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Supreme Court of New Jersey

DOCKET NO. 084167

STATE OF NEW JERSEY, :	Criminal Action
Plaintiff-Petitioner, :	On Certification Granted to the Superior Court of New Jersey, Appellate Division.
v. :	
EDWIN ANDUJAR, :	Sat Below: Hon. Ellen L. Koblitz, P.J.A.D. Hon. Mary Gibbons Whipple, J.A.D. Hon. Hany A. Mawla, J.A.D.
Defendant-Respondent. :	

BRIEF ON BEHALF OF THE ATTORNEY GENERAL OF NEW JERSEY
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PRELIMINARY STATEMENT

There appears to be agreement here that performing criminal-history record checks on potential jurors is permissible in appropriate situations. So it is no wonder that courts across the country have generally found such checks allowable. While most courts have entrusted prosecutors with the discretion to perform these checks, others have drawn sensible limits on the use and reach of the practice. Though the Attorney General is confident that New Jersey's prosecutors would perform these checks for valid, nondiscriminatory reasons, specific limits should be identified to ensure that the process is not abused.

The Attorney General largely agrees with the State that performing criminal-record checks on potential jurors in appropriate situations can advance crucial criminal-justice interests. For example, checking the jury pool for residents ineligible for service because of disqualifying convictions, revealing whether someone responded untruthfully to a juror-qualification question, and exposing improper juror-removal requests based on group affiliation. These ends progress the cause of justice for everyone. Still, the caselaw raises concerns justifying bounds on the record-checking process. The Attorney General would thus welcome guidelines to keep these checks from veering unreasonably off course in future cases. Drawing lines in this way will promote uniformity and fair play

in empaneling impartial juries for defendants and the State.

Valuable guidance is found in the historical roots of the relevant law and in how federal and state courts have decided issues like those presented here. The principles laid out in those courts' decisions set the legal landscape for the Attorney General's recommended approach.

To start, if the State reasonably believes that a sitting juror's criminal history may cast doubt on the juror's ability to impartially serve, prosecutors should be able to access that juror's criminal-record information in government databases. Prosecutors, if challenged, must be able to articulate a legitimate, good-faith belief why a pre-empanelment record check might be relevant to jury selection. Prosecutors – as well as defense counsel, who may obtain jurors' criminal records by subpoena, should promptly turn over the records to all parties.

Ideally, the parties should perform all record checks before jurors are sworn, so that no party will be tempted to remove enough jurors to provoke a mistrial if their case starts to crumble. After empanelment, the parties should perform such checks only with the judge's permission. If circumstances arise after empanelment that may call for record checks, trial judges should reasonably exercise their discretion to permit them. To temper concerns about unevenness in access, judges should (upon request) perform the criminal-record checks, as the New Jersey Administrative Code permits.

In the rare situation when such a criminal-record check is

performed on a juror, the parties and judge should endeavor to keep potential jurors from learning that a search was done. That way, potential jurors will not hesitate to serve in future cases, no matter their past.

When a criminal-record check reveals that a juror might have a disqualifying conviction, or that a juror may have made a false or materially misleading statement to the court, the trial judge should permit that juror to explain in private whether that is in fact the case. No mention need be made of the criminal-record check. Jurors need only be first instructed that their answers may be verified, to discourage deceit.

Apart from ensuring that fair and impartial juries will be empaneled, these procedures will (1) increase the odds that judges do not empanel statutorily ineligible residents; (2) screen out jurors who mislead the court about material facts; (3) minimize the likelihood that future jurors will be reluctant to serve for fear of having their past scrutinized; (4) preempt undesirable gamesmanship at trial by requiring judicial approval for such criminal-record checks after empanelment; (5) promote transparency by exposing pretextual peremptory challenges based on jurors' group affiliations; (6) leave in place the judiciary's supervisory powers over jury selection; and (7) head off unnecessary and costly post-verdict litigation.

This Court should thus allow criminal-record checks on potential jurors under appropriate circumstances.

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STATEMENT OF PROCEDURAL HISTORY AND FACTS

The Attorney General relies on the Counterstatement of Procedural History and the Counterstatement of Facts in the State's Appellate Division brief.

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LEGAL ARGUMENT

POINT I

PERFORMING CRIMINAL-RECORD CHECKS ON POTENTIAL JURORS SHOULD BE ALLOWED WHEN A PARTY, IF CHALLENGED, CAN ARTICULATE A LEGITIMATE, GOOD-FAITH BELIEF WHY ONE IS NEEDED TO PROTECT THE EVENHANDED ADMINISTRATION OF JUSTICE.

There seems to be agreement here that performing criminal-record checks on potential jurors is permissible under appropriate circumstances. Indeed, no court in the country has completely banned the practice. Yet concerns over potential abuses have led some courts to balance the valid criminal-justice purposes which the record searches might serve against possible infringements on the rights of defendants and potential jurors in deciding whether to permit the searches.

The more pressing question, then, is not whether performing the checks is sometimes permissible – but when and how such checks should ideally be performed – and who should perform them. The Attorney General proposes an answer to that question here and strives to achieve a three-fold goal: (1) increase the odds that courts will empanel fair and impartial juries for all; (2) promote principles of transparency and accountability during jury selection; and (3) preempt improper juror-removal requests based on race and other group affiliations.

Meeting these ends will require sensible line-drawing. Most obviously, Batson v. Kentucky, 476 U.S. 79 (1986), forbids purposeful racial discrimination during jury selection, and that

restriction should apply in this context. But this Court should also recognize other appropriate guidelines, some of which are already in place, that will keep such record checks from veering unreasonably off course. Uniformity and fair play in jury selection will thus not only be protected but enhanced.

Given the importance of the interests at stake, and the uncertainty in the law under review, the Court should establish procedural rules for when and how such checks may be performed. "[C]larity promotes compliance," so justice is more cleanly administered when the parties "know what they can and cannot do." Kisor v. Wilkie, __ U.S. __, 139 S. Ct. 2400, 2421 (2019). That point applies with particular force in this unsettled area of state law.

A. Allowing criminal-record checks on potential jurors in appropriate situations will advance the fair and equal administration of justice.

Valuable guidance is found in the historical roots of the relevant law and in how federal and state courts decided issues like those presented here. Those courts' decisions set the legal landscape for the Attorney General's recommended approach.

1. The evolution of the law governing criminal-record checks on potential jurors.

Concerns about unevenness between criminal defendants and prosecutors in access to information about the jury pool surfaced in a series of United States Courts of Appeals decisions rendered midway through the twentieth century. Those courts generally placed few, if any, constraints on the

government checking the criminal histories of potential jurors and imposed no duty to share such information with defense attorneys. Animating those decisions was the belief that if the government did not contact potential jurors about their criminal histories, future jurors would not be intimidated and thus discouraged from serving later. The practice was fair, courts found, if defense attorneys could openly question jurors about their criminal past during voir dire. See, e.g., United States v. Falange, 426 F.2d 930, 932-33 (2d Cir. 1970); Martin v. United States, 266 F.2d 97, 99 (5th Cir. 1959); United States v. Costello, 255 F.2d 876, 882-84 (2d Cir. 1958) (discussing government's use of jurors' tax returns to assess bias in tax-evasion case); Best v. United States, 184 F.2d 131, 141 (1st Cir. 1950); Christoffel v. United States, 171 F.2d 1004, 1006 (D.C. Cir. 1948), rev'd on other grounds, 338 U.S. 84 (1949).

Decades later, in a case not entirely different from this one, a federal court of appeals found no error when a prosecutor performed a criminal-record check on a recalcitrant member of a deadlocked jury because the prosecutor did not purposely provoke a later mistrial. United States v. McIntosh, 380 F.3d 548, 557-58 (1st Cir. 2004). Nor was there a causal link between the criminal-record check and the mistrial, found the court, because no juror knew that the government ran the criminal-record check. The court thus rejected the challenge. Ibid.

Like the United States Courts of Appeals, most state courts have not fixed limits on the prosecution's independent authority

to perform criminal-record checks on potential jurors. Nor have those courts, including some state courts of last resort, called for the prosecution to turn over jurors' criminal-record information to defense counsel. See, e.g., Albarran v. State, 96 So. 3d 131, 157-58 (Ala. Crim. App. 2011); Charbonneau v. State, 904 A.2d 295, 319 (Del. 2006); Monahan v. State, 294 So. 2d 401, 402 (Fl. Dist. Ct. App. 1974); Coleman v. State, 804 S.E.2d 24, 30 (Ga. 2017); People v. Franklin, 552 N.E.2d 743, 750-51 (Ill. 1990); Saylor v. State, 686 N.E.2d 80, 83 (Ind. 1997); State v. Jackson, 450 So. 2d 621, 628-29 (La. 1984); State v. Hernandez, 393 N.W.2d 28, 29-30 (Minn. Ct. App. 1986); Mack v. State, 650 So. 2d 1289, 1299-1300 (Miss. 1994); State v. Whitfield, 837 S.W.2d 503, 509 (Mo. 1992); People v. Burris, 275 A.D.2d 793, 794 (N.Y. App. Div. 2000); State v. Smith, 532 S.E.2d 773, 779-80 (N.C. 2000); State v. Matthews, 373 S.E.2d 587, 590-91 (S.C. 1988); Garcia v. State, 454 S.W.2d 400, 403 (Tex. Crim. App. 1970); State v. Grega, 721 A.2d 445, 450-51 (Vt. 1998); Salmon v. Commonwealth, 529 S.E.2d 815, 816 (Va. Ct. App. 2000). The defendants in these cases seldom challenged the prosecution's independent authority to run the record checks.

Although these courts procedurally premised their decisions on the unique laws of discovery in each state, as well as on state statutes governing the dissemination of criminal-record information, they often supplied the same substantive reasons for their holdings. Courts in Delaware and Vermont, for example, held that any prejudicial effect caused by the

prosecution's sole use and possession of the jurors' criminal-record information was negated by defense counsel's opportunity to probe jurors about their criminal histories during voir dire. Charbonneau, 904 A.2d at 319; Grega, 721 A.2d at 450.

Elsewhere, courts articulated different substantive bases to justify the same holding. Alabama and Louisiana courts declined to order the prosecution to disclose the records because, they theorized, the records might allay the legitimate concern that some jurors' criminal histories would make them biased against the people's case. Yet the same was not true of the defense. Albarran, 96 So. 3d at 157-58; Jackson, 450 So. 2d at 628-29.

Recently, the Supreme Court of Georgia rejected a defendant's assertion that a lack of access to the records would impede him in the exercise of his peremptory challenges. And, the court added, the records would not have helped him in his Batson challenge, because even if the records contained inaccuracies, the inaccuracies did not undermine the challenge, as Batson does not prevent the prosecution from using inaccurate (but race-neutral) information in challenging jurors. Coleman, 804 S.E.2d at 30.

Drawing on its precedent, the Supreme Court of Illinois held that the prosecution's failure to disclose juror record-check results did not lead to the empanelment of a biased jury because four potential jurors who were untruthful about their criminal histories were not sworn. Rather, the sworn jury was

made up of people who had been truthful about their criminal past and was thus impartial. Franklin, 552 N.E.2d at 750-51.

A competing approach, brought on by concerns about unevenness in access to potential jurors' criminal-record information, emerged in the 1970s. To alleviate those concerns, courts in Alaska, California, Colorado, Iowa, Massachusetts, Michigan, Nevada, and New Hampshire directed the prosecution to disclose such information to defense counsel. But not one court set out a bright-line rule banning the practice altogether. See, e.g., State v. Second Judicial Dist. Court, 431 P.3d 47, 48-52 (Nev. 2018); State v. Goodale, 740 A.2d 1026, 1029-30 (N.H. 1999); State v. Bessenecker, 404 N.W.2d 134, 135-39 (Iowa 1987); People v. Murtishaw, 631 P.2d 446, 465-66 (Cal. 1981); Losavio v. Mayber, 496 P.2d 1032, 1033-34 (Colo. 1972); Commonwealth v. Smith, 215 N.E.2d 897, 901 (Mass. 1966); Tagala v. State, 812 P.2d 604, 611 (Alaska Ct. App. 1991); People v. Aldridge, 209 N.W.2d 796, 797-98 (Mich. Ct. App. 1973).

A few courts, on due-process grounds, set up procedures to curb potential misuse of the record-checking process. For example, the Massachusetts Supreme Judicial Court – though finding that prosecutors have the statutory authority to perform such checks to confirm that jurors are fit to serve – held that their independent authority to perform the checks ends once the jury is sworn. Commonwealth v. Hampton, 928 N.E.2d 917, 929-31 (Mass. 2010). After that, criminal-record checks by either party should be performed only with the trial judge's approval,

as circumstances may arise during a trial that would warrant such action. Id. at 930. The court reasoned that after empanelment, a party who thinks the trial is going badly – (in Hampton, the prosecution performed the checks based on jurors' negative "facial reactions" to its presentation) – may be tempted to perform the checks in order to remove enough jurors to force a mistrial. Id. at 930-31. The court added that concerns about unevenness in access to criminal-history records may be "largely avoided" if judges, on request, order the records during jury selection. Id. at 930.

The Iowa Supreme Court drew even narrower bounds, holding that the prosecution may only run a criminal-record check on a potential juror if it obtains a court order after showing a reasonable belief that the records may be relevant to jury selection. See Bessenecker, 404 N.W.2d at 135-39. Considerations of fairness and judicial control over jury selection were the moving forces for the decision. Ibid.

Neither federal nor state courts facing these issues identified particular criteria to be considered in deciding whether to permit such record checks. Still, while no court barred the reasonable exercise of trial-court discretion allowing prosecutors to perform the checks on potential jurors, some chose to put measures in place to guard against possible abuse. This Court should follow a similar approach.

Yet urging the Court to continue to protect the integrity of state criminal prosecutions does not mean that New Jersey's

prosecutors are operating in an open area, free to arbitrarily enforce the law. Nor does it mean that this Court is writing on a blank slate. A range of restrictions already hold accountable prosecutors and police who stray impermissibly out of bounds in executing their duties. And that includes race-based criminal-record checks.

Sections 4(a) and 8 of the Code of Ethics for County Prosecutors, for example, subject prosecutors to discipline (including possible termination) for taking official action based on race or other improper considerations. Rule of Professional Conduct (RPC) 8.4(g) says that lawyers engage in professional misconduct when they discriminate based on race. These ethical rules thus incorporate the principles that Batson established and already restrain improper prosecutorial action.

There are strict mechanisms governing who has access to the National Crime Information Center (NCIC) database and how information can be entered and retrieved. See N.J.A.C. 13:59-1.6(c) (setting forth restrictions on accessing information stored in government databases). The NCIC may be used only in appropriate situations to check a potential juror's computerized criminal history (CCH). Every law-enforcement agency in New Jersey has access to the NCIC through New Jersey's Criminal Justice Information System (NJCJIS), which is administered by the Criminal Justice Information System Control Unit (CJISCU) at the New Jersey State Police in cooperation with the FBI. In turn, the CJISCU enforces system integrity, discipline, and

security of the NCIC system regulations from the member agencies through training, audits, and security checks.

Each time a law-enforcement officer runs an NCIC check, the officer's initials are recorded and stored in the system with a case number or docket number. The FBI requires every agency having access to the NCIC to appoint a Terminal Agency Coordinator (TAC), who conducts triennial audits to determine whether criminal-record checks were run for an improper purpose. See 28 C.F.R. § 20.21 (establishing measures protecting the integrity of criminal-history information search process). If the audit reveals an unauthorized or improper NCIC search, authorities may suspend the offender's access to the NCIC, demote or terminate the offender, or revoke an agency's NCIC access. See Criminal Justice Info. Sys., New Jersey Criminal Justice Information System (NJCJIS) Noncompliance Sanction Plan, Criminal Justice Information System (Feb. 1, 2014), http://cjis.njsp.org/forms/pdf/non_compliance_sanction_plan_/012714_noncomplan.pdf; O'Rourke v. City of Lambertville, 405 N.J. Super. 8, 11 (App. Div. 2008) (discussing discipline of police director for unauthorized use of NCIC computer terminal).

But prosecutors and police have more to fear than just discipline for improperly accessing government databases. Officials may face third-degree computer criminal-activity charges for such misuse – and mandatory prison time. See N.J.S.A. 2C:20-25(a), (h). Offenders might forever forfeit their public offices and lose their retirement benefits. See

N.J.S.A. 2C:51-2(a), N.J.S.A. 43:15A-38; In re Expungement Petition of D.H., 204 N.J. 7, 10-11, 25 (2010) (finding that detective's conviction stemming from unauthorized criminal-record check required mandatory forfeiture of public employment even though the Court ordered expungement of conviction).

So while added rules governing juror criminal-record checks may advance the fair and equal administration of justice, the Court should recognize as a threshold matter that such misconduct is already strongly discouraged and severely punished. Any notion that prosecutors can perform such checks with impunity is thus far off base to begin with. They cannot perform these record checks in secret, and they must, by necessity, reveal the information gleaned from the checks to use them in court. And because all the criminal record-check information is archived and readily reviewable, a digital paper trail will quickly catch up with any prosecutor who shirks her duty of candor to the tribunal.

2. Commonsense procedures can ensure the proper use and scope of juror criminal-record checks.

Given the concerns raised in the caselaw, the Attorney General is convinced that a set of best practices, some of which already apply, can be implemented to fairly balance the countervailing interests at stake here.

A good starting point is the law that authorizes prosecutors to perform criminal-record checks on potential jurors. N.J.S.A. 53:1-20.6 grants the Superintendent of the

State Police and the Attorney General the authority to adopt rules and regulations governing criminal-record information. This Court defers to an agency's interpretation of a regulation within the scope of its authority unless the interpretation is "plainly unreasonable." US Bank, N.A. v. Hough, 210 N.J. 187, 200 (2012). When "an agency has based its statutory interpretation on an opinion by the Attorney General, . . . a court should attach weight to the Attorney General's opinion." Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 70 (1978).

Two provisions of the New Jersey Administrative Code are in play here. N.J.A.C. 13:59-2.1(a) says that criminal-justice agencies may, for the purposes of the administration of criminal justice, access criminal-history record information collected by criminal-justice agencies and stored in particular repositories. The terms "administration of criminal justice" and "criminal justice purpose" must, "unless the context clearly indicates otherwise," include (in part) "the prosecution and adjudication" of "accused persons or criminal offenders." N.J.A.C. 13:59-1.1.

The most natural reading of the plain language is that jury selection directly involves the prosecution of accused persons and criminal offenders. Of course, a "prosecution is commenced for a crime when an indictment is found." N.J.S.A. 2C:1-6(d); State v. Cagno, 211 N.J. 488, 507 (2012) (discussing statute). "Once an indictment is returned, the State is committed to prosecute the defendant." State v. Sanchez, 129 N.J. 261, 276 (1992). Because an indictment has necessarily been returned

before "jury selection, [which] is an integral part of the process to which every criminal defendant is entitled," and because "jury selection" means that the prosecution has not ended, it follows that jury selection is part of the prosecution. See State v. McCombs, 81 N.J. 373, 375 (1979). The State may thus perform criminal-history checks on potential jurors at that time — if it performs them reasonably. See N.J.S.A. 2A:158-5 (stating prosecutors must use all reasonable diligence in detecting and convicting criminal offenders).

The remaining question is the more salient one: what procedures for performing the checks will best serve the fair administration of justice? A rational assessment of the competing interests at work should recognize that reasonably performing such checks may serve valid prosecutorial purposes – purposes which should play a cardinal role in fashioning a solution that fits the problem. Three such purposes stand out.

To start, running criminal-record checks in this context will serve the public interest by rooting out potential jurors who are reasonably suspected of having disqualifying indictable convictions. The Legislature found such people ineligible for service, N.J.S.A. 2B:20-1(e), given "[t]he very real potential for bias by convicted criminals against law enforcement officers and the criminal justice system[]." Sponsor's Statement to S. 264, 2 (L. 1997, c. 127). This is of special concern because of the sheer number of ineligible residents that the judiciary may summon for jury service: in 2018 alone, 146,300 New Jerseyans

were on probation or parole. See L. Maruschak & T. Minton, U.S. Dep't of Justice, Bureau of Justice Statistics, Correctional Populations in the United States, 2017-2018 (rev. Aug. 2020), available at https://www.bjs.gov/content/pub/pdf/cpus1718.pdf.

Because the prosecutor "is a constitutional officer representing the sovereign power of the people of the State," State v. DiPaglia, 64 N.J. 288, 297 (1974), she should be able to reasonably help courts protect the case from what the Legislature found to be an unjustified threat to the truth-seeking process. See N.J. Const. art. IV, § VII, ¶ 9 (authorizing the Legislature to pass laws having to do with "[s]electing, summoning or empaneling grand or petit jurors.")

Next, performing criminal-record checks on potential jurors might be useful to reveal whether, unbeknownst to the parties, someone has been untruthful in their questionnaire or during voir dire. For example, a defendant would want to know whether a potential juror was the victim of a hate crime before that juror judges his guilt of the same crime, for fear that the juror's own experience might poison his ability to be fair. For the same reason, a prosecutor must know whether a juror was convicted of a hate crime before she tries to convince that juror beyond a reasonable doubt that the defendant is guilty of a similar hate crime of which the juror was convicted.

Anything but full candor in that context might blemish the jury's impartiality. See Foster v. Chatman, __ U.S. __, 136 S. Ct. 1737, 1751 (2016) ("We have no quarrel with the State's

general assertion that it could not trust someone who gave materially untruthful answers on voir dire.”). Counsel on both sides of the table have a heavy interest in choosing jurors able to faithfully seek the truth. The parties are unlikely to realize that interest if a juror is untruthful, but they do not know it.

At the same time, because “it is as much the prosecutor’s duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one,” State v. McNeill-Thomas, 238 N.J. 256, 275 (2019), the Attorney General has a paramount interest in thwarting all impermissible juror-removal requests based on group affiliation. That aim may be advanced, and thus concerns about pretextual juror-removal requests assuaged, if the State shares potential jurors’ criminal-record information with the defense and the court. That way, judges will be in a better position to decide whether lawyers are making juror-removal requests for race-neutral reasons (such as a criminal conviction or an untruthful response to a materially important juror-qualification question), rather than for discriminatory reasons.

A recent statewide survey of prosecutors revealed that record checks of jurors is a rare occurrence. Still, the Court has an interest in confirming that all record checks are conducted in a nondiscriminatory way. One such way is by providing guidance and criteria that will prevent the parties from slipping into potentially dangerous areas in future cases.

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Drawing on principles laid down by this and other courts, the Attorney General recommends the following set of best practices.

1. Before empanelment, if the State reasonably believes that a potential juror has a disqualifying conviction or has been untruthful with the court, judges should permit prosecutors to use government databases to access that juror's criminal-record information. Prosecutors, if challenged, must be able to articulate a legitimate, good-faith belief why a criminal-record check is needed under the totality of the circumstances – mere hunches that a potential juror is being dishonest with the court or may have been convicted of a disqualifying offense should not be enough. This approach dovetails with the Court's acknowledgement that jurors sometimes fail to disclose important facts during voir dire. See State v. Thompson, 224 N.J. 324, 336 (2016) ("Juror Jn was dismissed because during voir dire he provided a 'deliberately misleading' statement that neither he nor any member of his family had ever been charged with an offense. In actuality, the prosecutor was aware, and the juror subsequently admitted, that he and his brothers were facing assault charges in Essex County at the time of trial."); State v. Loftin, 146 N.J. 295, 340 (1996) ("Defendant points to jurors who failed to disclose criminal backgrounds; however, those jurors were all questioned at sidebar, in an individualized manner, yet still failed to disclose the information.").

2. Like in the Batson/Gilmore context, criminal-record checks on potential jurors should be allowed when prosecutors,

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if challenged, can "articulate some legitimate, nondiscriminatory reason" justifying one. See State v. Gilmore, 103 N.J. 508, 534 n.7 (1986) (describing the burden-shifting standard applying to potentially discriminatory peremptory challenges). Checks might be justified if judges, prosecutors, or defense counsel have reliable information that a potential juror is being untruthful with the court or was convicted of a disqualifying offense.

3. For instance, a prosecutor in a particular county may have experience with a potential juror from a prior case generating a legitimate, good-faith suspicion that the juror lied about his criminal history on his questionnaire or during voir dire. Likewise, the parties – who have the feel of the case – may reasonably take a juror's equivocation or evasiveness about his criminal past during voir dire to mean that he is being dishonest with the court, justifying a record check.

4. Take one more example identifying circumstances under which criminal-record checks may be warranted. A prosecutor could articulate a legitimate reason to perform such a record check if, after speaking with colleagues, the prosecutor learns that the juror was just convicted of an indictable offense, yet the judiciary sent out the juror's summons before entering the judgment of conviction into its system. If that ineligible juror – who likely already submitted his questionnaire to the court – does not disclose the conviction during voir dire, the judge would not know about it. Yet a record check would reveal

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it, averting later problems. See N.J.S.A. 2B:20-1(e).

5. Prosecutors in this context should never check potential jurors' criminal histories just because they deny having been arrested, charged with a crime, or convicted of a crime. Such a misplaced exercise of prosecutorial discretion would contravene not only Batson and Gilmore's bar on arbitrary state action, but the ethical rules incorporating those cases' prohibitions.

To appreciate why that process would be unwise, take an analogy based on Fourth Amendment law. One court said, "[a] refusal to consent to a search cannot itself form the basis for reasonable suspicion." United States v. Santos, 405 F.3d 1120, 1125 (10th Cir. 2005). Were that not true, the reasonable-suspicion requirement would be easily circumventable. That principle applies with force here. Apart from undercutting the judicious approach the Attorney General recommends, it would be rather imprudent under the framework Batson and Gilmore established (requiring a legitimate and genuine reason for certain state action during jury selection) to suggest that a juror's mere denial of a criminal past justifies a criminal-record check. For many, if not most, jurors have no criminal past. So basing record checks on their assertions to that effect would make no more sense than the police basing their criminal suspicions on a refusal to grant consent by a person who is presumed innocent. Such a rule would not fit with this Court's caselaw, nor would it advance the nondiscriminatory administration of justice.

6. The State should not perform criminal-record checks on everyone in the jury pool. That would be infeasible because prosecutors' offices have neither the time nor the resources to perform checks on that mass scale. Rather, prosecutors should only run the checks when they can (if challenged) reasonably articulate a legitimate, good-faith belief that a juror is being dishonest with the court or has a disqualifying conviction. Blanket searches would needlessly sacrifice jurors' valuable time, inappropriately presume their untruthfulness, and cut against longstanding policies strictly regulating the dissemination of criminal-history information.

7. The State should promptly turn over jurors' criminal-history records to the defense and trial court. (The inverse is true if the defense acquires the records – licensed attorneys may request criminal-history records for use in contested, docketed matters in state court under N.J.A.C. 13:59-1.2(a)(3)). The open-file approach that applies generally to discovery should apply here unless safety concerns demand otherwise.

8. After empanelment, if relevant circumstances arise that raise questions about a juror's candor to the court or suggest that a juror may have a disqualifying conviction, the trial court should reasonably exercise its discretion to permit a criminal-record check and to turn over the results to the parties and the court. After the jury is sworn, the parties should have to obtain permission from the trial court to perform any criminal-record checks on jurors.

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9. When requested, trial courts (which are "criminal justice agencies" under N.J.A.C. 13:59-1.1) should be encouraged to perform criminal-record checks on potential jurors to temper concerns about unevenness in access. This will in turn protect from the mere partial disclosure of relevant information, whether inadvertent or intentional. That added prophylaxis would neither be "unduly burdensome nor time consuming" and would benefit the parties and the public. See Hampton, 928 N.E.2d at 930.

10. All parties and the trial courts should take care to keep potential jurors from learning that a party has performed a criminal-record check. Potential jurors need only be generally instructed that their answers might be subject to verification, to encourage candidness about relevant but potentially embarrassing information. Running the checks need not be a shadowy act; it should be transparent and discussed on the record – but for this single aspect. For if jurors learn that the prosecutor could always scrutinize their criminal backgrounds at will, future jurors may be intimidated. But there is little reason to believe that will happen if the parties and the trial courts are circumspect in their approach and say only that the court may verify any answers jurors provide on a questionnaire or during voir dire.

11. Even so, before a trial court excuses a potential juror because of a disqualifying conviction, or because of a materially misleading statement, the court should give the juror

a chance to privately explain whether that is in fact the case. No mention need be made, by anyone, of the criminal-record check. Judges should ask the potential juror relevant, clarifying questions at sidebar to determine whether the juror is ineligible or unfit to serve because of disqualifying convictions or deceptive statements made to the court.

Aside from increasing generally the odds that judges will empanel fair and impartial juries, these procedures will advance key interests vital to the equal administration of justice.

First is increasing the probability that judges do not empanel statutorily ineligible residents. The harm that may otherwise follow might be considerable. Consider an example to understand why. Suppose that a defendant stands accused of bias intimidation for allegedly targeting an African American resident. In that event, the fair administration of justice would favor making certain that no prospective juror was ever convicted of a similar crime himself – for example, terroristic threats made simply because of a victim's skin color. Because "[b]ias incidents are increasing throughout the State and the nation," prosecuting crimes with a component of intimidation based on race is a priority for the Attorney General. See Attorney General's Bias Incident Investigation Standards (Apr. 5, 2019). It would be more than a little incongruous to suggest that the Attorney General cannot access potential jurors' criminal records under any circumstance because of equal-protection concerns when he may need such access to carry out

his paramount responsibility of safeguarding the rights of those New Jerseyans who most need the equal protection of the law.

Second is minimizing the likelihood that potential jurors will be reluctant to serve for fear of having their criminal histories checked. While criminal records are not entitled to privacy protection because the public has the right to access them, see Doe v. Poritz, 142 N.J. 1, 79 (1995), jurors may (once again) be less willing to serve in the future if they learn that the attorneys and the court will inspect their criminal records at will. Of course, such an "invasion" of jurors' privacy is no more intrusive than if judges ask them questions about their criminal history during jury selection, if the jurors are not told of the record checks. One is just a verification of the other. If judges must ask jurors about their criminal past to determine their eligibility to serve, then the parties should not be barred from reasonably verifying that information. After all, if jurors cannot expect their conviction records to remain private, then they should not expect to keep private their misleading statements about their criminal records.

Third is screening out potential jurors who intentionally mislead the court about their criminal histories or other material facts on their questionnaires or during voir dire. If a juror conceals information that would keep him off a jury, or lies to improve his chances of serving, he "introduces destructive uncertainties into the process . . . [for] a perjured juror is unfit to serve even in the absence of . . .

vindictive bias." See Green v. White, 232 F.3d 671, 677 (9th Cir. 2000) ("How does someone who herself does not comply with the duty to tell the truth stand in judgment of other people's veracity?" (citations omitted)). Such a person may poison a trial, forcing a do-over. See Warger v. Shauers, 574 U.S. 40, 43 (2014) (unanimously reaffirming that "[i]f a juror was dishonest during voir dire and an honest response would have provided a valid basis to challenge that juror for cause, the verdict must be invalidated."). Thus, if a verdict must be reversed because a juror deceitfully says that he has not been convicted of a crime, the interests of justice are best served by keeping that from happening in the first place.[1]

Fourth is preempting undesirable gamesmanship by requiring, in all events, judicial approval for juror criminal-record checks after empanelment. Attorneys naturally vie for competitive advantages during the heated and unpredictable atmosphere of trial. Because the temptation to seek a juror's removal may arise if their case is breaking down, leading them to launch a criminal-record check for the wrong reasons, trial courts should exercise care in deciding whether such a check is justified once the jury is sworn.

Fifth is promoting transparency by showing that when the

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[1] One research psychologist estimated that between 15 and 18 percent of potential jurors that courts summon for service "have a biased mindset and actively seek out jury service as a way to comment on or influence a trial." Molly McDonough, Rogue Jurors, ABA Journal (Oct. 24, 2006), https://www.abajournal.com/magazine/article/rogue_jurors/

State uses a peremptory challenge or seeks to remove a juror for cause, it does so for reasons unrelated to race or other group affiliations. Criminal convictions that make residents ineligible for jury service are, of course, race-neutral. But without the judicious use of criminal background checks, it may appear that the prosecutor is racially discriminating when challenging a prospective juror.

Imagine, for instance, that a prosecutor uses a peremptory challenge to remove a minority juror. The defendant asserts that the challenge was race-based. The prosecutor, citing past knowledge about the juror, replies that the juror is ineligible to serve because he was recently convicted of a crime. If the prosecutor then produces the juror's criminal-record information, and it supports her point, then the court will likely view the challenge as valid. If the prosecutor does the same thing, but the records reveal nothing, then the court might find that the challenge was discriminatory, and the State may have an equal-protection problem to contend with. Transparency will therefore be enhanced.

Sixth is leaving in place the judiciary's supervisory powers over jury selection. See In re Supervision & Assignment of Petit Jury Panels, 60 N.J. 554, 559-60 (1972). Performing criminal-record checks on jurors will not impermissibly infringe on those powers if the process's contours are defined so that the potential for misuse is deadened. Because judges – under these procedures – would have the same juror criminal-record

information that the State has, the risk of damaging the integrity of the jury-selection system would be slim.

Seventh, and last, is preventing unnecessary and costly post-verdict litigation. Even if a sworn juror gives an untruthful answer during voir dire for a benign reason, that untruth could later endanger the verdict. For example, jurors may be untruthful because they have forgotten about past criminal incidents, or they misunderstood the question, or they just felt too embarrassed to answer honestly. Because these jurors' inaccurate responses do not stem from a lack of honesty, they may not affect their impartiality, yet they could still lead to protracted post-verdict litigation. Indeed, this has happened around the country. See McDonough, supra (listing cases); Stacy St. Clair et al., With No Background Checks for Jurors, Cellini Conviction Shaky, Chi. Trib. (Nov. 12, 2011), https://www.chicagotribune.com/news/ct-xpm-2011-11-12-ct-met-cellini-juror-1113-20111112-story.html (noting frustration of attorneys and public that federal appeals court might overturn high-profile conviction, and thus taxpayers might have to foot bill for second trial, because sworn juror concealed two disqualifying convictions, even though court had procedure in place to prevent such missteps). If the Court were to permit criminal-record checks under reasonable conditions, less-than-candid jurors – or jurors who mistakenly think they are eligible for service – are more likely to be weeded out, and with them, costly and time-consuming post-verdict litigation.

These principles show that procedures like those suggested here would propel forward the fair and equal administration of justice for all residents.

One related (and final) point: if these policies reasonably advance legitimate interests, then courts should not slow down the process by withholding from the prosecution altogether potential jurors' birthdates and addresses. Rather, courts should carefully disseminate that information to the State and the defense case-by-case for good cause shown.

In re State ex rel. Essex County Prosecutor's Office, 427 N.J. Super. 1 (Law Div. 2012), makes a rational case against the categorical dissemination of jurors' criminal-record information to the State alone. Yet its rationales do not rule out the dissemination of such information within reasonable limits. Indeed, the approach taken by that case harmonizes with that of the procedures advanced here. See id. at 18-26 (finding that courts should distribute juror questionnaires with "deep caution" because doing so implicates defendants' due-process rights and jurors' privacy rights; arguing for judicial oversight over juror-qualification process).

Even though the prosecution may find a juror's profile in a government database without a birthdate or address, that search would entail a narrowing-down of potential people in the juror's municipality, which might be too time-consuming, doing more harm than good to the efficient selection of a jury. And if the State can articulate a legitimate, good-faith belief warranting

a criminal-history check, and it shares all the information with the defense and court, that should diminish concerns about due-process problems or inadequate judicial oversight. And post-empanelment, the judge's discretion will carefully circumscribe the parties' ability to perform such checks using personal identifiers, curbing the potential for abuse.

That said, the Law Division's analysis rested on an incorrect premise. It does not follow from this Court's caselaw that jurors have much, if any, right of privacy in their birthdates or addresses. See id. at 18-20. Doe rejected plaintiff's claim that he had an "expectation of privacy in the information disclosed under the Registration Law[,]" which included his birthdate and address. 142 N.J. at 78-79, 115. The Court reasoned that because public records (such as DMV and tax records) contain the information disclosed under the Registration Law, and because New Jersey guarantees public access to those records, disclosure of the information in the records did not implicate plaintiff's right of privacy. Id. at 79. This Court never mentioned plaintiff's obligation to register as a sex offender in disposing of his claim, so his privacy interest in no way hinged on that fact. Id. at 78-81.

Likewise, since jurors' birthdates and addresses are freely available in public records, they cannot reasonably expect such information to remain private. While the "right to privacy includes 'the right to be free from the government disclosing private facts about its citizens,'" it has never included the

right to be free from the government disclosing public facts about its citizens. See In re State, 427 N.J. Super. at 18 (quoting Doe, 142 N.J. at 77). But even if jurors have some slight privacy interest in such information, the public's overriding interest in empaneling juries made up of truthful and eligible residents may demand its disclosure. That might be true when the totality of the circumstances reasonably suggest that a juror has not been fully candid about a fact bearing on his eligibility or fitness to serve.

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CONCLUSION

For these reasons, the Attorney General urges the Court to allow the parties and trial judges to check jurors' criminal histories under appropriate case-specific circumstances, but to do so in a way that protects the rights of defendants and jurors to be free from discrimination.

Respectfully submitted,

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