FILED, Clerk of the Supreme Court, 08 Jan 2021, **084167**

STATE OF NEW JERSEY, PLAINTIFF-APPELLANT, V. EDWIN ANDUJAR, DEFENDANT-RESPONDENT.	SUPREME COURT OF NEW JERSEY DOCKET NO. 084167 CRIMINAL ACTION ON CERTIFICATION FROM THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO.: A-0930-17T1 SAT BELOW: Hon. Ellen L. Koblitz, P.J.A.D. Hon. Mary Gibbons Whipple, J.A.D. Hon. Hany A. Mawla, J.A.D.

BRIEF OF PROPOSED AMICUS CURIAE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY

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PRELIMINARY STATEMENT

In July 2020, this Court released its Action Plan for Ensuring Equal Justice, which includes examining "options for changes to the Court Rules relating to impartiality in the juror selection process" and responding to a study regarding "the effects of the exercise of peremptory challenges on the racial composition of jury venires and seated juries." The Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ) welcomes actions to better root out implicit and institutional biases in the jury selection process that are used to remove people of color from juries.

Although the U.S. Supreme Court's landmark decision in Batson v. Kentucky, 476 U.S. 79 (1986), was initially applauded as a historic step toward eliminating discriminatory jury selection practices, it has since been criticized by many as ineffective. Putting aside the fact that prosecutors are often permitted to explain away even overt discrimination with race-neutral excuses, Batson's focus on intentional discrimination fails to account for implicit biases, which unconsciously permeate decision-making. It also fails to consider how a seemingly race-neutral reason for striking jurors, such as whether they or those they know have been arrested, can be a pretext for discrimination or, at a minimum, can implicate race because people of color are disproportionately arrested at higher rates than white people. Presumably, based on the Action Plan, this Court recognizes that State v. Gilmore, 103 N.J. 508 (1986), shares these same shortcomings.

The facts of this case demonstrate why reforms are needed to

protect a defendant's constitutional right to a fair trial by an impartial jury drawn from a representative cross-section of the community. Two prosecutors from the Essex County Prosecutor's Office (ECPO), clearly fueled by implicit biases, evaded a Batson/Gilmore analysis altogether by having F.G., a young Black male juror, arrested and removed for cause after they ran a criminal background check on him and found an outstanding municipal warrant. The trial court had already denied the State's request to remove F.G. for cause, stating it had "no doubt" that he would "make a fair and impartial juror," but the prosecutors still felt F.G. must be lying about his "background" because he had used some criminal justice "lingo," which he said he learned growing up in a bad neighborhood in Newark. The prosecutors said they had a "duty" to investigate F.G. because of "the people that he indicated he has close ties to," i.e. neighborhood friends that are "in a lifestyle and hustling drugs and getting arrested."

Although the court rejected those very reasons when it refused to strike F.G. for cause, the prosecutors took matters into their own hands and ran an ex parte criminal background check on him. After they told the judge that they were going to have F.G. "locked up" because of the municipal warrant, the judge removed him for cause and helped plan his arrest. Defense counsel argued that race was implicated because a disproportionate number of Black men are arrested and are thus more likely to have friends or family with arrest records. The judge "understood her point," but did not apply Batson/Gilmore because F.G. was going to be arrested.

It did not award Defendant the extra peremptory challenge that his counsel sought. F.G. was arrested. Defendant was later convicted.

The Appellate Division questioned whether prosecutors are permitted to run background checks on *any* jurors, but because the State had singled out only a minority juror for a background check and then had him arrested to circumvent the judge's ruling and avoid Batson/Gilmore, it reversed Defendant's conviction. The court noted that a prior judge had once denied ECPO's motion to obtain the birth dates of jurors so that it could run background checks on them. Although the State told the judge in this case that it does not have a "habit" of running background checks, the fact that it had tried years earlier to get information that would make it easier to do so suggests the practice occurs more often than it admits. It also almost certainly occurs elsewhere.

Although future changes are needed, the Court should act now to prohibit the State from performing ex parte criminal background checks on jurors. It is unfair to defendants, who do not have access to the State's database, and it opens the door to prosecutors singling out and striking minority jurors based on implicit biases, violating the constitutional rights of defendants to a jury of their peers. A juror should not have to fear jury duty. Subjecting jurors to background checks and possible arrest will no doubt have a chilling effect, making it harder for courts to form juries. Finally, as happened in this case, the State should not be permitted to use a background check to circumvent judge's decision to deny its challenge to a juror for cause.

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INTEREST OF AMICUS CURIAE

Proposed amicus curiae Association of Criminal Defense Lawyers of New Jersey ("ACDL-NJ") is a non-profit corporation organized under the laws of New Jersey to, among other purposes, "protect and insure by rule of law, those individual rights guaranteed by the New Jersey and United States Constitutions; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance, to promote justice and the common good." Founded in 1985, ACDL-NJ has over 500 members across New Jersey.

This Court has found that ACDL-NJ has the special interest and expertise to serve as an amicus curiae per Rule 1:13-9 in numerous cases throughout the years. See, e.g., State v. Williams, __ N.J. __ (2020); State v. Andrews, 243 N.J. 447 (2020); State v. Greene, 242 N.J. 530 (2020); State v. McCray, 243 N.J. 196 (2020); State v. Courtney, 243 N.J. 77 (2020); State v. J.V., 242 N.J. 432 (2020); H.R. v. New Jersey State Parole Bd., 242 N.J. 271 (2020); Matter of G.H., 240 N.J. 113 (2019); State v. Fowler, 239 N.J. 171 (2019); State v. L.H., 239 N.J. 22 (2019). Importantly, ACDL-NJ has participated as amicus curiae in cases similar to this one, which calls upon the Court to ensure that the jury selection process is free of racial discrimination and fair to defendants. See, e.g., State v. Osorio, 199 N.J. 486 (2009) (upholding reversal of conviction where prosecutor singled out minority jurors for peremptory challenges); Gilmore, 103 N.J. 508 (adopting framework

from Batson, 476 U.S. 79); In re State ex rel. Essex Cty. Prosecutor's Office, 427 N.J. Super. 1 (Law. Div. 2012) (rejecting prosecutor's request for birth dates of jury pool).

STATEMENT OF FACTS & PROCEDURAL HISTORY

ACDL-NJ relies upon the Statement of Facts and Procedural History as set forth in Defendant's briefs and in the Appellate Division's published decision below. See State v. Andujar, 462 N.J. Super. 537 (App. Div. 2020).

LEGAL ARGUMENT

I. THE APPELLATE DIVISION'S DECISION TO REVERSE DEFENDANT'S CONVICTION SHOULD BE AFFIRMED

For purposes of brevity and to avoid burdening the Court with duplicative briefing, ACDL-NJ fully adopts the arguments made in Defendant's comprehensive briefs and adds only the following: The State's position that it can subject prospective jurors to ex parte criminal background checks at its own discretion is deeply troubling and usurps the Judiciary's authority over the jury selection process. That the State also maintains it can do so and then *arrest* a juror to circumvent the judge's decision not to remove the juror for cause is outrageous. By singling out F.G., a Black man, for a criminal background check based on what were clearly implicit biases by the prosecutors and then arresting him, the State violated Defendant's constitutional right to a fair and impartial jury "drawn from a representative cross-section of the community." Gilmore, 103 N.J. at 529.

It also violated F.G.'s rights under the Equal Protection

Clause and interfered with his exercise of a civic duty, a responsibility that the trial judge had found, without a doubt in its mind, that F.G. would perform fairly and impartially. Andujar, 462 N.J. Super. at 547. The municipal warrant, which perhaps related to something as minor as a non-appearance for a parking ticket or traffic violation, did not disqualify F.G. from jury service. By insisting that it must immediately arrest F.G., and by plotting with the trial judge to find a way to bring F.G. "into the grasp of [a] law enforcement officer," id. at 548, the State perpetuated the criminalization of minorities in our criminal justice system.[1] The Appellate Division correctly concluded that Defendant's conviction should be reversed in light of the State's conduct and ACDL-NJ encourages this Court to affirm.

II. THIS CASE DEMONSTRATES HOW BATSON/GILMORE CAN BE EASILY EVADED BY PROSECUTORS AND HOW REFORMS TO THE JURY SELECTION PROCESS ARE NEEDED

This Court has eloquently noted the paramount importance of a jury selection process that is free from racial discrimination:

> One of our most cherished rights is the right to trial by a fair and impartial jury. We zealously guard that right by, among other things, requiring that the jury selection process be free of racial or ethnic taint. When it has been discerned that impermissible bias has infected the selection of a jury, we have not hesitated to excise that cancer and

[1] This Court has recognized that significant municipal court reforms are needed to advance racial justice, and in 2019, the Court dismissed hundreds of thousands of old municipal cases. See New Jersey Supreme Court Order (Jan. 17, 2019).

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> require a new trial, one where prejudice and hatred have no place.
>
> [State v. Osorio, 199 N.J. 486, 492 (2009).]

Importantly, the protections afforded by this Court in Gilmore under various provisions of the New Jersey Constitution exceed those provided by the U.S. Supreme Court in Batson under the Equal Protection Clause.[2] Collectively, Article I, paragraphs 5, 9, and 10 of the New Jersey Constitution provide a defendant the right to a "trial by an impartial jury drawn from a representative cross-section of the community." Gilmore, 103 N.J. at 522–23. This right applies "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." Id. at 526-527 (emphasis added).

A defendant's right to a fair and impartial jury "drawn from a representative cross-section of the community" is violated when a prosecutor strikes jurors because they are members of a protected group. Id. at 531. That must be true whether the prosecutor demonstrated overt discrimination, whether she was fueled by implicit biases,[3] or whether the ostensibly race-neutral

[2] The U.S. Supreme Court has held that under the Equal Protection Clause "whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 128 (1994).

[3] "Implicit biases are the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgement." Judge Mark W. Bennett, Unraveling the Gordian

justifications for removing a minority juror are manifestations of institutional racism within our criminal justice system. Unfortunately, Batson/Gilmore does not capture our current understanding of racial discrimination and minority jurors are still targeted and removed from juries across this nation and in this state.

Over the course of the past three decades, there has been considerable discussion about Batson's failures to adequately remedy discrimination in the jury selection process. See, e.g., Annie Sloan, "What to Do About Batson?": Using A Court Rule to Address Implicit Bias in Jury Selection, 108 Calif. L. Rev. 233 (2020) (discussing recent proposals to fix Batson's failures); Vida B. Johnson, Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson, 34 Yale L. & Pol'y Rev. 387 (2016) (discussing how discrimination by prosecutors in jury selection persists because discrimination can be easily masked as a race neutral excuse); Abbe Smith, A Call to Abolish Peremptory Challenges by Prosecutors, 27 Geo. J. Legal Ethics 1163 (2014) (calling Batson unenforceable and proposing removal of the *prosecution's* peremptory challenges as the only solution to the problem); Jeffrey Bellin & Junichi P. Semitsu, Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney, 96 Cornell L. Rev. 1075 (2011) (calling

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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. 149 (2010). We are largely unaware of such biases and "[a]s a result, we unconsciously act on such biases even thought we may consciously abhor them."

Batson "all form and little substance"); Antony Page, Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge, 85 B.U.L. Rev. 155 (2005) (discussing how the Batson framework is ill-suited to address the problem of discrimination because it does not properly account for implicit biases).

Most critiques of Batson fall into three general categories. First, as Justice Thurgood Marshall warned in his Batson concurrence, "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror." Batson, 476 U.S. at 106 (Marshall, J., concurring). See also People v. Randall, 671 N.E.2d 60, 65-66 (Ill. App. Q. 1996) (considering the "charade that has become the Batson process" and listing facially race-neutral explanations that other courts have accepted). Studies have shown that very few Batson challenges are successful. See Bellin & Semitsu, 96 Cornell L. Rev. at 1092 (finding that only 6.69 percent of 269 federal decisions involving Batson challenges resulted in a new trial and only 3.7 percent resulted in a remand).

Second, also predicted by Justice Marshall, "[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" and "[a] judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported." Batson, 476 U.S. at 106 (Marshall, J., concurring). Batson focuses on conscious or intentional racism and few courts have applied it to unconscious racism, or implicit

bias. See Sloan, 108 Calif. L. Rev. at 235 ("In the context of peremptory challenges, a party may not *intend* to discriminate against a juror based on the juror's race, but the party may nonetheless act on biases without realizing. Under Batson, strikes of this nature escape judicial inquiry.").

Third, although some of the factors courts consider in determining whether a proffered reason for a challenge is pretextual might root out *some* unconscious bias, Batson fails to address institutional racism and how it impacts jury composition:

> A significantly higher percentage of people of color have arrest records due to the disproportionate number of stops, searches, and arrests of people of color. Black people are also more likely to have friends and family who are Black. As a result, Black jurors are more likely than White jurors to have friends and family who have been arrested. Judges and prosecutors then use the existence of prior arrests of the jurors or the jurors' friends or family to strike these prospective jurors, in effect producing juries whose racial compositions are whiter than that of the respective communities.
>
> [Johnson, 34 Yale L. & Pol'y Rev. at 389.]

Those are the very arguments that Defendant made in this case, which the trial court initially said it understood. However, after the State singled F.G. out for a background check based on the prosecutors' hunches about his "background,"[4] and their unhappiness

[4] See Andujar, 462 N.J. Super. at 563 ("Black jurors have historically faced the attribution they will show leniency toward defendants and are indifferent to criminality.") (citing Thomas Ward Frampton, The Jim Crow Jury, 71 Vanderbilt L. Rev. 1593, 1603 (2018).

with the judge's decision not to remove F.G. for cause, the trial court failed to identify it as a Batson issue. Importantly, all of the information F.G. provided regarding his neighborhood friends who had been arrested was elicited due to the Judiciary's Model Jury Questions, meaning that our jury selection process, *by design*, may cause Black jurors to be removed from juries because Black people are arrested at higher rates than white people in this State. See, e.g., American Civil Liberties Union of New Jersey, Study Documents Extreme Racial Disparity In Arrests For Low-Level Offenses (Dec. 2015) ("In four test cities, Blacks were 2.6 to 9.6 times more likely than Whites to be arrested for loitering, disorderly conduct, trespassing, and marijuana possession.").

Some state high courts have recently responded to these critiques of Batson and recognized the need to reform the jury selection process to combat implicit bias. See Beth Schwartzapfel, A Growing Number of State Courts Are Confronting Unconscious Racism In Jury Selection, Marshall Project (May 11, 2020); Judicial Branch of California, California Supreme Court Names Jury Selection Work Group (July 6, 2020) (studying role of implicit bias in the jury selection process, as well as whether "allowing peremptory challenges based on a prospective juror's negative experiences or views of law enforcement or the justice system result in disproportionate exclusion of jurors of certain backgrounds"); State v. Holmes, 221 A.3d 407, 412 (Conn. 2019) (referring the "systemic concerns about Batson's failure to address the effects

of implicit bias and disparate impact to a Jury Selection Task Force, appointed by the Chief Justice, to consider measures intended to promote the selection of diverse jury panels in our state's courthouses”).

At least one court has already acted. The State of Washington’s new jury selection rule requires judges to consider whether “implicit, institutional, and unconscious biases, in addition to purposeful discrimination” have resulted in the exclusion of potential jurors. Wash. Gen. R. 37(f). Among other things, judges must scrutinize a prosecutor’s proffered reason for a peremptory strike to consider whether the reason “might be disproportionately associated with a race or ethnicity.” Wash. Gen. R. 37(g). Certain reasons for exercising a peremptory strike are presumptively invalid, including “having prior contact with law enforcement officers,” “expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling,” and “having a close relationship with people who have been stopped, arrested, or convicted of a crime.” Wash. Gen. R. 37(h). Even after the rule's promulgation, the Washington Supreme Court demonstrated its commitment to addressing Batson's inadequacy by modifying Batson’s third prong to move away from the preponderance of the evidence standard and to instead require a trial court to consider “whether an objective observer *could* view race or ethnicity as *a factor* in the use of the peremptory strike,” which must be “an objective inquiry 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." State v. Jefferson, 429 P.3d 467, 470 (Wash. 2018).

In July 2020, this Court issued the New Jersey Judiciary's Action Plan for Equal Justice. See New Jersey Judiciary, Commitment to Eliminating Barriers to Equal Justice: Immediate Action Items and Ongoing Efforts (2020). The Action Plan contains nine different action items and is part of the Judiciary's work "to uncover and address institutional obstacles to justice for all people, especially those who have been disadvantaged by the court system and denied true justice." Ibid.

The first item in the Action Plan is "Supporting Juror Impartiality," which states:

> 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*. Internally and in collaboration with stakeholders, we also will respond to the results of the "Peremptory Challenge Impact Study," *a forthcoming analysis by external experts of the effects of the exercise of peremptory challenges on the racial composition of jury venires and seated juries*.
>
> [Action Plan, at 2 (emphasis added).]

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ACDL-NJ applauds this Court for demonstrating national leadership and working to combat discrimination and ensure equal access to justice in this state.

This case is but one example of implicit and institutional bias that has occurred in the jury selection process and resulted in the exclusion of a juror of color. Although ACDL-NJ proposes one specific reform in Point III below, it is hopeful that as a result of the Action Plan and the external study "of the effects of the exercise of peremptory challenges on the racial composition of jury venires and seated juries," the Court will address the flaws in the Batson/Gilmore framework identified above and make changes to ensure that a defendant's right to "a fair and impartial jury drawn from a fair cross-section of the community" is more fully protected. Gilmore, 103 N.J. at 535. *All* racial bias within the jury selection system – be it intentional, implicit, or institutional – must be eradicated not only to protect the constitutional rights of defendants, but also to protect jurors from discrimination and to ensure the public's confidence in our criminal justice system.

III. THE COURT SHOULD EXERCISE ITS SUPERVISORY POWERS TO PROHIBIT THE STATE FROM CONDUCTING BACKGROUND CHECKS ON JURORS

Although a reversal of the conviction is the appropriate remedy for Defendant in this case, there is one step this Court can take now to curb future discrimination in our jury selection processes and to ensure that prosecutors do not have an unfair advantage over defendants in criminal trials. The State relies

upon N.J.A.C. 13:59-2.1(a), which permits a "criminal justice agency"[5] to access criminal history record information (CHRI) "for purposes of the administration of criminal justice," to argue that it did nothing wrong by conducting an ex parte background check on F.G. to find a reason to remove him for cause after the judge refused to do so. The Appellate Division "question[ed] whether performing a criminal record check for the purpose of disqualifying a juror at trial supports 'the administration of justice,'" but ultimately did "not reach the question of whether a criminal record check is authorized during jury voir dire." Andujar, 462 N.J. Super. at 554, 55. In its successful petition for certification, the State argued that the issue of conducting background checks on prospective jurors is one "of first impression in New Jersey . . . that should be considered and decided by this Court." [PCb22].[6] ACDL-NJ agrees that the Court should reach that question and asks asks the Court to exercise its supervisory powers[7] to

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[5] "Criminal justice agency" includes state and federal courts, as well as law enforcement agencies, such as police departments and prosecutors' offices. N.J.A.C. 13:59-1.1.

[6] PCb = Petition for Certification Brief

[7] The Court has the constitutional authority to "make rules governing the administration of all the courts in the State and, subject to law, the practice and procedure in all such courts." N.J. Const., art. VI, §2, ¶3. See also Winberry v. Salisbury, 5 N.J. 240, 245 (1950). Moreover, this Court also has a "common law supervisory power over criminal practice within [its] jurisdiction." State v. Long, 119 N.J. 439, 518 (1990). State v. Kuchera, 198 N.J. 482, 500 (2009) ("[W]hen we perceive, as we do here, that more might be done to advance the reliability of our criminal justice system, our supervisory authority over the criminal courts enables us constitutionally to act.").

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prohibit prosecutors from running background checks on prospective jurors except in the narrowest of circumstances.

A. Giving Prosecutors Unfettered Discretion to Run Background Checks on Prospective Jurors Does Not Support the Administration of Justice, But Rather Undermines It

N.J.A.C. 13:59-2.1 states that "criminal justice agencies, for purposes of the administration of criminal justice, may . . . access information collected by criminal justice agencies . . . containing criminal history record information." N.J.A.C. 13:59-2.1. The "administration of criminal justice" is defined 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.
>
> [N.J.A.C. 13:59-1.1.]

Nothing in the regulation's plain language or its history suggests that running background checks venire members is considered the "administration of justice," and, in fact, the long history of this state demonstrates a preference *against* subjecting jurors to investigations.

In In re State ex rel. Essex County Prosecutor's Office, 427 N.J. Super. 1, 6-13 (Law Div. 2012), ECPO filed an application to seeking an order to compel "the jury manager to turn over the dates of birth of certain persons in the petit jury pool to the State to facilitate running criminal background checks on those potential jurors." Id. at 4. Assignment Judge Patricia Costello provided a lengthy history of the law regarding the investigation of jurors. That history can be summarized succinctly as follows:

> Voir dire questioning of potential jurors in New Jersey has evolved from a common law system in which no questioning was allowed absent an extrinsically established cause for challenge, to a system in which jurors are asked multiple questions about their personal lives to allow attorneys to more intelligently exercise their peremptory challenges. Finding the process at one point to have veered too close to full-on interrogation of potential jurors by attorneys, however, the Supreme Court has also curbed this evolution of voir dire, by placing the power to question in judges rather than attorneys.
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> [Id. at 6-7.]

Accordingly, Judge Costello flatly denied ECPO's request to obtain the birth dates of jurors in part because doing so "would represent an acute departure from even the evolving nature of the Judiciary's

examination into the qualifications of potential jurors." Id. at 14.

As recognized by Judge Costello, the jury selection process has always been the province of the Judiciary. On at least one occasion in recent history, this Court has rejected the efforts of another law enforcement officer who attempted to interfere with the control of the jury selection process because "the statutory scheme which the Legislature has adopted . . . touching the selection, summoning and control of petit jurors, reveals a clear legislative intent that this area of judicial administration shall rest with the judiciary and especially the assignment judges." In re Supervision & Assignment of Petit Jury Panels in Essex Cty., 60 N.J. 554, 559 (1972) (rejecting sheriff's attempts to control "the manner in which petit jury panels are to be summoned" and "to care for and supervise petit jurors during their terms of service").

The Court stressed that the State Constitution "reposes in the Supreme Court the responsibility to see that all aspects of jury procedure — so uniquely vital to our system of judicial administration — are preserved, maintained and developed to play their essential part in meting out justice." Id. at 562 (citing N.J. Const. art. VI, § 1, ¶ 1). This Court has exercised that power to adopt rules that place the responsibility of jury questioning upon trial judges and then has adopted procedures and model questions for trial judges to follow. A regulation by the Department of Law and Public Safety cannot override this Court's constitutional authority to control all aspects of jury procedure,

including jury selection. Thus, this Court has the constitutional authority to implement rules regarding a prosecutor's ability to run criminal background checks upon venire members. There are many reasons to do so.

First, as argued above, permitting prosecutors to run criminal background checks on jurors would usurp the trial court's control over the jury selection process. That is what happened in this case. The State even admitted that one reason that it ran the background check on F.G. was because the trial court had denied its request to remove him for cause. Andujar, 462 N.J. Super. at 243. It took matters in its own hands, went behind the judge's back to run a criminal background check on F.G., and then used the results to force the judge's hand to remove F.G. for cause because the State was going to arrest him. Our courts should not cede control over the jury selection process or the decision to remove jurors for cause to the State.

Second, although parties often perform research on jurors by conducting internet searches or reviewing public databases,[8] such a practice is less problematic because the same information is available to everyone. In sharp contrast, the State's database contains CHRI that is accessible only by[9] "criminal justice

[8] See, e.g., Thaddeus Hoffmeister, Investigating Jurors in the Digital Age: One Click at A Time, 60 U. Kan. L. Rev. 611, 613 (2012) (discussing case where defense attorney discovered a juror had posted on Facebook on the eve of trial about how it will be fun to announce the defendant's guilt).

[9] CHRI is confidential unless a statute provides a permissible use. There are statutes that permit access to CHRI to specific

agencies," which includes prosecutors and courts, but not criminal defense attorneys. N.J.A.C. 13:59-1.1. The CHRI database is free to prosecutors and contains data that is not available in other databases that criminal defense attorneys can access, such as Promis Gavel (which is limited to New Jersey records). This unfairly places defense counsel, and thus defendants, at a disadvantage during jury selection. Because the State already has vast resources at its disposable that are unavailable to defendants, especially indigent defendants, our courts should strive for fundamental fairness on this issue and prohibit the State from using its exclusive database to strike jurors.

Third, permitting prosecutors to run ex parte background checks on jurors gives them too much unchecked discretion and opens the door to discrimination and potential abuse. As played out in this case, the prosecutors "argued essentially that because F.G. 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." Andujar, 462 N.J. Super. at 562. That suspicion fueled them to single F.G. out for an ex parte investigation into his background. The results of that investigation gave the State a reason to arrest F.G. and thus

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government agencies for purposes of licensing, employment, or similar purposes. See, e.g., N.J.S.A. 2B:1-3 (giving Supreme Court access to CHRI for purposes of licensing attorneys); N.J.S.A. 45:19-32 (permitting access to CHRI for licensing bounty hunters). Moreover, under strict procedures that require the fingerprints of the individual to be searched, CHRI can be released to non-governmental entitles for limited reasons such as conducting employment background checks. N.J.A.C. 13:59-1.2.

aided it in its quest to remove him for cause after the judge refused to do so, sparing itself a peremptory challenge. Limitations need to be placed upon the State's ability to investigate jurors because "implicit bias has the greatest potential to thrive in situations where decision-makers have broad discretion." Sharon Price-Cates, Implicit Bias New Science in Search of New Legal Strategies Toward Fair and Impartial Criminal Trials 65-66, N.J. Lawyer (Aug. 2018).

Finally, subjecting jurors to criminal background checks would have a chilling effect. "Other than voting, serving a jury is the most substantial opportunity that most citizens have to participate in the democratic process." Flowers v. Mississippi, __ U.S. __ (2019) (citing Powers v. Ohio, 499 U.S. 400, 407 (1991)). Jury duty is a burden for most individuals, requiring them to take time off from work in exchange for almost no juror compensation. The voir dire process itself can feel intrusive, requiring jurors to disclose intimate things about their experiences they may have never even told their family or friends. See generally Michael R. Glover, The Right to Privacy of Prospective Jurors During Voir Dire, 70 Cal. L. Rev. 708 (1982). While many people may dread the hassles of jury duty, no one should need to *fear* jury duty because it means being investigated by a prosecutor. F.G. performed his civic responsibility by reporting to jury duty and then he was treated as though he had conducted himself in such a way as to give probable cause to a law enforcement

officer to run a record check and arrest him. That simply should not happen.

Knowing that jury duty may be accompanied by a criminal background investigation, and possibly the threat of an arrest, will undoubtedly lead to more jurors finding ways to be excused from jury duty. In other contexts, this Court has taken measures "to prevent juror harassment[.]" State v. Harris, 181 N.J. 391, 503 (2004) (stating that a defendant must meet a "very high bar" to conduct a post-verdict interview of a juror). It should just be as protective of jurors in this context too.

B. In Very Rare Circumstances Where the Interests of Justice Require It, Both the Prosecutor *and* the Defense Attorney Should Be Permitted to Ask the Court to Conduct a Background Check on a Prospective Juror

For all the reasons argued above, ACDL-NJ asks the Court to prohibit the State from conducting criminal background checks upon jurors because it undermines justice. Recognizing that there may be circumstances beyond ACDL-NJ's imagination where one party would be deprived of a fair trial if a background check were not conducted, ACDL-NJ proposes that the Court permit *either party* to apply to the trial judge for a limited criminal background check of a juror where the interests of justice warrant it. In deciding whether to grant the application, which should be based on proof aliunde, the judge should consider the whether the proffered reason for the background check is pretextual or whether the request might be fueled by implicit bias or institutional bias.

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If the judge determines that the interests of justice warrant a criminal background check, it should be limited to searches for disqualifying convictions only. Importantly, to protect a juror's privacy, the court itself should conduct the background check and the results should not be disclosed to either party unless something disqualifying is discovered. Under no circumstances should the background check lead to the juror's arrest during his or her jury service. To ensure compliance, the Court should require that any lawyer failing to abide by these procedures with respect to a venire person from a group protected by Batson/Gilmore *shall* be referred by the trial judge to the Office of Attorney Ethics for a determination of whether there has been a violation of R.P.C. 8.4(g).

At least one other jurisdiction has adopted a similar rule. See State v. Bessenecker, 404 N.W. 2d 134 (Iowa 1987). In Bessenecker, the Iowa Supreme Court ruled that a prosecutor

> may obtain a court order allowing acquisition and use of the rap sheet of a particular prospective juror only upon a showing of reasonable basis for believing that the rap sheet may contain information that is pertinent to the individual's selection as a juror and unlikely to be otherwise disclosed. If a rap sheet is thus acquired by court order, it must also be made available to the defendant unless good cause is shown to the contrary.
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> [Id. at 139.]

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Although most other jurisdictions have not reached this issue and a handful of jurisdictions have permitted prosecutors to run background checks on jurors,[10] this Court has never shied away from being more protective of a criminal defendant's constitutional rights than other jurisdictions. See, e.g., State v. Shaw, 241 N.J. 223 (2020) (becoming one of only approximately a dozen other states to place limits on the number of times a prosecutor may resubmit a matter to a grand jury after a "no bill"); State v. Bacome, 228 N.J. 94 (2017) (remaining the one of the very few states to prohibit police from automatically ordering passengers out of cars during motor vehicle stops).

CONCLUSION

For the reasons argued above, this Court should affirm the Appellate Division's reversal of Defendant's conviction and should enact a rule prohibiting the State from conducting criminal background checks upon jurors.

Respectfully Submitted,

/s/ CJ Griffin
CJ Griffin

Dated: November 30, 2020

[10] Many of these states have still required the State to disclose the results of any background checks to defendants under the principle of fundamental fairness. See, e.g., Tagala v. State, 812 P.2d 604, 612 (Alaska Ct. App. 1991); People v. Murtishaw, 631 P.2d 446, 465 (Cal. 1981); Losavio v. Mayber, 496 P.2d 1032, 1035 (Colo. 1972); Commonwealth v. Smith, 215 N.E. 2d 897, 901 (Mass. 1966); State v. Goodale, 740 A.2d 1026, 1031 (N.H. 1999).