective juror number 30 is "a unit tech[nician]" at a hospital who does not have a license or a certification and is therefore an unskilled laborer. He commented that he believed that "she works in the lower level **[*5]** of labor at [the hospital], probably in some sort of care capacity that would make her sympathetic for individuals in circumstances that may be perceived as dire." He noted that she indicated during voir dire that she favored "rehab over punishment." Furthermore, he observed that she was single with no children with a high school education only. The prosecutor opined that those factors "would indicate someone who would not be a favorable State's juror in a case such as this one."

The trial court accepted the State's explanations as race neutral and genuine, and it overruled defense counsel's *Batson* motion. Because neither party used peremptory strikes on them, the following prospective jurors were ultimately seated on the jury in this case: 5, 6, 9, 11, 21, 24, 28, 32, 34, 35, 38, and 39.[1] The jury found appellant guilty of aggravated assault on a public servant and assessed a life sentence.

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[1] The State struck prospective jurors numbered: 3, 4, 14, 15, 17, 19, 26, 27, 30, and 36. Appellant struck prospective jurors numbered: 1, 2, 13, 16, 18, 25, 29, 31, 40, and 41. The trial court granted challenges for cause against prospective jurors numbered: 7, 8, 10, 12, 33, and 37. Prospective jurors 20, 22, and 23 were excused by agreement under Article 35.05. *See* TEX. CODE CRIM. PROC. art. 35.05. After excusals by agreement and strikes for cause, the strike zone was set to include and end at prospective juror number 41.

B. Court of Appeals's Opinion

The court of appeals rejected appellant's claim that the trial court had erred in overruling the *Batson* motion. *See* *Tennyson v. State, No. 12-16-00225-CR, 2018 Tex. App. LEXIS 1711, 2018 WL 1180750, at *5 (Tex. App.—Tyler March 7, 2018)* (mem. op., not designated for publication). The court of appeals found that "[n]o discriminatory intent is inherent in **[*6]** the prosecutor's explanations" and that "the reasons offered are race neutral." *2018 Tex. App. LEXIS 1711, [WL] at *3*. The court of appeals determined that, after reviewing the entire voir dire record and giving proper deference to the trial court's implicit credibility determinations, the trial court did not clearly err in finding that the State's proffered reasons for striking the jurors were not a pretext for purposeful racial discrimination. *2018 Tex. App. LEXIS 1711, [WL] at *5*. The court of appeals noted that the venire members were examined in a group rather than individually, which significantly lowered the evidentiary value of a lack of questioning. *2018 Tex. App. LEXIS 1711, [WL] at *4*.

With respect to the individual reasons given by the State for its strikes, the court of appeals upheld those reasons as genuine because the trial record was inadequate to show otherwise and the combination of reasons as to each of the minority jurors justified each peremptory strike. The court of appeals determined it was "unable to compare the treatment of the venire members on the issues of education, employment, marital status, and parental status because the juror cards of only the three contested venire members were admitted into evidence." *2018 Tex. App. LEXIS 1711, [WL] at *5*. However, it could compare juror selection based on favoring **[*7]** rehabilitation over punishment. *Id.* It found that, of the ten venire members struck by the State, nine favored rehabilitation. *Id.* It noted that, "in addition to the three African American venire members who favored rehabilitation, six nonblack venire members who favored rehabilitation were struck by the State," but "ten nonblack potential jurors who favored rehabilitation were not struck by the State." *Id.* Although the State struck all three African American potential jurors but only six of sixteen nonblack potential jurors favoring rehabilitation over punishment, the court of appeals found that such disparity did not reveal clear evidence of racial discrimination. *Id.* Because it had only ten peremptory strikes and could not remove all potential jurors favoring rehabilitation, the "State could plausibly have used the rehabilitation factor along with its other proffered reasons to decide to strike the three [African American] venire members and not others without the existence of racial discrimination." *Id.*

II. Analysis

Having struck every potential African American juror, the prosecutor's purportedly race-neutral explanations should be closely scrutinized for evidence of purposeful **[*8]** discrimination. Below, I will review the applicable law for *Batson* complaints, and then examine the prosecutor's stated reasons for exercising his peremptory strikes against all of the African American prospective jurors to demonstrate why those reasons are pretextual and show racial bias. I will conclude by explaining why the current method for reviewing *Batson* complaints may be inadequate for inoculating the criminal justice system against the cancer of racial prejudice.

A. Applicable Law for Review of *Batson* Claims

A *Batson* claim that a peremptory strike has been improperly used to remove a prospective juror on the basis of race is addressed through a three-part inquiry. First, the opponent of the strike must make a prima facie case that the strike was purposeful racial discrimination. Second, the proponent of the strike must give a facially race-neutral explanation for the strike. Third, the trial court must determine if the proffered race-neutral explanation is genuine or pretextual. *Watkins v. State, 245 S.W.3d 444, 447 (Tex. Crim. App. 2008)*. In reviewing *Batson* claims, courts must consider at least two matters that are at issue in the instant case. First, a court should examine whether the State used peremptory strikes on minority-race **[*9]** prospective jurors but did not strike similarly situated people who were not of a minority race. Although the State's explanations may present facially race-neutral reasons for excluding prospective jurors from a racial minority group, the Supreme Court has explained that reviewing courts must consider the disparate treatment of similar prospective jurors to assess the State's true motive. *Miller-El v. Dretke, 545 U.S. 231, 241, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005)*. It stated, "More powerful than [bare statistics of use of peremptory challenges], however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve." *Id.* "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful

discrimination to be considered at *Batson*'s third step." *Id.*[2] The Supreme Court explained,

> [T]he rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it. It is true that peremptories are often the subjects of instinct, and it can sometimes be hard **[*10]** to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Id. at 251-52 (internal citations and quotations omitted).

Second, a court should examine whether the State questioned the prospective jurors during voir dire about the matter on which it relies as its stated rationale for using its peremptory strikes on all of the minority jurors. The State's lack of questioning to gain a complete understanding of how its stated reasons would affect a prospective juror's ability to render judgment, as opposed to offering a conclusion based on a generalized "impression" or "experience," strengthens the inference that its reasons were not genuine. *See Reed v. Quarterman, 555 F.3d 364, 376 (5th Cir. 2009)* ("If the State asserts that it was concerned about a particular characteristic but did not engage in meaningful voir dire examination **[*11]** on that subject, then the State's failure to question the juror on that topic is some evidence that the asserted reason was a pretext for discrimination.").

B. The Prosecutor's Purported Race-Neutral Reasons for Striking All of the African American Prospective Jurors Were Not Genuine

The prosecutor stated that he struck all of the African American prospective jurors for reasons that included employment involving unskilled labor, prior jury service, and preference for rehabilitation over punishment. I review each of these reasons to demonstrate that they were not genuinely race-neutral bases for peremptory strikes.

1. Unskilled Labor

The prosecutor averred that he struck all of the potential African American jurors because they were "unskilled labor." On its face, the reason is patently absurd as to prospective jurors 14 and 15, who each have a college degree and are educated beyond a high school diploma. Prospective juror number 14 works as a manager, which is not necessarily "unskilled labor." In any event, the prosecutor did not strike the following prospective jurors who were not African Americans but who were unskilled laborers: prospective juror number 13 who works as a gallery director **[*12]** and has a four-year degree; prospective juror number 16 who works as a secretary and has a high school diploma only; and prospective juror number 29 who identified as self-employed at a wells-services company and has a two-year degree.[3] There is no plausible reason to prefer a secretary with a high school diploma over a custodian or a McDonald's manager who have two-year degrees under the theory that the former has skilled employment while the latter have unskilled employment. Moreover, the State did not ask the prospective jurors any questions about their skill level or whether or how that would affect their deliberations in this case. And the State disregarded the actual education level of the prospective jurors, two of whom were college graduates with two-year degrees, so

[2] "If the State asserts that it struck a black juror with a particular characteristic, and it also accepted nonblack jurors with that same characteristic, this is evidence that the asserted justification was a pretext for discrimination." *Reed v. Quarterman, 555 F.3d 364, 376 (5th Cir. 2009)*. "Striking a black panelist for reasons that apply as well to similar nonblacks who serve 'is evidence tending to prove purposeful discrimination.'" *Williams v. Norris, 576 F.3d 850, 864 (8th Cir. 2009)* (quoting *Miller—El v. Dretke, 545 U.S. 231, 241, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005)*).

[3] I note that, although the appellate record does not include juror information cards for the entire panel, the juror information cards for prospective jurors 13, 16, and 29 are included in the record along with the information cards for the three African American prospective jurors. Although we are unable to conduct a full disparate treatment analysis on the issue of unskilled labor due to the absence of juror information cards for the entire panel, the juror information cards for these three additional jurors provide some basis upon which we can examine disparate treatment. Even the limited information provided in these three jurors' information cards shows that the State's proffered reasons for its strikes pertaining to unskilled labor could have applied equally to other non-African American prospective jurors.

as to focus on the purported skill level of the occupation instead.

Importantly, the prosecutor espoused a belief that unskilled laborers are more sympathetic to "criminal defendants" and used that rationale to strike all of the African American prospective jurors from the panel. If that rationale is accepted as genuine by courts, then *Batson* will be a nullity. According to a 2016 report by the Bureau of Labor Statistics, **[*13]** thirty percent of employed African Americans worked in management, professional, and related occupations, which means that seventy percent of them possibly could be considered unskilled laborers.[4] If the prosecutor's reason for striking all of the African American prospective jurors on the basis of being unskilled laborers is deemed credible here, regardless of the fact that two of the prospective jurors had college degrees, then the principles underlying *Batson* are essentially overruled because the vast majority of African American potential jurors can be struck freely because of their race under this false rationale that there is a connection between the skill of an occupation and leniency for defendants.[5] Peremptory strikes of people who are of a minority race on the basis that they perform unskilled labor, particularly when people who are not of a minority race and who perform unskilled labor are permitted to stay on a jury, are pretextual and violate *Batson*. *See* Miller-El, 545 U.S. at 241.

2. Prior Jury Service

The State indicated that it struck prospective **[*14]** juror number 15 because he had previously served on a jury and had assessed a light sentence for a person with a criminal history. The record shows that several other prospective jurors within the strike zone also had prior jury service. Two prospective jurors, numbered 11 and 28, said that the verdict in their respective previous jury service was not guilty so that no sentence was assessed at all.

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[4] U.S. DEP'T OF LAB., BUREAU OF LAB. STATS. REPORTS, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2016 (October 2017), https://www.bls.gov/opub/reports/race-and-ethnicity/2016/home.htm (last visited Oct. 23, 2018).

[5] I note that such a result is especially troubling given that minorities are already at greater risk of under-representation in jury pools in general. *See* Geoffrey Cockrell, *Batson Reform: A Lottery System of Affirmative Selection*, 11 Notre Dame J. L. Ethics & Pub. Pol'y 351, 353-54, nn.16-17 (1997).

The State's proffered reason for striking juror number 15 due to his having assessed punishment at the lower end of the range of punishment is suspect given that the State did not exercise strikes against prospective jurors 11 and 28, non-African American people who had acquitted the defendants in those cases. A prospective juror unwilling to convict at all is certainly less favorable to the State as compared to one who is willing to convict but assesses a low sentence. The State's explanation that it struck the African American prospective juror due to a perceived inclination to favor defendants by assessing lower sentences cannot be deemed genuine given that the State did not strike the non-African American prospective jurors who more significantly favored defendants in prior jury service **[*15]** by acquitting those defendants outright. *See* Snyder v. Louisiana, 552 U.S. 472, 484-85, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008) (finding purposeful discrimination when the proffered race-neutral reason applied with greater force to unchallenged nonblack prospective jurors). Furthermore, the State did not question prospective jurors 11 and 28 about how their prior jury service might impact their decision in the instant case, and thus the State's rationale for its peremptory strike against prospective juror number 15 is additionally suspect for this reason.

3. Preference for Rehabilitation over Punishment

The prosecutor averred that the African American prospective jurors' preference for rehabilitation over punishment was a basis for striking each of them. During his voir dire, the prosecutor learned that twenty-five venire members, the majority of the potential jurors in the strike zone, favored rehabilitation over punishment: prospective jurors 2, 3, 4, 5, 6, 7, 12, 14, 15, 18, 19, 20, 22, 23, 24, 26, 27, 29, 30, 33, 35, 36, 37, 38, and 39. The State used peremptory strikes on prospective jurors 3, 4, 14, 15, 17, 19, 26, 27, 30, and 36. If the State's explanation were genuine that it did not have enough strikes to strike all twenty-five people who favored rehabilitation **[*16]** and that it was using strikes in a non-discriminatory manner, then the State would have exercised its peremptory strikes on the first ten jurors who held this view: prospective jurors numbered 2, 3, 4, 5, 6, 14, 15, 18, 19, and 24. But instead, the State found the non-African American prospective jurors numbered 2, 5, 6, 18, and 24 to be acceptable on this basis, whereas African American prospective jurors numbered 14, 15, and 30 were not. Furthermore, if the State's reasons were genuine, then it would not have used a peremptory strike on prospective juror number

17, a non-African American juror who favored punishment over rehabilitation, and instead it would have used that strike to remove another non-African American juror who favored rehabilitation. It is simply inaccurate to suggest that the State struck as many non-African American jurors as it could who favored rehabilitation in light of the State's use of a strike on juror number 17 instead of using that strike on another non-African American juror who favored rehabilitation. The State allowed non-minorities who favored rehabilitation to remain on the jury whereas it struck all of the minorities who favored rehabilitation. Thus, **[*17]** the State's reasons for its strikes were not genuine and are indicative of purposeful discrimination.

According to the court of appeals's opinion, even though the State did not strike all of the non-African Americans who favored rehabilitation over punishment, the State's strikes against the African Americans could be race neutral. *See* Tennyson, 2018 Tex. App. LEXIS 1711, 2018 WL 1180750, at *5. The court explained that the "State could plausibly have used the rehabilitation factor along with its other proffered reasons to decide to strike the three venire members and not others without the existence of racial discrimination." *Id.* The problem with the court of appeals's analysis is that the State's proffered reasons, at least as to two of the three prospective African American jurors, do not provide a plausible basis for separating them from the non-African American prospective jurors on any basis other than race. The cumulation of non-race-neutral reasons cannot add up to a proper race-neutral reason. Perhaps the court of appeals's rationale could be correct as to prospective juror number 14 who had a relative prosecuted for murder, but its reasoning is wholly inadequate as to the other two African American prospective jurors. Although I agree **[*18]** that it may be proper to use a peremptory strike against a prospective juror whose relatives have been prosecuted for a crime, even that reason becomes suspicious when all of the prospective African American jurors are removed from the panel by the State and when its reasons for doing so are not equitably applied in the same manner to the non-minority prospective jurors. Given this record, it appears clear to me that the State's purported reasons for striking one-hundred percent of the African American jurors who could have served on this jury were not genuinely race neutral.

B. It May Be Time to Reform *Batson* to Provide More Than Illusory Scrutiny

I agree with critics who have opined that *Batson* is often an inadequate vehicle for eliminating racial prejudice from jury selection. *See, e.g.*, Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 Wis. L. Rev. 501, 501-02 (1999). "Only the most overtly discriminatory or impolitic lawyer can be caught in *Batson*'s toothless bite and, even then, the wound will be only superficial." *Id.* Legal commentators have noted how courts have struggled judging whether a facially race-neutral explanation is, **[*19]** in fact, neutral because "[a] large variety of explanations can be surrogates for race, gender, or ethnicity." Id. at 532-37. A determination that race-neutral explanations are genuine or credible, to some degree, depends on the plausibility of those proffered reasons. Id. at 538. But plausibility is not required of the State's proffered reasons. *See* Purkett v. Elem, 514 U.S. 765, 767-68, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) (holding that race-neutral explanations must be genuine but not persuasive or even plausible). For example, "trial courts often accept race-neutral reasons that are easy to invoke and/or difficult to disprove, such as demeanor evidence, or which correlate with race, such as having a family member who had been a criminal defendant." Alafair S. Burke, *Prosecutors and Peremptories*, 97 Iowa L. Rev. 1467, 1470 (2012). Accordingly, "*Batson* and its progeny have proven to be less an obstacle to discrimination than a roadmap to it." Cavise, supra, at 545.[6]

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[6] *Batson*'s burden-shifting framework is seen by many as so ineffective that alternate approaches to race-neutral jury selection have been proposed, including eliminating peremptory challenges altogether, employing affirmative-action principles into jury selection, imposing specific ethical rules on counsel that afford disciplinary sanctions for purposeful discrimination, and using blind questionnaires and video recording of questioning in voir dire. *See* Alafair S. Burke, *Prosecutors and Peremptories*, 97 Iowa L. Rev. 1467, 1471-72 (2012). In recognition of the failure of the current framework to effectively combat racial discrimination during jury selection, the Washington State Supreme Court recently announced a modified *Batson* inquiry. State v. Jefferson, No. 94853-4, 429 P.3d467 , 192 Wn.2d 226, 2018 Wash. LEXIS 719, 2018 WL 5732128, at *1 (Wash. Nov. 1, 2018). In order "to do better to achieve the objectives of protecting litigants' rights to equal protection of the laws and jurors' rights to participate in jury service free from racial discrimination," the court held that "[i]f a *Batson* challenge to a peremptory strike of a juror proceeds to that third step of *Batson*'s three-part inquiry, then the trial court must ask whether an objective observer could view race or ethnicity as a factor in the use of

If any implausible or outlandish reason that was never even discussed with a prospective juror can be accepted as a genuine race-neutral strike by a trial court, as here, and if appellate courts simply defer to trial courts, as here, then *Batson* is rendered meaningless, and it is time **[*20]** for courts to enact alternatives to the current *Batson* scheme to better effectuate its underlying purpose. Here, the State said it was striking African Americans who had college degrees for being unskilled labor, but it did not strike a Caucasian secretary without a college degree; the State struck African Americans who had assessed lower punishment during their prior jury service under the theory that they might favor this appellant, but it did not strike non-African Americans who had more favorably treated other defendants during their trials by acquitting them; and the State struck African Americans who favored rehabilitation over punishment while allowing non-African Americans who felt the same way to remain on the jury. If this record is inadequate to establish a *Batson* violation, then the problem lies with *Batson*'s framework and it must be reformed to provide more than illusory protections against racial discrimination.

III. Conclusion

Because I conclude that it was clear error for the trial court to find that appellant did not rebut the State's pretextual race-neutral reasons for its strikes given the totality of the voir dire record and the disparate treatment of other non-African **[*21]** American prospective jurors, I would grant appellant's petition for discretionary review. Because this Court does not, I respectfully dissent.

Filed: December 5, 2018

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the peremptory strike." *Id.* "If so, then the strike must be denied and the challenge to that strike must be accepted." *Id.*; *see also* *2018 Wash. LEXIS 719, [WL] at *12* ("[W]e hold that the question at the third step of the *Batson* framework is not whether the proponent of the peremptory strike is acting out of purposeful discrimination. Instead the relevant question is whether 'an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge.'"). Additionally, because this modified third step applies an objective standard, the decision of the trial court is to be reviewed *de novo* rather than under *Batson*'s deferential "clearly erroneous" standard of review. *2018 Wash. LEXIS 719, [WL] at *12*.

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November 30, 2020

Hon. Michael Cresitello, J.S.C.
Chair, Supreme Court Committee on
Model Civil Jury Charges
Via Email: Michael.Cresitello@njcourts.gov

Hon. John A. Young, J.S.C.
Chair, Supreme Court Committee on
Model Criminal Jury Charges
Via Email: John.Young@njcourts.gov

Re: Proposed Supplemental Jury Charges on Implicit Bias and Impartiality – Request for Review

Dear Judge Cresitello and Judge Young:

I am writing to you jointly in your roles as Chairs of the Supreme Court Committees on Model Civil Jury Charges and Model Criminal Jury Charges, respectively, to request your prompt review of proposed new jury charges developed by the Working Group on Juror Impartiality (Working Group).

In March 2019, I established the Working Group to assist in developing practical steps that can be implemented to improve fairness in the jury selection and deliberation process. Criminal Presiding Judge Edward J. McBride, Jr., and Judge David Ironson serve as co-chairs of the Working Group, which includes judges drawn from the Supreme Court's Committees on Jury Selection, Criminal Practice, and Civil Practice.

The Court is requesting the assistance of both of your committees in reviewing model jury charges designed to raise awareness and seek to address the consequences of implicit bias in jury selection.

As part of an interlocking set of initiatives, the Court asked the Working Group to develop proposed model jury instructions to address implicit bias and impartiality. The Court at a recent Administrative Conference (SCAC) reviewed the draft language prepared by the Working Group and approved referral to your committees for preliminary input (including any potential proposed edits).

Accordingly, please circulate the attached proposal for consideration by your membership as promptly as practicable. The plan is for the Court at an upcoming SCAC to consider publishing the draft jury charges on impartiality and implicit bias as

part of a package of proposals designed to address the first of nine items listed in its July 16, 2020 Action Plan for Ensuring Equal Justice:

1. **Supporting Juror Impartiality**. The Judiciary will work to implement policies and protocols to support juror impartiality, including: (a) expanded juror orientation content regarding implicit and explicit bias; (b) **model jury charges on impartiality and implicit bias**; (c) new and revised mandatory model jury selection questions on recognizing and counteracting bias in the jury process; and (d) examining options for changes to the Court Rules relating to impartiality in the juror selection process…

Thank you for your prompt attention to this referral and for your ongoing oversight of the work of the Jury Charge Committees.

Very truly yours,

Glenn A. Grant, J.A.D.
Acting Administrative Director

cc: Chief Justice Stuart Rabner
Hon. Edward J. McBride, Jr., Co-Chair,
Working Group on Juror Impartiality
Hon. David Ironson, Co-Chair
Working Group on Juror Impartiality
Steven Bonville, Chief of Staff
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Kristi Jasberg Robinson, Staff
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Lisa M. Burke, Staff, Working Group on Juror Impartiality