

SUPREME COURT OF NEW JERSEY
DOCKET NO. 084167

STATE OF NEW JERSEY,

Plaintiff-Petitioner,

v.

EDWIN ANDUJAR,

Defendant-Respondent.

CRIMINAL ACTION

On Appeal From:
Superior Court of New Jersey
Appellate Division
Docket No. A-0930-17T1

SAT BELOW:

Hon. Ellen L. Koblitz, J.A.D.
Hon. Mary Gibbons Whipple, J.A.D.
Hon. Hany A. Mawla, J.A.D.

BRIEF OF AMICUS CURIAE
SETON HALL UNIVERSITY SCHOOL OF LAW CENTER FOR SOCIAL JUSTICE
In Support of Defendant-Respondent

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

STATEMENT OF INTEREST OF AMICUS CURIAE.....1

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY.....2

PRELIMINARY STATEMENT.....2

LEGAL ARGUMENT.....4

I. State v. Gilmore Prohibits the State’s Discriminatory Use of Background Checks to Exclude Prospective Jurors.....4

 A. The Principles Underlying Gilmore Apply Broadly to Background Checks Conducted on Prospective Jurors.....4

 B. The State Violated Gilmore by Conducting a Background Check Simply Because a Prospective Black Juror Lived in a High-Crime Neighborhood, Thus His Friends and Family Had Contact with the Criminal Justice System.....14

 1. Step One: Andujar Has Established a Prima Facie Case of Discrimination.....17

 2. Step Two: The State Has Failed to Provide a Valid Race-Neutral Explanation for its Conduct.....20

 3. Step Three: If This Court Reaches the Question, Andujar Has Met His Burden Under Step Three of Gilmore to Show that F.G.’s Exclusion Was Tainted by Racially Biased Presumptions.....23

 C. Implicit Bias Is a Form of Racially Disparate Treatment that Violates Gilmore and its Representative Cross-Section Rule.....24

 D. In the Alternative, Even if the Constitution Did Not Reach Implicit Bias, Fundamental Fairness Prohibits the State’s Conduct in this Case, Resulting in Unfairness and Grossly Disparate Racial Impact.....32

II. New Jersey's Administrative Code Authorizes Background Checks on Prospective Jurors Only Subject to Strict Requirements, Including Judicial Approval, Which Were Not Satisfied Here.....37

 A. Attorneys Are Authorized to Conduct Background Checks on Prospective Jurors in Contested Court Matters Under N.J.A.C. 13:59-1.2 for "Noncriminal Justice Purposes," But Only Under Strict Requirements Not Satisfied Here.....39

 B. Criminal Background Checks on Prospective Jurors Are Not Authorized Under N.J.A.C. 13:59-2.1 to 2.4 for Criminal Justice Purposes.....43

III. This Court Should Exercise its Inherent Judicial Authority to Enact Rules that Protect Against Systemic Racism in the Jury Selection Process.....48

 A. This Court Should Adopt Washington State's Rules for Identifying and Preventing Implicit Bias in Jury Selection.....50

 B. This Court Should Exercise its Inherent Authority to Limit the Circumstances Under Which the State is Permitted to Conduct Background Checks on Prospective Jurors.....59

CONCLUSION.....65

TABLE OF AUTHORITIES

Cases

Batson v. Kentucky, 476 U.S. 79 (1986).....4, 6

Bostock v. Clayton Cty., 590 U.S. ___, 140 S. Ct. 1731
(2020).....27

Clifford v. State, 61 N.J.L. 217 (N.J. 1897).....62

Doe v. Poritz, 142 N.J. 1 (1995).....33, 34 61

Flowers v. Mississippi, ___ U.S. ___, 139 S. Ct. 2228 (2019)6, 12

In re Essex Cty. Prosecutor’s Office, 427 N.J. Super. 1 (Law
Div. 2012).....*passim*

In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 415 (2004).46

In the Matter of Lyndon Johnson, City of Long Branch Police
Department, 2017 N.J. AGEN LEXIS 660 (July 10, 2017)..46, 47

Kellam v. Feliciano, 376 N.J. Super. 580 (App. Div. 2005).....35

Oberhand v. Dir. Div. of Taxation, 193 N.J. 558 (2008).....33

Russell v. Rutgers Community Health Plan, Inc., 280 N.J. Super.
445 (App. Div. 1995).....19, 20

State v. Abbati, 99 N.J. 418 (1985).....49

State v. Andujar, 462 N.J. Super. 537 (App. Div. 2020).....*passim*

State v. Chevalier, 340 N.J. Super. 339 (App. Div. 2001).....22

State v. Clark, 316 N.J. Super. 462 (App. Div. 1998).....22

State v. Delgado, 188 N.J. 48 (2006).....49

State ex rel W.C., 85 N.J. 218 (1981).....49

State v. Gilliam, 224 N.J. Super. 759 (App. Div. 1988).....21

State v. Gilmore, 103 N.J. 508 (1986).....*passim*

Cases, cont'd

State v. Miller, 216 N.J. 40 (2013).....33
State v. Osorio, 199 N.J. 486 (2009).....*passim*
State v. Porter, 460 P.3d 1276 (Ariz. Ct. App. 2020).....55
State v. Pruitt, 430 N.J. Super. 261 (App. Div. 2013).....19
State v. Pruitt, 438 N.J. Super. 337 (App. Div. 2014).....10
State v. Saintcalle, 309 P.3d 326 (Wash. 2013).....*passim*
State v. Thompson, 224 N.J. 324 (2016).....17, 20, 21, 24
State v. Veal, 930 N.W.2d 310 (Iowa 2019).....54
State v. Zellers, 7 N.J.L. 220 (N.J. 1824).....62
United States v. Jones, 332 F. App'x 767 (3d Cir. 2009).....4
Zaccardi v. Becker, 88 N.J. 245 (1982).....49

Statutes and Constitutional Provisions

N.J.A.C. 13:59-1.1 to 2.4.....*passim*
N.J. Const. art. I, ¶¶ 5, 9, 10.....*passim*
N.J.S.A. 2B:20-1(e).....19
R. 1:8-3.....62
R. 2.1, cmt. 1, 3.....53
Wash. G.R. 37.....*passim*
15 U.S.C. § 1681b(b) (3).....43

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Ashley Nellis, The Color of Justice: Racial and Ethnic Disparity in State Prisons, The Sentencing Project (June 2016), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>.....36-37

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Letter from Stuart Rabner, Chief Justice, Supreme Court of N.J., to John F. Kelly, Sec'y, Dep't of Homeland Sec., (Apr. 19, 2017).....65

N.J. Judiciary, Commitment to Eliminating Barriers to Equal Justice: Immediate Action Items and Ongoing Efforts (June 5, 2020), <https://njcourts.gov/public/assets/supremecourtactionplan.pdf>.....51

The Ohio State University Kirwan Institute for the Study of Race and Ethnicity, Understanding Implicit Bias, State of the Science: Implicit Bias Review 2015, <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>.....28

William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977).....58

STATEMENT OF INTEREST OF AMICUS CURIAE

Seton Hall University School of Law's Center for Social Justice ("CSJ") respectfully submits this amicus brief to help inform the Court about important matters of public interest concerning racial bias in the jury selection process, arguing for a broad understanding of systemic racism under State v. Gilmore, 103 N.J. 508 (1986), and urging the Court to adopt Washington State's approach to such bias, enacting rules to combat implicit bias in jury selection in New Jersey.

Seton Hall University School of Law is dedicated to providing a quality legal education while fostering personal and social values of integrity, loyalty, and engagement with the needs of its community. Its commitment to service and to aiding the public interest is demonstrated most notably through its support of the CSJ, which houses the law school's clinical programs.¹ The CSJ is both a state-certified legal services program and a clinical legal education program in which law students and professors work together on issues of public interest affecting the poor, minority groups, and other disempowered members of society. The CSJ provides free legal representation for hundreds of indigent citizens of New Jersey and neighboring states each year, and has

¹ The CSJ expresses its gratitude to law students Louis Dodge, Franziska Mangot, and Avi Muller. Each is a Seton Hall Law student enrolled in the CSJ's Impact Litigation Clinic. These students drafted this amicus brief under Professor Romberg's supervision.

regularly provided pro bono and amicus representation to inmates and criminal defendants, including in this Court.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For the purposes of this proceeding, amicus accepts the facts and procedural history as recounted in the filings of Defendant-Respondent Edwin Andujar, and the consistent statements of the Appellate Division. See State v. Andujar, 462 N.J. Super. 537 (App. Div. 2020).

PRELIMINARY STATEMENT

The State's criminal background check on F.G. and use of the information therein to make F.G. unable to serve on the jury in this case violate State v. Gilmore, 103 N.J. 508 (1986). As Point I.A. explains, such conduct is subject to review under Gilmore and the broad principles animating that case prohibiting biased group presumptions and requiring that New Jersey juries reflect a representative cross-section of the community. The State's conduct here violates Gilmore because it was motivated by a biased group presumption, a belief that F.G. was properly treated differently than other jurors because, as is typical of those residing in high-crime neighborhoods composed largely of minority citizens, his friends and relatives had significant contact with the criminal justice system, rather than any fact related to F.G. as an individual. See Point I.B. This sort of biased group presumption is best understood as implicit bias in violation of

Gilmore. See Point I.C. In the alternative, the State's conduct violates the fundamental fairness doctrine. See Point I.D.

Furthermore, the State's background check was not authorized under the relevant provisions of the New Jersey Administrative Code. The Code authorizes background checks conducted by attorneys in contested legal matters, but such "noncriminal justice" background checks are only permitted pursuant to strict requirements not satisfied here. See Point II.A. The Code does not authorize background checks of prospective jurors for "criminal justice" purposes, which are limited to checks of criminal suspects or defendants, or at most to further a criminal investigation, not to background checks of prospective jurors in trials that happen to be criminal. See Point II.B.

Finally, to protect against presumed group bias in future cases, amicus respectfully suggests that this Court follow the approach of the Washington State Supreme Court in State v. Saintcalle, 309 P.3d 326, 339 (Wash. 2013), enacting rules governing jury selection similar to the procedural safeguards set forth in Wash. G.R. 37. See Point III.A. And this Court should employ its inherent authority to require judicial approval of background checks of prospective jurors. See Point III.B.

LEGAL ARGUMENT

I. State v. Gilmore Prohibits the State's Discriminatory Use of Background Checks to Exclude Prospective Jurors.

A. The Principles Underlying Gilmore Apply Broadly to Background Checks Conducted on Prospective Jurors

The fundamental principles guarding against racial discrimination in jury composition recognized under the federal and New Jersey Constitutions by Batson v. Kentucky, 476 U.S. 79 (1986), and State v. Gilmore, 103 N.J. 508 (1986), respectively, apply broadly to criminal background checks conducted on prospective jurors, as in this case. Although the State does not contest Gilmore's applicability in this case, see Br. for Pl.-Resp't at 30, State v. Andujar, 462 N.J. Super. 537. (App. Div. 2020) (No. A-0930-17T1) [hereinafter "State's App. Div. Br."], amicus Seton Hall Law CSJ respectfully suggests that this Court overtly recognize that Gilmore reaches beyond the peremptory challenge context and protects against racially discriminatory background checks conducted on prospective jurors.

This Court should reject the reasoning of United States v. Jones, 332 F. App'x 767, 769 (3d Cir. 2009) ("[T]he principles of [Batson] apply only to peremptory strikes.") (non-precedential opinion), which would improperly limit review to peremptory challenges, a mistakenly narrow interpretation of the federal Constitution and, in any event, a patently improper application of this Court's interpretation of New Jersey's Constitution. The

reasons why Gilmore applies here, as this Point explains, also illuminate why Gilmore prohibits the State's conduct in this case, as explained in Points I.B. and I.C., below.

If the State were permitted to engage in discriminatory background checks to exclude jurors, free from the restrictions of Gilmore, such a practice could dramatically affect the racial composition of New Jersey's juries. Accordingly, this case warrants the Court's overt recognition that Gilmore's fundamental protections against racial discrimination extend to all discriminatory actions in the jury selection process, whether through peremptory challenge, for cause challenge, or the State's conduct that could otherwise serve to make a juror unavailable, including but not limited to background checks.

First, even under the narrower protections of the federal Constitution, Batson guards against discriminatory background checks that could serve to exclude prospective jurors. That principle applies even when, as here, the State excludes the juror by making the juror unavailable to serve using information gained in a discriminatory background check, or through for cause challenge, rather than by exercising a peremptory challenge. Though prior cases in the Batson line have involved peremptory strikes as the mechanism by which discrimination has tainted jury selection, the reasoning in those decisions applies fully to other discriminatory conduct resulting in a juror's exclusion.

Batson, 476 U.S. at 86, recognized that a defendant has “the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria.” The federal Equal Protection Clause “guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race . . . or on the false assumption that members of his race as a group are not qualified to serve as jurors.” Ibid. (citations omitted).

More recently, in Flowers v. Mississippi, __ U.S. __, 139 S. Ct. 2228 (2019), the Court observed that it was “break[ing] no new legal ground,” id. at 2235, in concluding that, under Batson, “disparate questioning and investigation of prospective jurors on the basis of race can arm a prosecutor with seemingly race-neutral reasons to strike the prospective jurors of a particular race,” id. at 2248. Although disparate investigation alone does not itself constitute a Batson violation, when considered along with other evidence, disparate investigation can “inform the trial court’s evaluation of whether discrimination occurred.” Ibid.

In Flowers, the Court explained that a prosecutor’s racially uneven questioning and investigation of jurors “can itself be evidence of the prosecutor’s objective as much as it is of the actual qualifications of the black and white prospective jurors who are struck or seated.” Ibid. As Flowers demonstrates, Batson protects not merely against the act of making a biased peremptory strike, but also against biased investigation and inquiry into a

prospective juror that later manifests itself in a jury tainted by improper racial assumptions and biases.

Even if federal protections were thought limited to juror exclusion through racially motivated peremptory challenges, New Jersey's Constitution protects more broadly. While the federal Constitution provides a substantial "floor of minimum constitutional protection" for protections against race-based juror exclusion, Gilmore, 103 N.J. at 524, this Court has recognized that the New Jersey Constitution, independent of Batson, confers even broader protections against jury pools tainted by racial bias, id. at 543-44. Our Constitution prohibits the State from taking actions, through peremptory challenge or otherwise, that are motivated by racial biases and assumptions that result in a jury that fails to represent a fair racial cross-section of New Jersey's citizens. Id. at 526.

As this Court recognized in Gilmore, jury selection "must be so designed as to insure that juries are impartially drawn from community cross-sections." Ibid. (citation omitted). This 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." Ibid. Thus, this Court has already specifically recognized in Gilmore that New Jersey's constitutional protections are not limited to peremptory

challenges, but instead reach all biased conduct that tends to result in a tainted jury.

The State characterizes F.G.'s exclusion as a for cause challenge, State's App. Div. Br. at 18, which would mean that its conduct is unquestionably subject to Gilmore. It is more accurate, however, to say that F.G. was not on the jury because the state intentionally took actions that made F.G. unavailable for jury service; the trial court had denied a for cause challenge just a day earlier on the same grounds the State used to justify its background check. But for its biased background check, the State would have been unable to exclude F.G. from the jury.

This Court has construed Article I, Paragraphs 5, 9, and 10 of the New Jersey Constitution to protect three core interests: a defendant's right to a fair and impartial jury; the legitimization of the judicial process through representative juror participation; and the creation of a record permitting judicial assessment of allegedly discriminatory jury selection techniques. See Gilmore, 103 N.J. at 522-24. As explained below, each of these interests demonstrates that discriminatory background checks conducted on prospective jurors for exclusionary purposes are subject to, and violative of, the New Jersey Constitution.

First, and most obviously, defendants have a right to an impartial jury, which "entails the right to trial by a jury drawn from a representative cross-section of the community." Gilmore,

103 N.J. at 524. Thus, any practices that result in a jury not drawn from a fair cross-section of the community, or that otherwise impair a jury's impartiality, violate the defendant's rights under Article 1, Paragraph 10 of the New Jersey Constitution.

Second, in New Jersey, the right to "a jury drawn from a representative cross-section of the community," ibid., is broader than the federal Constitution's protections because it does not exclusively belong to the criminal defendant who has been subjected to an improperly composed jury. That right also belongs to those potential jury members improperly subject to exclusion through discriminatory biases and assumptions, see id. at 525 (noting that the state Constitution "implicates not only the defendant's civil rights but also those of citizens generally . . . to participate in the administration of justice by serving on grand and petit juries").

The right to an impartial jury drawn from a representative cross-section of the community also belongs to members of the community as a whole, whose confidence in the judicial system is undermined by both the reality and the perception that it is tainted by systemic racial bias. See ibid. (noting that the representative cross-section rule "enhances the legitimacy of the judicial process in the eyes of the public by . . . legitimating the judgments of the courts, promoting citizen participation in government, and preventing further stigmatization of minority

groups”) (internal quotation omitted).

The “main point of the representative cross-section rule 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 (quoting People v. Wheeler, 583 P.2d 748, 761 (Cal. 1980)). Absent the protection of the representative cross-section rule, the jury risks being “dominated by the conscious or unconscious prejudices of the majority.” Id. at 531 (quoting Wheeler, 583 P.2d at 761). If jurors are disparately investigated and excluded, the diverse values, beliefs, and experiences that the case law stresses are so valuable to jury impartiality will be foreclosed.

The third reason Gilmore warrants judicial supervision over background checks on prospective jurors is to ensure that the trial judge assesses the propriety of the State’s proposed conduct before it occurs. Gilmore establishes the trial court’s gatekeeper function when a defendant asserts that jurors have been impermissibly excluded. Id. at 535; see also State v. Osorio, 199 N.J. 486, 501 (2009). The trial court as gatekeeper can both prevent a problem before it occurs and create a record at the trial level to ensure effective appellate review. See, e.g., State v. Pruitt, 438 N.J. Super. 337, 342 (App. Div. 2014) (“The trial court must make specific findings as to each allegedly improper challenge, to determine whether the State’s explanation is

relevant to the specific case, and whether there is any evidence that the explanation is nonetheless apparently pretextual.”). By facilitating the development of a contemporaneous record prior to any effect on the jury’s composition, Gilmore ensures that trial and appellate courts are not put in the position of deciding whether and how to undo any harm that may have occurred. The trial judge is best positioned to assess each party’s credibility and any facts related to the individual juror, ruling based on the best evidence available at the time while developing a record that facilitates further judicial review.

Under the New Jersey Constitution, all defendants are entitled to an impartial jury comprised of a representative cross-section of the community; all members of the community are entitled to serve on juries composed through processes that are not driven by racially unfair assumptions and biases; and all members of the community are entitled to a judicial system in which they feel welcomed and believe they will be treated fairly. The State’s use of biased background checks on prospective jurors threatens each of these substantive interests.

These considerations apply with full force to background checks undertaken by prosecutors in the course of jury selection.²

² Gilmore scrutiny should occur when a prosecutor seeks to conduct a background check, rather than when the State seeks to use the results of a background check as a basis for a peremptory or for

In this case, the trial judge denied the State's initial for cause motion seeking to strike F.G., holding that F.G.'s voir dire statements did not create any doubt in the judge's mind as to whether F.G. could serve as a fair and impartial juror. State v. Andujar, 462 N.J. Super. 537, 547 (App. Div. 2020).

At that point, the State had remaining peremptory challenges and could have chosen to strike F.G. without cause, id. at 549, subject to assessment under Gilmore, but it did not do so. Instead, it conducted a background check and used the results to make F.G. unavailable to serve on the jury. This suggests a conscious intent to circumvent Gilmore, and in any event, it had that effect; the State avoided exercising a peremptory challenge that would thereby have made its conduct subject to--and highly suspicious under--Batson and Gilmore. Thus, whatever the outer bounds of Gilmore, this case is plainly within its scope.

The practical effect of limiting Gilmore to the peremptory challenge context would be devastating. If the State were allowed

cause challenge. First, even if an unjustified background check turns up nothing problematic for a particular juror, public confidence in the jury system is undermined by biased fishing expeditions. Second, if the State uses the results of an unjustified background check to make a peremptory challenge on a facially neutral basis, that does not whitewash the underlying impropriety. See Flowers, 139 S. Ct. at 2248. And third, as may be true in this case, the background check may reveal a minor bench warrant that would otherwise be highly unlikely to result in arrest, apart from a desire to make the juror unavailable for jury duty, a deeply troubling consequence that would dissuade selective portions of the community from showing up for jury service.

to engage in racially biased background checks without judicial scrutiny, and then use the results of those tainted inquiries to strike jurors for cause or make those jurors unavailable, as here, defendants would be tried by juries "dominated by the conscious or unconscious prejudices of the majority." Gilmore, 103 N.J. at 531 (quoting Wheeler, 583 P.2d at 761).

Finally, by applying Gilmore to the State's request to conduct a background check on prospective jurors, trial courts could prevent the empaneling of a biased jury before trial occurs. Even if the trial judge were ultimately shown to be mistaken about an empaneled juror's impartiality, she would create the type of record Gilmore emphasizes is essential to ensure public confidence in the impartiality of the process and preserve the possibility of meaningful appellate review. Here, the trial court record did not preserve for judicial review the details of the background check, the nature of the warrant pursuant to which F.G. was arrested, or whether that warrant was for an indictable offense that actually would have made F.G. unqualified to serve as a juror.

As the Appellate Division noted, "a more complete record should have been made before the court granted the prosecutor's request to dismiss F.G. for cause. . . . [T]he State should not have undertaken such measures that would render a seated juror unavailable without leave of court." Andujar, 462 N.J. Super. at 555. Timely assessment of background check applications under

Gilmore “will facilitate the development of as complete a record of the circumstances as is feasible, as well as enabl[e] the trial court to make a fairer determination.” Gilmore, 103 N.J. at 535.

B. The State Violated Gilmore by Conducting a Background Check Simply Because a Prospective Black Juror Lived in a High-Crime Neighborhood, Thus His Friends and Family Had Contact with the Criminal Justice System.

As explained in Point I.A., and as the State concedes, the Gilmore framework applies to prohibit racially biased prosecutorial decisions to conduct background checks on prospective jurors. Moreover, as this Point explains, a prima facie inference of discrimination arises under Gilmore when, as here, the State conducts a background check because a prospective juror, as a result of his belonging to the group of those living in a high-crime, largely minority neighborhood, has friends and family who had contact with the criminal justice system, and is familiar with law enforcement terminology, but when there is no plausible, individualized basis to conclude that the prospective juror’s ability to serve as an impartial juror is in any way impaired.³

As this Court recognized in Gilmore, when the State proffers a purportedly race-neutral explanation for treating a Black juror

³ Instead, the State should only be able to run a background check on a prospective juror if the State has, among other things, a plausible, individualized basis for running the check and has received approval from the trial court. See Point III.B.

differently, even if that explanation is ostensibly trial-related because it is directed at the prospective juror as an individual, judicial scrutiny is imperative: If the State's proffered explanation for treating the juror differently would reach virtually every person living in large areas of a city like Newark, the State's explanation and the assumptions on which it is grounded are impermissibly racially tainted and cannot prevail. Gilmore, 103 N.J. at 543 (noting that, in such a case, the State's "alleged [individualized,] trial-related reasons [for treating a prospective juror differently] sweep so broadly as to attenuate their validity [given that, under the State's] assumptions, the exclusion of any and all Blacks living near Newark would be justifiable"). If the State were permitted to operate on such sweeping assumptions that selectively capture a large and not meaningfully differentiated group of Black potential jurors, simply because of where they live, "'valid trial-related reasons' would become so broad as to approximate presumed group bias itself." Gilmore, 103 N.J. at 543.

Here, the State conducted a background check on F.G. because he came from a high-crime community, had friends and family who had contact with the criminal justice system (as victims, defendants, and police officers--collectively suggesting no plausible bias as to law enforcement), and had some familiarity with law enforcement terminology; these facts, as the trial court

concluded, were not a basis to doubt his impartiality or treat him differently than other jury members. The State nonetheless conducted the biased background check, then used the information uncovered to arrest F.G. and thereby make him unable to serve on the jury.

As explained in Point I.A., the State's conduct is subject to review under Gilmore. Gilmore requires a three-step analysis when determining whether the State has engaged in conduct that undermines the jury's composition as a fair cross-representation of New Jersey's citizens. Osorio, 199 N.J. at 492-93. Applied here, (1) Andujar must first make a prima facie case by producing evidence sufficient to draw an inference that the State's decision to conduct the background check was biased, (2) the burden then shifts to the State to provide a race-neutral explanation supporting the background check, and, if it successfully does so, (3) the trial court must then weigh the prima facie case and the proffered explanation to determine, by a preponderance of the evidence, whether the defendant has shown that the background check was conducted on the unconstitutional, impermissible grounds of presumed group bias. See ibid.

As explained in more depth below, given the strong prima facie inference of discrimination, the only serious questions arise under step two, whether the State provided a satisfactory race-neutral explanation and, if so, under step three, whether the

evidence establishes that the background check was conducted on unconstitutionally impermissible grounds.

The Court should, therefore, take one of three possible courses of action. Most appropriately, the Court should conclude that the State's proffered explanation, rather than being race neutral, is necessarily steeped in racially discriminatory group assumptions; no reasonable balancing test would find otherwise. Thus, this Court should hold that the State violated Gilmore, reverse Andujar's conviction, and remand for a new trial.

In the alternative, if this Court were to find the State has met its burden to provide a race-neutral explanation at step two, the Court should either resolve the ultimate question of racial bias on its own or remand for a balancing test under step three of Gilmore. The third possibility, because none of this analysis occurred in the trial court, is that the Court should conclude, as it did in Osorio, 199 N.J. at 508-09, that "the scant record" compels "vacating [D]efendant's convictions and remanding the case for a new trial." At the very least, remand is required so that the trial court may properly conduct the Gilmore analysis in the first instance. See State v. Thompson, 224 N.J. 324, 347 (2016).

1. Step One: Andujar Has Established a Prima Facie Case of Discrimination.

Under the first step of Gilmore, Andujar need only produce "evidence sufficient to draw an inference that discrimination has

occurred.” Osorio, 199 N.J. at 502 (quoting Johnson v. California, 545 U.S. 162, 170 (2005)) (modifying Gilmore to clarify that this standard is not “onerous” and does not require showing that discrimination was “more likely than not” involved). The State’s decision to conduct a background check on F.G., a member of the cognizable group of Black jurors, readily gives rise to this inference: F.G.’s circumstances are not sufficiently trial-related or individualized to him to justify differential treatment. The trial court, however, did not apply Gilmore, instead treating the State’s decision to conduct the background check and use its results to make F.G. unavailable as a fait accompli that it had no power to review or remedy.

Under a proper Gilmore analysis, Andujar satisfied his burden under step one because the State (1) violated N.J.A.C. 13:59-1.1-2.4, the Code provisions that authorize background checks, see Point II, (2) when it only conducted a background check against a Black prospective juror, (3) for highly suspect reasons implicating group bias that the trial court had already determined did not warrant for cause removal.

A single exclusion of a prospective juror can support an inference of discrimination in a context like this. See, e.g., State v. Pruitt, 430 N.J. Super. 261, 272-73 (App. Div. 2013), cert. denied, 221 N.J. 287 (2015); Russell v. Rutgers Community Health Plan, Inc., 280 N.J. Super. 445, 453-54 (App. Div. 1995).

In this case, the inference of improper discriminatory bias is palpable. The State conducted the background check on F.G., and F.G. alone, for his voir dire answers typical of residents of high-crime neighborhoods, see Point I.D., below, despite the trial court having specifically denied for cause removal on precisely those grounds: the trial court, stating that it understood defense counsel's argument that the State's reasons supporting for cause removal would broadly discriminate against Black men from Newark, specifically concluded that F.G.'s voir dire answers "le[ft] no doubt in my mind that [F.G.] . . . would make a fair and impartial juror." Andujar, 462 N.J. Super. at 546-47.⁴

Instead, rather than accepting the trial court's assessment that F.G.'s voir dire answers provided no basis to doubt F.G.'s ability to be an impartial juror, the State not only relied on those answers to conduct the unjustified background check but then used the equivocal information thereby revealed to intentionally make F.G. unavailable to serve on the jury, immediately carrying out the municipal arrest warrant in the courthouse. Andujar, 462

⁴ Moreover, the State's background check showed only an outstanding municipal arrest warrant and two previous arrests. Nothing in the record demonstrates that F.G. was statutorily ineligible to serve for having been convicted of an indictable offense under N.J.S.A. 2B:20-1(e). In fact, the section of the Code restricting an attorney's ability to use the information uncovered by a background check to disqualify a prospective juror, see Point II.A., seems to anticipate this very problem: "A person is presumed innocent of any pending charges or arrests for which there are no final dispositions indicated on the record." N.J.A.C. 13:59-1.6.

N.J. Super. at 547-48.

The State's conduct after running the impermissible background check is also highly revealing and buttresses the State's intent to remove F.G. from the jury, rather than to treat him like any other prospective juror. Rather than confirming that the revealed information related to F.G. as opposed to someone with a similar name, and rather than discussing and attempting to resolve the warrant with F.G., and rather than complying with the other requirements of the Administrative Code authorizing such checks, see Point II, the State arrested F.G. on a municipal warrant, making him unavailable to serve on the jury.

Given this compelling prima facie evidence of bias, the trial court should at least have assumed without deciding that a prima facie case had been established and required the State to present a race-neutral explanation--the "better practice" for New Jersey courts. See, e.g., Thompson, 244 N.J. at 347; Russell, 280 N.J. at 454; State v. Gilliam, 224 N.J. Super. 759, 766 (App. Div. 1988).

2. Step Two: The State Has Failed to Provide a Valid Race-Neutral Explanation for its Conduct.

The State's only argument is that Andujar cannot succeed on a Gilmore challenge to the background check because he failed to establish a prima facie case. State's App. Div. Br. at 35. Because the trial court did not conduct a Gilmore analysis, the

State never provided a race-neutral explanation at step two. This omission resulted in a scant record, requiring a new trial or, at the very least, a remand to develop the record. See Osorio, 199 N.J. at 509 (“[B]ecause the scant record before us does not instill confidence that the trial court properly exercised its discretion . . . 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.”); Thompson, 244 N.J. at 347 (“[A]s a practical matter, the better practice is to allow the State to make a record of its reasons for exercising its peremptory challenges Because this did not occur there was sufficient support for the initial remand ordered by the Appellate Division.”).

The State’s current position--that F.G.’s voir dire answers supported conducting a background check and using the uncovered information to make F.G. unavailable to serve on the jury--effectively serves as the State’s race-neutral explanation at step two of Gilmore. See State’s App. Div. Br. at 35. This explanation, however, is steeped in racially biased assumptions and thus cannot serve as a valid, race-neutral explanation. The trial court found that F.G.’s voir dire answers did not in any way support his for cause removal or raise any basis to doubt F.G.’s ability to serve as an impartial juror. State’s App. Div. Br. at 8; Andujar, 462 N.J. Super. at 546-49.

This purportedly race-neutral explanation is invalid because, as with the presumption rejected in Gilmore, it “sweep[s] so broadly as to attenuate [its] validity” given that it would nearly justify “the exclusion of any and all Blacks living near Newark.” Gilmore, 103 N.J. at 543. As defense counsel pointed out, and the Appellate Division observed, Andujar, 462 N.J. Super. at 546-47, the State’s proffered explanation reflects presumed group bias and thus cannot be a valid, race-neutral explanation. See State v. Chevalier, 340 N.J. Super. 339, 348 (App. Div. 2001); State v. Clark, 316 N.J. Super. 462, 469 (App. Div. 1998).

The State’s reliance on F.G.’s residence in a high-crime, overwhelmingly minority community and his connection to friends and family who had contact with the criminal justice system, is insufficient to justify treating F.G. differently by conducting a background check. The State lacked any basis to “exclu[de] [F.G.] on grounds of situation-specific bias,” Gilmore, 103 N.J. at 541, i.e., on grounds individualized to him, rather than on grounds typical of the group to which he belonged.

The State’s explanation for treating this segment of the population differently from others relies on unfounded and impermissible assumptions. As Gilmore explains, “‘[h]unches,’ ‘gut reactions,’ and ‘seat of the pants instincts’ may be colloquial euphemisms for the very prejudice that constitutes impermissible group bias or invidious discrimination.” Gilmore,

103 N.J. at 539).⁵ The State's intuition that the implications of F.G.'s residence in a high-crime, largely minority neighborhood justified treating him differently than other jurors simply cannot serve as a valid, non-racial explanation under step two of Gilmore. Andujar's conviction should therefore be vacated.

3. Step Three: If This Court Reaches the Question, Andujar Has Met His Burden Under Step Three of Gilmore to Show that F.G.'s Exclusion Was Tainted by Racially Biased Presumptions.

If this Court were to conclude that the State's explanation for its conduct is sufficient to satisfy its burden under step two of Gilmore, the third step requires the Court to weigh the defendant's prima facie case against the State's proffered explanation "to determine whether the defendant has carried the ultimate burden of proving, by a preponderance of the evidence, that the prosecution [acted] on constitutionally impermissible grounds of presumed group bias." Gilmore, 103 N.J. at 539.

Weighing Andujar's prima facie case against the State's explanation, the preponderance of the evidence demonstrates that the State conducted the background check on the impermissible

⁵ This language, in addition to its application in step two of Gilmore, represents Gilmore's recognition that impermissible bias can result from racially disparate treatment, even if instinctual rather than conscious. This biased treatment often arises from prosecutorial assumptions that are insufficiently grounded on the individual characteristics of prospective jurors and instead turn on assumptions about group characteristics that are unduly tethered to racial bias. See Point I.C., below.

grounds of presumed group bias against typical residents of high-crime, largely minority neighborhoods, rather than on any characteristics specific to F.G. individually. See id. at 508.

This Court could properly so conclude, or it may find that the record is too scant to allow an appellate court to adequately conduct this third step. See Andujar, 462 N.J. Super. at 562-63. This may warrant vacating the conviction and remanding for a new trial, see Osorio, 199 N.J. at 507-09 (vacating conviction and remanding for new trial because the passage of time and the trial court's failure to require the State to place "on the record its non-discriminatory reasons" for its conduct caused the record to be too scant for review), or remanding for the trial court to develop the record and conduct an adequate Gilmore analysis, see Thompson, 224 N.J. at 346-47 (recognizing that the failure of the trial court to require the State to make a record of its reasons is sufficient grounds to support a remand, even though the defendant had not established a prima facie case).

C. Implicit Bias Is a Form of Racially Disparate Treatment that Violates Gilmore and its Representative Cross-Section Rule.

As explained in Point I.B., above, the State's justification for its background check of F.G. in this case both gives rise to a prima facie inference of racially biased treatment under step one of Gilmore and is also not a viable nondiscriminatory explanation for that conduct under step two. The State's

justification for its conduct, while not driven by morally opprobrious racial animus, nonetheless arises from a conscious and intentional view of the class of residents of high-crime, largely minority neighborhoods that is impermissible under this Court's settled Gilmore jurisprudence.

Moreover, this Court should expressly recognize that the sort of biased group assumption at issue in this case is best understood as a form of implicit bias and should hold that such bias violates Gilmore. The State engaged in a conscious and intentional effort to investigate and exclude a Black juror, grounded on improperly biased assumptions about the group to which he belonged rather than on an individualized assessment of that particular juror.

Even though this case fits comfortably within established principles under Gilmore, amicus Seton Hall Law School CSJ respectfully suggests that this Court take the opportunity presented by this case to take two actions that are of paramount importance to the legitimacy of, and public confidence in, New Jersey's jury selection process. This Court should join the Washington State Supreme Court, see Saintcalle, 309 P.3d at 339, in (1) recognizing that implicit bias in the jury selection process violates the New Jersey Constitution. See Point I.C., below. Even assuming that individual prosecutors in this and similar cases may be driven by unfounded assumptions about racial groups rather than any racial animus, such implicit bias violates Article I,

Paragraphs 5, 9 and 10 of the Constitution. Furthermore, as explained in Point III.A., below, amicus respectfully suggests that this Court join Washington State in (2) enacting rules governing jury selection similar to those set forth in Wash. G.R. 37, creating procedural safeguards to combat implicit bias in the jury selection process.

There are three reasons why this Court should take the opportunity to recognize that Gilmore applies to instances of implicit bias that result in differential, biased treatment of prospective jurors. First, implicit bias is a form of racially disparate treatment within the meaning of Gilmore because an individual thereby treats another differently because of that person's race, even if the individual is not consciously aware that his reasons for acting are biased.

Second, implicit bias represents the concern this Court recognized in Gilmore, 103 N.J. at 539, that a prosecutor's "hunches" and "seat of the pants instincts" may represent the very prejudice that constitutes "impermissible presumed group bias or invidious discrimination." Finally, implicit bias violates Gilmore because when the State removes jurors for reasons tainted by racial bias, conscious or not, that bias results in juries that do not represent a fair cross-section of New Jersey's population; this Court has recognized that criterion as fundamental to upholding the Constitution's guarantee of a fair and legitimate

legal system that does not stigmatize its minority citizens.

First, implicit bias results in treating another differently because of his or her race, thereby constituting racially disparate treatment. Cf. Bostock v. Clayton Cty., 590 U.S. ____, 140 S. Ct. 1731, 1742 (2020) (“Just as sex is necessarily a but-for cause when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably intends to rely on sex in its decisionmaking.”). Impermissible racial bias means precisely that: an individual treats others differently because of an impermissible criterion such as race, regardless of whether the individual is conscious of the reason for that different treatment.⁶ The Gilmore framework accounts for implicit bias because when an individual treats others differently because of factors connected to their membership in a racially coherent group rather than to trial-specific, individual

⁶ This Court has at times used language such as intentional or purposeful discrimination in describing conduct that violates Gilmore. At other times, it has recognized that hunches and gut reactions may constitute presumed group biases that violate Gilmore, 103 N.J. at 539. Most fundamentally, this Court has drawn the line between conduct that properly excludes a juror because of specific, trial-related bias particular to that juror, as opposed to improper bias flowing from membership in the group to which he or she belongs. See, e.g., id. at 530-31.

Rather than have this case turn on a semantic debate about language from prior cases that was not intended to resolve the situation present in this case, this Court should arrive at its decision here based on its assessment of whether unconscious bias against racial groups, resulting in differential treatment in the jury selection process, violates New Jersey’s Constitution.

biases, then regardless of whether the individual does so consciously, his biased presumptions about group membership violate Gilmore. Implicit bias constitutes racial discrimination because, although unconscious, it involves intentional conduct directed at another because of race.⁷

The second reason this Court should conclude that implicit bias violates Gilmore is that this Court has effectively already done so. Gilmore itself accounts for implicit bias by explaining that unconscious “hunches” and “gut reactions” may be another way to describe seemingly race-neutral practices that cloak group bias constituting unlawful discrimination. Gilmore, 103 N.J. at 539; see also Osorio, 199 N.J. at 505 (same). Under Gilmore, the trial court “must be sensitive to the possibility that ‘hunches,’ ‘gut reactions,’ and ‘seat of the pants instincts’ may be colloquial

⁷ The Kirwan Institute defines implicit bias in the following way:

Also known as implicit social cognition, implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual’s awareness or intentional control. Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social and/or political correctness. Rather, implicit biases are not accessible through introspection.

[The Ohio State University Kirwan Institute for the Study of Race and Ethnicity, Understanding Implicit Bias, State of the Science: Implicit Bias Review 2015, <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>.]

euphemisms for the very prejudice that constitutes presumed group bias or invidious discrimination.” Gilmore, 103 N.J. at 539. The dividing line between permissible and impermissible bases for excluding a juror under Gilmore is whether the State permissibly does so based on the juror’s suspected, individualized “specific bias” relating to the particular case or parties at hand, or whether the State is acting impermissibly, motivated by instinctual but ungrounded assumptions reflecting “presumed ‘group bias’ or mere ‘group affiliation.’” Id. at 530-31.

Even when there is an entirely reasonable statistical correlation between membership in a group--such as residents of a high-crime, almost exclusively minority neighborhood--and a tendency toward skepticism of the prosecution in a criminal trial, it is impermissible for the State to seek to exclude members of that group simply based on presumed biases arising from group membership.

As the Gilmore Court explained, “it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups.” Gilmore, 103 N.J. at 525. Despite those preconceptions or even biases strongly correlated with group membership, exclusion from the jury on that group basis is unconstitutional; the “only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury,” not

to exclude based on group membership. Ibid. (quoting Wheeler, 583 P.2d at 755). Striking a juror on such a group-based presumption violates Gilmore, even when unconsciously focused on race, because it results in striking a juror for reasons related primarily to his group affiliation rather than to the individual characteristics or bias of that juror.

The third reason this Court should expressly recognize that implicit bias violates Gilmore is that such bias denies the "right to trial by a jury drawn from a representative cross-section of the community." Gilmore, 103 N.J. at 524. Implicit bias undermines a defendant's right to trial by an impartial jury, id. at 524-25, and also impairs the constitutional right of "citizens generally . . . to participate in the administration of justice by serving on grand and petit juries," id. at 525, both of which are rights guaranteed under the New Jersey Constitution, id. at 524; N.J. Const. art. I, ¶¶ 5, 9, 10.

As Gilmore explains, "[t]his right to trial by an impartial jury, in our heterogeneous society where a defendant's 'peers' include members of many diverse groups, entails the right to trial by a jury drawn from a representative cross-section of the community." Gilmore, 103 N.J. at 524. Permitting a party to strike a juror for racially biased reasons, conscious or unconscious, will result in the disproportionate elimination of jurors who are members of cognizable groups (whether it be race,

color, ancestry, national origin, or sex).

The violation of the representative cross-section rule also implicates the legal system's overriding interest in being free from both the reality and appearance of bias in order to avoid contributing further to systemic marginalization of protected groups. As Gilmore explains, the representative cross-section requirement "enhances the legitimacy of the judicial process in the eyes of the public by serving . . . 'other essential functions': 'legitimizing the judgments of the courts, promoting citizen participation in government, and preventing further stigmatizing of minority groups.'" Gilmore, 103 N.J. at 525 (quoting Wheeler, 583 P.2d at 755 n.6).

Gilmore specifically prohibits the "alleg[ation]" of purportedly race-neutral assumptions arising from group affiliation that "sweep so broadly as to attenuate their validity, for on these assumptions, the exclusion of any and all Blacks living near Newark would be justifiable." Id. at 543. If such assumptions were permissible, they "would become so broad as to approximate presumed group bias itself, and so in this sense lack any real relation to the particular case on trial." Ibid. So, too, here, does the State's justification for treating F.G. differently, though not openly or consciously grounded on race, sweep so broadly as to approximate presumed group bias itself, thereby violating Gilmore.

D. In the Alternative, Even if the Constitution Did Not Reach Implicit Bias, Fundamental Fairness Prohibits the State's Conduct in this Case, Resulting in Unfairness and Grossly Disparate Racial Impact.

If this Court were for some reason hesitant to decide this case on the basis of Gilmore and its constitutional guarantees, it should recognize that the doctrine of fundamental fairness requires the same result as urged in Points I.B. and I.C., above. Moreover, it should also implement the same remedies urged in Point III., below, adopting rules concerning jury selection similar to Washington State's, and requiring judicial approval before the State runs a criminal background check on a prospective juror.

As explained above, the State's conduct in this case violates the conventional understanding of Gilmore, see Point I.B., and an understanding of Gilmore that incorporates implicit bias, see Point I.C. Even if that were not true, the State violates the doctrine of fundamental fairness by conducting criminal background checks purportedly justified by a life history typical of residents of high-crime, overwhelmingly minority neighborhoods.

Furthermore, it would also violate fundamental fairness if the State were to engage in wholesale background checks on all prospective jury members absent any individualized reason to conduct such checks. Particularly concerning is the possibility that the State, as it did here, would arrest prospective jurors who have minor municipal warrants so as to make them unavailable

for service. This Court has never permitted jury service to be burdensome, oppressive, or fear-inducing, and for good reason, given the importance that all communities in New Jersey view jury duty as welcoming and even-handed. See Point III.B., below.

Unjustified background checks are antithetical to this State's interest in the fair administration of justice. In addition to the problems discussed above, background checks will inevitably have a grossly disparate impact on members of discrete and cognizable groups, including Blacks and Hispanics; will undermine defendants' ability to obtain a jury that reflects a representative cross-section of the community; will provide the prosecution with a weapon not similarly available to the defense; and, for all of these reasons, will undermine public confidence in the fairness and impartiality of New Jersey's legal system.

As this Court explained in Doe v. Poritz, 142 N.J. 1, 109 (1995), fundamental fairness applies when the court determines that an individual was treated unfairly but there was "no explicit statutory or constitutional protection to be invoked." Fundamental fairness applies within the penumbra of other constitutional provisions; it is "an integral part of due process, and is often extrapolated from or implied in other constitutional guarantees." Ibid.; see also Oberhand v. Dir. Div. of Taxation, 193 N.J. 558, 578 (2008); State v. Miller, 216 N.J. 40, 71-72 (2013).

Fundamental fairness also “has been invoked when the actions of government, though not quite rising to the level of a constitutional violation, nonetheless included aspects of unfairness which required this Court’s intervention.” Poritz, 142 N.J. at 108. Fundamental fairness plays an essential role in the criminal justice context: “This Court has relied on the concept of fundamental fairness to require procedures to protect the rights of defendants at various stages of the criminal justice process even when such procedures were not constitutionally compelled.” Id. at 109 (listing numerous examples).

Thus, if this Court were to conclude that implicitly biased or overly broad criminal background checks on prospective jurors are deeply problematic but are for some reason outside the scope of Gilmore, it should rely on fundamental fairness to prohibit such conduct. Fundamental fairness should be found to bar background checks based on reasons that generally apply to residents of high-crime, overwhelmingly minority neighborhoods, and to justify the rules discussed in Point III.A., below. Moreover, fundamental fairness should be found to require that the State seek judicial approval prior to conducting criminal background checks on prospective jurors as outlined in Point III.B., below. These requirements, if for some reason not compelled by Gilmore itself, are properly “extrapolated from or implied in other constitutional guarantees,” most notably those

also giving rise to Gilmore, i.e., Article I, Paragraphs 5, 9 and 10 of the New Jersey Constitution.

If the State were permitted to engage in unfettered background checks on prospective jurors, then use that information to shape the composition of the jury, the effect would be pernicious. In addition to the effect on jury composition, it would unfairly deny defense attorneys a parallel opportunity. The State's suggestion that it merely be required to share information it uncovers on the subset of jurors it wishes to investigate is an empty remedy, given the skewed and biased for cause and peremptory challenges that might arise from the State's conducting such background checks.

Fundamental fairness precludes this problematic disparity between the State and defense in procuring information that serves to exclude prospective jurors. Cf. Kellam v. Feliciano, 376 N.J. Super. 580, 582 (App. Div. 2005) (holding on fundamental fairness grounds that a trial judge may order a plaintiff to satisfy additional discovery requests upon determining that limitations on discovery permitted by the Special Civil Part rules inequitably restrict the flow of pretrial information). If the State were to have unfettered access to such information, particularly in the absence of equal access for defense counsel, the defendant would be deprived of his right to a fair and impartial jury.

Notably, if the State were permitted to conduct background checks on all jurors, or on those who share characteristics typical

of residents of high-crime neighborhoods, it would disproportionately reduce the number of members of discrete and cognizable groups who would be able and willing to appear for jury service and to serve on juries. This would undercut the representative cross-section requirement of Gilmore, 103 N.J. at 525, deprive defendants of the right to a fair and impartial jury, and undermine public confidence in the legal system. These are the type of "arbitrary actions" fundamental fairness is designed to prevent, whether grounded in particular constitutional provisions, see N.J. Const. art. I, ¶¶ 5, 9, and 10, or in broader principles of due process and fundamental fairness.

Finally, even if not prohibited as race discrimination under the Constitution, unconstrained background checks would have a grossly disparate impact on the jury pool composition on the basis of race. In New Jersey, African-Americans comprise fourteen percent of the population but sixty-one percent of the prison population. Crossroads N.J., Criminal Justice Reform, https://www.fundfornj.org/crossroadsnj/reports/criminal-justice-reform?items_per_page=All. Further, in New Jersey, African-Americans are more likely to be arrested than Caucasians for similar offenses; for example, African-Americans are 3.7 times more likely to be arrested for possession of marijuana than are Caucasians. Id. New Jersey has the highest racial disparity in terms of incarceration in the nation, with African-Americans incarcerated

at more than twelve times the rate of Caucasians. Id.; see also Ashley Nellis, The Color of Justice: Racial and Ethnic Disparity in State Prisons, The Sentencing Project (June 2016), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>. The need for the protections argued for above are manifest, whatever legal label this Court thinks most appropriate.

II. New Jersey's Administrative Code Authorizes Background Checks on Prospective Jurors Only Subject to Strict Requirements, Including Judicial Approval, Which Were Not Satisfied Here.

As explained in Point I, the State violated Gilmore when it conducted a background check against F.G. on the basis that he shared characteristics indistinguishable from others in his group, i.e., that, as a resident of a high-crime, overwhelmingly minority neighborhood, he had family and friends who had contact with the criminal justice system and knew some of its terminology. As explained in Point II, below, the State's violation of Gilmore, through its biased removal of F.G., is also evident from the fact that the State conducted the background check in violation of New Jersey regulations governing such background checks.

The Appellate Division recognized that this regulatory question is an issue that may make the constitutional question moot. See Andujar, 462 N.J. Super. at 554-55. And even apart from potentially mooting the constitutional question, amicus respectfully suggests that the issue warrants the Court's

attention because recognition of the strict limits the Administrative Code imposes on background checks conducted on prospective jurors will meaningfully protect the integrity and fairness of New Jersey's jury system.

As explained in Point II.A., "[a]ttorneys-at-law" are specifically empowered to conduct background checks on prospective jurors in "contested matters" in "court[]" for "noncriminal justice purposes" under N.J.A.C 13:59-1.2, but only subject to strict requirements that were not fulfilled in this case. The State failed to fulfill those requirements in that it apparently did not obtain and submit F.G.'s birthdate, with the court's approval or otherwise, and did not give F.G. notice and an opportunity to confirm or deny the accuracy of the information in the criminal history record before using that information to interfere with his jury service.

Moreover, Point II.B. explains that the State cannot conduct background checks on prospective jurors under the alternative justification of serving a "criminal justice purpose" under N.J.A.C. 13:59-2.1 to 2.4. Such a construction would be inconsistent with the plain language of N.J.A.C. 13:59-1.1 and with the New Jersey Office of Administrative Law's interpretation of the Code, both of which require that the background check be conducted on a criminal suspect, or at least in furtherance of a criminal investigation, rather than on a prospective juror in what

happens to be a criminal trial. Any other reading would obviate the careful restrictions set out in N.J.A.C 13:59-1.1 to 1.6 for background checks conducted by attorneys in contested matters and create a problematic power imbalance between prosecutors and defense attorneys.

A. Attorneys Are Authorized to Conduct Background Checks on Prospective Jurors in Contested Court Matters Under N.J.A.C. 13:59-1.2 for "Noncriminal Justice Purposes," But Only Under Strict Requirements Not Satisfied Here.

"Attorneys-at-law" are specifically permitted to run background checks, which encompasses those run on prospective jurors, in "contested matters" in "court[]" for "noncriminal justice purposes." N.J.A.C. 13:59-1.2. See generally N.J.A.C. 13:59-1.1 to 1.6. But these sections impose significant requirements for and protections over such searches, ibid., requirements the State did not comply with here. And these significant limitations are imposed for good reason, lest the privacy interests of the prospective juror be infringed. See In re Essex Cty. Prosecutor's Office, 427 N.J. Super. 1, 18-19 (Law Div. 2012). Going forward, any background checks on prospective jurors should only be conducted in strict conformity with the Code, and only after a trial court grants leave to do so.

The section of the Code that authorizes background checks on prospective jurors specifically allows "[a]ttorneys-at-law licensed by any state" to conduct background checks "for use in

any contested matters docketed in any state or Federal courts.” N.J.A.C. 13:59-1.2. While this broad language authorizes attorneys’ use of background checks in contested court matters, attorneys who wish to conduct such background checks must comply with the strict requirements imposed by these sections; two of these requirements are directly relevant here and to background checks conducted on prospective jurors generally.

First, though such searches can be run without fingerprints, the resulting records bear an explicit warning that the accuracy of records unaccompanied by fingerprints cannot be guaranteed. N.J.A.C. 13:59-1.7. These “name-based criminal history search requests,” which attorneys are specifically empowered to run without fingerprints, specifically require that the requestor instead provide the “name . . . [and] the date of birth of the subject” of the check. N.J.A.C. 13:59-1.4(d). Indeed, the privacy infringement from providing a birthdate is what led to Judge Costello’s refusal in Essex Cty. Prosecutor’s Office, 427 N.J. Super. at 15-20, to provide the State with jurors’ dates of birth to enable a background check.

Second, the Code mandates that if a background check is used to interfere with the subject person’s “obtaining or holding any position” or “performing any services”—notably, here, performing service on a grand or petit jury—the requestor must “provide the subject of the request with adequate notice and opportunity to

confirm or deny the accuracy of any information contained in the criminal history record.”⁸ N.J.A.C. 13:59-1.6.

Here, and in future cases, the State should be required to satisfy these express code requirements before running a background check on prospective jurors, in addition to seeking approval from the trial court under Gilmore. See Point I.B.; see also Point III.B. (urging this Court to require further judicial approval over background checks). These preconditions were not satisfied here, thus the background check was impermissible in this case and should be so found in future cases not satisfying these requirements.

These are rigorous requirements that are not easily satisfied. First, the prospective juror’s birthdate that she has disclosed for jury service is presumptively privileged, protected by the juror’s reasonable expectation of privacy. See Essex Cty. Prosecutor’s Office, 427 N.J. Super. at 18-19. Therefore, to run a permissible background check, an attorney must apply to the trial court, demonstrating particular circumstances involving that prospective juror that show “a genuine need that can in some way be addressed by that dissemination,” id. at 20, and that the application is consistent with Gilmore.

⁸ This section further requires that the subject “be afforded a reasonable period of time to correct or complete the record prior to a final determination or decision concerning the subject’s eligibility for the position.” N.J.A.C. 13:59-1.6.

Second, if an attorney seeks to disqualify a prospective juror through information found in the criminal history record, as the State did here, she must take any information uncovered in that search and give the prospective juror notice and an opportunity to confirm or deny the accuracy of the information before using that information to remove the juror. See N.J.A.C. 13:59-1.6.⁹

This obligation is of great importance because it requires parties to allow the prospective juror to clarify the sort of ambiguous information uncovered in F.G.'s background check that may well not have warranted F.G.'s removal. This obligation would also serve to avoid the kind of extraordinary conduct on the part of the State here--making F.G. unavailable to serve by arresting him based on what may have been a minor outstanding municipal warrant that would not otherwise have resulted in an arrest.

Furthermore, allowing the State to conduct background checks and act on the resulting information in the manner that occurred in this case would serve to dissuade many citizens from showing up

⁹ This principle, granting an opportunity to contest information before it is used against the subject of the report, is not unique to the Code and is used as a means of protection in other, similar circumstances. See, e.g., 15 U.S.C. § 1681b(b)(3) (Fair Credit Reporting Act requirement that notice be provided to an applicant for employment before an employer is permitted to use information in a consumer credit report to take adverse employment action, thereby allowing the applicant an opportunity to contest information in that report before her interests are harmed); see also Long v. SEPTA, 903 F.3d 312, 319 (3d Cir. 2018) ("The advance notice requirement . . . supports both accuracy and fairness," "not limited to situations where the report is inaccurate.")

for jury service. If New Jersey citizens knew that appearing for jury service might well result in being arrested for, e.g., unpaid traffic tickets, citizens would be very hesitant to show up for jury service or would make every effort to be excused, for cause or on a peremptory challenge, without tempting the State to probe for any outstanding warrants.

Prospective jurors should not as a matter of course be subject to indiscriminate background checks absent compliance with the requirements of the Code and a judge's specific approval. Requiring judicial approval and allowing an opportunity for resolution of any potential concerns revealed by an authorized background check would serve the important ends of protecting jurors' privacy and furthering the public's confidence in the integrity of the jury selection process.

B. Criminal Background Checks on Prospective Jurors Are Not Authorized Under N.J.A.C. 13:59-2.1 to 2.4 for Criminal Justice Purposes.

Though the State was authorized to conduct background checks under N.J.A.C. 13:59-1.2, subject to strict limitations, as described in Point II.A., it was not authorized to conduct a criminal background check on F.G. under N.J.A.C. 13:59-2.1 to 2.4 for "criminal justice purposes." The State argues that it was authorized to do so because "ensuring a fair trial . . . is a legitimate 'criminal justice purpose.'" State's App. Div. Br. at 26. But the State ignores the directly applicable authorization

for attorneys to conduct background checks in contested court matters discussed in Point II.A., above, and overlooks the definitions section of the Code, which strongly counsels against the State's argument that it is entitled to use the less constrained power to conduct a background check for criminal justice purposes because, though unconnected to any criminal suspect or investigation, it is connected to a criminal trial.

"Criminal justice purposes" are defined narrowly in the Code: the focus is on searches of those charged with or suspected of crimes.¹⁰ None of these purposes apply here. The State's purported justification--"ensuring a fair trial"--is not listed in or suggested by N.J.A.C. 13:59-1.1, nor was it a reason given by the State at jury selection. Instead, the State selectively and unjustifiably conducted a background check on F.G. because he displayed characteristics typical of residents in high-crime neighborhoods, then arrested and thereby intentionally made F.G. unavailable to serve on the jury, see Andujar, 462 N.J. Super.

¹⁰ Those purposes include "[t]he detection, apprehension, detention, pretrial and post-trial release, prosecution, adjudication, correctional supervision or rehabilitation of accused persons or criminal offenders," and "[c]riminal identification activities, including the accessing of the New Jersey Criminal Justice Information System [(CJIS)], 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 above. N.J.A.C. 13:59-1.1.

at 547-48, conduct that is exceedingly difficult to categorize as “ensuring a fair trial.” As this Court has admonished the State, “[t]he . . . [prosecuting] Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” State v. Farrell, 61 N.J. 99, 104 (1972) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

Investigating F.G. and making him unavailable does not qualify as a criminal justice purpose. The Code’s language concerning criminal justice purposes is best understood as authorizing a “criminal justice agency” to conduct background checks on the accused person or criminal defendant who is the subject of the agency’s criminal justice inquiry. (At the very least, a criminal justice purpose must relate to a criminal justice agency’s investigation of a suspected crime, not to an attorney’s inquiry about a prospective juror in a contested court matter.)

Indeed, it would make no sense to interpret the Code as intending to grant the State a broad right to conduct background checks on prospective jurors in trials that happen to be criminal rather than civil; the “criminal justice purpose” relates to investigation of the underlying crime, not to whether a prospective juror is being considered for a panel that happens to involve a

criminal rather than civil trial.

Furthermore, although there is little agency guidance, a New Jersey Office of Administrative Law opinion is instructive and entitled to great weight. See In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 415, 419 (2004). In that decision, the ALJ found that "a CJIS search may only be performed by a police officer in New Jersey as part of a criminal investigation or to determine a criminal history background for purposes of bail." In the Matter of Lyndon Johnson, City of Long Branch Police Department, 2017 N.J. AGEN LEXIS 660, *91 (July 10, 2017). Both of the circumstances that the ALJ found permissible involve running a background check on the "accused person[] or criminal offender." Ibid. (quoting N.J.A.C. 13:59-1.1). The ALJ expressly rejected the arguments raised by the police officer in that case who attempted to equate "criminal justice purpose" with "the performance of [his] duties" and asserted that he was authorized to conduct a background check for anyone involved in a domestic violence episode. Id. at *56-57, *91-96.

The ALJ's "commonsense" construction of the Code, id. at *100, limits background checks for criminal justice purposes to those conducted on the accused person or criminal offender and, even more plainly, only in aid of criminal investigations. A contrary conclusion would improperly authorize the State to run background checks on anyone arguably connected to a crime under investigation—

or, going much further, even on a potential juror in a criminal trial with no connection whatsoever to any criminal investigation.

The inapplicability of the Code provisions governing background checks for criminal justice purposes, N.J.A.C. 13:59-2.1 to 2.4, is demonstrated by the fact that those sections are much less constrained than the directly applicable sections governing background checks by attorneys in contested court matters for noncriminal justice purposes. See Point II.A., above. Under N.J.A.C. 13:59-2.3 to 2.4, background checks for criminal justice purposes require only that the agency execute a CJIS Users Agreement and that such background checks only be used for the "authorized purposes for which it was obtained," an ouroboric restriction that imposes no meaningful constraint if the purposes for which it was obtained are unrelated to any criminal suspect or investigation. In contrast, a background check for noncriminal justice purposes requires a fee, compare N.J.A.C. 13:59-1.3 with N.J.A.C. 13:59-2.2, a date of birth, and notice and an opportunity to contest the information in the report, see N.J.A.C. 13:59-1.6.

Furthermore, noncriminal justice background checks, with their strict limitations, are available to all attorneys in contested matters, both prosecution and defense. If the State were instead allowed to conduct unfettered background checks on prospective jurors under the criminal justice purposes section of the Code, this would create a deeply unfair power imbalance between

the prosecution and defense because, unlike the noncriminal justice purpose section, only a "criminal justice agency" may run a background check for criminal justice purposes. N.J.A.C. 13:59-2.4. A "criminal justice agency" is a "governmental entity . . . which performs functions pertaining to the administration of criminal justice." N.J.A.C. 13:59-1.1.¹¹ Selectively advantaging the State for no apparent reason would fly in the face of the principle that "[t]he rules of court . . . are intended for the equal benefit of all parties." See Zaccardi v. Becker, 88 N.J. 245, 254 (1982) (citation omitted).

In sum, the language of the Code, common sense, fairness, and the limited case law all counsel toward holding that background checks on prospective jurors are authorized only for noncriminal justice purposes, subject to the limitations described in Point II.A.: approval by the trial court; submission of a fee and a properly obtained birthdate; and notice and an opportunity to be heard by the prospective juror being investigated.

III. This Court Should Exercise its Inherent Judicial Authority to Enact Rules that Protect Against Systemic Racism in the Jury Selection Process.

The concerns described above provide this Court with inherent judicial authority to implement rules to guard against bias in the

¹¹ While "Governmental entity" is broadly defined, and the Office of the Public Defender likely falls within its purview, see N.J.A.C. 13:59-1.1, many criminal defendants are of course represented by private counsel rather than the Public Defender.

jury selection process in future cases. Amicus respectfully suggests that this Court adopt rules paralleling Washington G.R. 37, enacted by the Washington Supreme Court following its decision in State v. Saintcalle, 309 P.3d 326 (Wash. 2013). See Point III.A. In addition to restrictions on background checks imposed by the New Jersey Administrative Code, see Point II, this Court should exercise its inherent authority to impose further restrictions, including prior judicial approval. See Point III.B.

This Court has authority under the Constitution and pursuant to its inherent judicial authority to implement rules protecting jury selection from systemic racism and implicit bias. This Court has looked to the “precepts of fundamental fairness, together with the judiciary’s need to create appropriate and just remedies, and its general responsibility to assure the overall efficient administration of the criminal justice system, [to] confirm an inherent power” to manage the criminal justice process. State v. Abbati, 99 N.J. 418, 427 (1985); see also State v. Delgado, 188 N.J. 48, 62 (2006); State ex rel W.C., 85 N.J. 218, 221 (1981). This supervisory role warrants the creation of rules that prevent bias in jury selection, rather than Gilmore having to serve as an imperfect, retrospective remedy for obvious violations.

“[J]udicial power imports the power to fashion needed and appropriate remedies . . . in our courts [and] to create, mold and apply remedies once jurisdiction is invoked. This is particularly

true in the criminal justice field. 'The court's power to fashion remedies in the realm of criminal justice is unquestioned.'" Abbati, 99 N.J. at 428-29 (citations omitted). This Court's enactment of rules guarding against bias in the jury selection process are a very much needed and appropriate remedy. As explained in Point III.A., Washington State's rules provide a useful template for this State's adoption of rules protecting against implicit bias in jury selection. Point III.B. then explains that background checks should require judicial pre-approval that encompasses compliance with the Administrative Code, Gilmore, and any rules enacted to guard against implicit bias.

A. This Court Should Adopt Washington State's Rules for Identifying and Preventing Implicit Bias in Jury Selection.

Point I.C., above, explains that the State's improper conduct in this case is best understood as arising from implicit bias. Amicus respectfully suggests that this Court follow Washington State's approach to identifying and preventing implicit bias by adopting rules for the jury selection process that (1) apply an objective standard to identify implicit bias and bar a peremptory challenge "if the court determines that an objective observer could view race or ethnicity as a factor," Wash. G.R. 37(e), and (2) establish a list of "reasons presumptively invalid" for striking jurors that bar justifications similar to those offered in this case, Wash. G.R. 37(h). Adopting rules to preemptively

prevent implicit bias is prudent because implicit bias is difficult to identify and judges may be hesitant to conclude that prosecutors who appear regularly in their courtrooms, whom they believe bear no conscious ill will, acted on implicit bias.

As this Court has already recognized, bias in the jury selection process is a pervasive problem in New Jersey. See N.J. Judiciary, Commitment to Eliminating Barriers to Equal Justice: Immediate Action Items and Ongoing Efforts (June 5, 2020), <https://njcourts.gov/public/assets/supremecoutactionplan.pdf> (including as one of several "Continuing Critical Judiciary Initiatives," "Analyzing and Reforming the Jury Selection Process"). In that report, this Court committed to continue "evaluation of potential disproportionate exclusion of people of color at critical junctures in the post-selection process, including the exercise of peremptory challenges. Those ongoing efforts will inform new strategies to support more representative juror pools and seated juries." Id. (emphasis added). To further this goal, amicus respectfully suggests that this Court adopt an approach similar to that embraced by the Washington State Supreme Court in Saintcalle, 309 P.3d at 329, as codified in Washington G.R. 37.

In Saintcalle, the Washington Supreme Court strongly criticized the Batson framework's limited ability to combat the role of implicit bias and unconscious discrimination in the jury selection process given that such bias is difficult to detect and

easy to justify: “[I]t is evident Batson . . . is failing us.” Ibid. As research cited by the plurality demonstrated, “people will act on unconscious bias far more often if reasons exist giving plausible deniability (e.g., an opportunity to present a race-neutral reason).” Id. at 336. While “discrimination in this day and age is frequently unconscious and less often consciously purposeful . . . [t]hat does not make it any less pernicious.” Ibid.

The court concluded that the significant role of implicit bias in Washington’s jury selection process called for action by “adopt[ing] a rule [governing jury selection] that would strengthen our procedures for Batson challenges [because] this may be the most effective way to reduce discrimination and combat minority underrepresentation in our jury system.” Id. at 339. Following Saintcalle, the Washington Supreme Court adopted Washington G.R. 37 to govern review of peremptory challenges, (1) adopting an “objective observer” standard, and (2) listing bases for juror challenges that are per se impermissible as reflecting implicit bias. While G.R. 37 is directed at peremptory challenges, amicus respectfully suggests that this Court adopt the same principles to reach all conduct within the scope of Gilmore.

The first rule this Court is urged to adopt is the objective observer test. Wash. G.R. 37(e). Rule 37(e) prohibits conduct “if the court determines that an objective observer could view race or ethnicity as a factor” Wash. G.R. 37(e). An

"objective observer" is defined as an individual who "is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors." Wash. G.R. 37(f). Under this rule, a court assesses the justification for a peremptory challenge from the perspective of an individual who is cognizant of the existence and impact of implicit bias and who determines that race or ethnicity could objectively be viewed as a factor in the attempt to remove the potential juror.¹²

Amicus respectfully requests that this Court also adopt the list of "reasons presumptively invalid" for striking jurors provided under Washington G.R. 37(h). Given the history of association with improper discrimination in jury selection, the following justifications for striking a juror are among those held per se impermissible: (i) "having prior contact with law enforcement officers"; (ii) "expressing a distrust of law enforcement or a belief that law enforcement officers engage in

¹² This Court has previously embraced a parallel approach imposing an objective observer standard in a similar context implicating "[p]ublic confidence in the judiciary." R. 2.1, cmt. 1. Rule 2.1 requires that a "judge shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." In particular, "an appearance of impropriety is created when a reasonable, fully informed person observing the judge's conduct would have doubts about the judge's impartiality." R. 2.1, cmt. 3.

racial profiling"; (iii) "having a close relationship with people who have been stopped, arrested, or convicted of a crime"; or (iv) "living in a high-crime neighborhood." Wash. G.R. 37(h).¹³ This Court should adopt rules similar to Washington's because they provide a practical method to root out implicit bias in jury selection in a manner that is not only fully consistent with but actively promotes the principle and values animating Gilmore.

Implicit bias results in systemic racism, even though unconscious, thereby tainting the operation of New Jersey's legal system and undermining public confidence in its impartiality. We are at a moment in history where it is of paramount importance that the public have confidence in the good faith of its government, including its legal system, and in its willingness and ability to provide fair and equal treatment for all.

Implicit bias in the course of jury selection is a serious and pervasive issue, one that is difficult to address on a case-by-case, retrospective basis; Washington's pro-active approach

¹³ This Court should also join Washington in requiring corroboration by the judge or opposing counsel of forms of alleged juror conduct that have historically enabled effectively unreviewable, purportedly race-neutral justifications for striking a juror. Wash G.R. 37(i). This conduct includes, for example, an assertion that the prospective juror was: "sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers." Ibid. These bases for exclusion may only be raised if the party notifies and obtains corroboration of that conduct from the judge or opposing counsel. Ibid.

provides a fair and practical solution. See State v. Veal, 930 N.W.2d 310, 343 (Iowa 2019) (Appel, J., dissenting) (endorsing the Washington approach, explaining that, “[b]ecause of the intractable and evolving nature of racial bias, we must adopt a pragmatic and flexible approach to sculpting appropriate judicial remedies to meet the challenge”); see also Saintcalle, 309 P.3d at 348 (González, J., concurring) (“Peremptory challenges are . . . often based largely or entirely on racial stereotypes or generalizations At the same time . . . courts cannot reliably identify which particular challenges involve racial discrimination and which do not.”); State v. Porter, 460 P.3d 1276, 1290 (Ariz. Ct. App. 2020) (McMurdie, J., dissenting) (favorably discussing a rule change petition modeled after Wash. G.R. 37, stating, “whatever path reform of the Batson framework takes within Arizona, I find merit in the State of Washington’s ‘objective observer’ test”).

Washington’s approach is beneficial for several reasons. First, it is difficult for a reviewing court to recognize when implicit bias has occurred because such bias is by its nature unconscious and can often be supported by facially neutral justifications. A prophylactic rule preventing bias to begin with will be more effective and less disruptive than litigation after harm occurs, including layers of appellate review. Second, a judge who has ongoing relationships with local prosecutors will

understandably be hesitant to find that they harbored implicit bias when the issue is uncertain. Moreover, bright-line rules will provide attorneys with guidance and relieve the judge of concerns that her judgment will be second-guessed or that she will offend an attorney who appears regularly in her courtroom.

Third, Washington's approach is the best means to promote the representative cross-section rule and public confidence in the impartiality of the judicial process. See Gilmore, 103 N.J. at 525 (explaining that New Jersey's Constitution places great weight on the public's faith in the impartiality of the judicial system). Washington's rule helps to ensure that jurors who are members of cognizable groups will not be struck for reasons that at the very least have the appearance, and may well have the reality, of being motivated by unconscious bias, and that juries will not disproportionately lack members of such groups.

This case presents circumstances exemplifying the wisdom of rules that would serve to constrain implicit bias before it has a chance to undermine the jury selection process. As Judge Whipple explained in the Appellate Division, "the prosecutor's proffered explanation for performing the record check was very much like the sort of speculation against which Osorio cautioned." Andujar, 462 N.J. Super. at 562. The Appellate Division explained that the prosecutor failed to point to any of F.G.'s personal characteristics that would cause concern or suggest his bias toward

the specific case or parties, as required by Osorio. Ibid.

Rather, the State justified its efforts to strike F.G. for cause--and subsequently used the same justifications for its background check, and used that information to arrest him to make him unavailable to serve on the jury--on grounds tainted by group bias. The State justified its actions by the fact that F.G.'s residence in a high-crime neighborhood overwhelmingly populated by minorities meant he had numerous friends and relatives who had contact with the criminal justice system (as victims and as defendants, in addition to two cousins who are police officers), and knew some of the "street" lingo typical of such neighborhoods, all of which is typical of members of that group. See ibid.

This is precisely the sort of implicit bias and unfounded assumptions about groups, rather than characteristics specific to the individual juror, proscribed by Osorio, 199 N.J. at 505 ("[T]he trial court must be sensitive to the possibility that 'hunches,' 'gut reactions,' and 'seat of the pants instincts' may be colloquial euphemisms for the very prejudice that constitutes impermissible presumed group bias or invidious discrimination.") (quoting Gilmore, 103 N.J. at 539).

These are also precisely the types of justifications expressly barred as per se improper under Wash. G.R. 37(h), obviating the need for lengthy and complex appeals such as this one. Had a rule been in place similar to Wash. G.R. 37, this case

would never have arisen; the State's efforts to remove F.G. from the jury because he grew up in a high-crime neighborhood and thus had friends and relatives who had frequently encountered the criminal justice system would have been per se impermissible bases to attempt to remove F.G. from the jury.¹⁴

This case amply demonstrates the wisdom of a rule that serves to preclude the operation of implicit bias, and this Court has the power to implement such a rule on state constitutional grounds. Justice Brennan put it best when, looking to his service on this Court, he admonished, "state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 491 (1977). This Court should take the opportunity presented by this case not only to find that the prosecution violated Gilmore by engaging in extraordinary efforts to remove F.G. from the jury on biased grounds, but also take the

¹⁴ If voir dire answers reveal that a juror is likely ineligible to serve on the jury, or raise heightened individualized concerns about the potential juror in particular rather than those flowing from the group to which he belongs, the prosecution may of course seek to have the juror stricken for cause, make a peremptory challenge on a basis not foreclosed by the rules or by the judge's determination that the challenge otherwise violates Gilmore, or seek judicial approval for a background check.

more important step of following Washington State in adopting rules for jury selection in New Jersey that will combat future pernicious effects of implicit bias on the jury selection process.

B. This Court Should Exercise its Inherent Authority to Limit the Circumstances Under Which the State Is Permitted to Conduct Background Checks on Prospective Jurors.

Even apart from the restrictions that New Jersey's Administrative Code imposes on the State's ability to conduct background checks on prospective jurors, this Court should exercise its inherent authority to require that such checks only occur following judicial approval. Defendants, jurors, and society at large have significant interests that weigh against allowing background checks, whether individual or widespread, without prior judicial approval. This Court should therefore require that before the State may conduct any background checks on prospective jurors, an application must be made to the trial court for leave to conduct that background check. Approval should only be granted based on a specific finding that individualized information related to that particular juror warrants further, more invasive investigation into that juror's criminal background.

First, if prosecutors were given carte blanche to conduct background checks on prospective jurors--and, as here, to arrest those whom they wish to remove from the jury--citizens would be more suspicious of the jury selection process and thus less willing to appear when summoned for jury duty. That is true regardless of

whether the State conducts criminal background checks on all jurors, or more selectively on those who come from high-crime neighborhoods. Many citizens, particularly those from urban communities of color, will be hesitant to appear for jury duty, given a fear of unknown outstanding warrants and possible arrest upon arrival at the courthouse, or even a simple aversion to invasive probing of their background.

The selective nature of the background check conducted in this case illustrates precisely the risk that prospective jurors will perceive when they receive their jury duty summons in the mail. Moreover, suspicionless, dragnet criminal background checks would very likely result in disproportionate self-exclusion of minority citizens from the jury pool. See Point I.D., above. Such dragnet background checks would permit juror challenges that could not occur absent the results of an intrusive fishing expedition with a highly disparate impact on jurors of color. The likely result would be a venire that less resembles a representative cross-section of the community than a cross-section of citizens who believe they have little to fear from interacting with the State's law enforcement power.

Though the representative cross-section rule does not mandate that the jury be "an exact microcosm" of the surrounding community, Gilmore, 103 N.J. at 529, allowing dragnet background checks would almost undoubtedly result in defendants from high-crime areas

being tried before individuals with decidedly different life experiences and perspectives, see Part III.C., above. Unfettered background checks would chill juror participation and civic engagement with the criminal justice system, while making it more difficult for defendants to be tried before impartial juries composed of a representative cross-section of the community.

Moreover, jurors have a privacy interest in the information needed to obtain accurate background checks, so the dissemination of that information should be subject to judicial approval. See Point II.A., above. The right to privacy includes "the right to be free from the government disclosing private facts about its citizens." Poritz, 142 N.J. at 78. Jurors expect that the information they provide--under summons--to determine their qualifications as a juror will not be used to probe their personal backgrounds beyond what is reasonably necessary to determine if they are qualified to sit on a jury. To conduct background checks with a reasonable guarantee of accuracy and therefore ensure that jurors are not wrongfully excluded from juries based on criminal records that are not in fact theirs, prosecutors must submit information that jurors reasonably expect "will not be further disseminated to the prosecutor's office for law enforcement purposes." Essex Cty. Prosecutor's Office, 427 N.J. Super. at 19.

Second, allowing for widespread use of background checks would betray New Jersey's long tradition of trusting jurors to

provide truthful answers during voir dire speaking to their impartiality. Under current jury selection procedures, prospective jurors are not placed under oath when answering questions about their qualifications for jury service. See R. 1:8-3(a). This has been standard practice in New Jersey courts for nearly two hundred years. See Clifford v. State, 61 N.J.L. 217 (N.J. 1897); State v. Zellers, 7 N.J.L. 220, 222 (N.J. 1824); Essex Cty. Prosecutor's Office, 427 N.J. Super. at 12 (noting that New Jersey voir dire procedures "never . . . condone[d] the practice of placing potential jurors under oath during preliminary questioning").

Allowing prosecutors to probe prospective jurors' criminal backgrounds without judicial approval would transform New Jersey's jury selection system from one "in which jurors are implicitly trusted to one in which their disinterest and qualifications to sit on a case are verified by pretrial investigation." Essex Cty. Prosecutor's Office, 427 N.J. Super. at 14. Extensive pretrial investigation, especially that which carries the potential for arrest, will undermine trust and further deter prospective jurors from appearing for jury duty and playing their essential role in administering criminal justice.

Because unfettered background checks will impair defendants' right to be tried before an impartial jury, and undermine jurors' privacy interests and the public's perception of the judiciary's impartiality and legitimacy, this Court should require trial

courts to find explicitly that the use of a criminal background check is warranted before any party may conduct such a check on a prospective juror. This Court should require that the application demonstrate the basis for a background check on grounds particular to that individual juror (regardless of the other party's consent). By requiring trial judges to rule on the permissibility of each background check, this Court would ensure that jurors' privacy interests are appropriately protected.

If this Court were to adopt a rule similar to Wash. G.R. 37, as amicus urges, trial courts should assess the basis for a background check by considering factors similar to those stated in Wash. G.R. 37(g), and the presumptively invalid reasons stated in Wash. G.R. 37(h). See Point III.A, above. The trial court should also be required to find that the proposed background check complies with all relevant requirements of the New Jersey Administrative Code, as well as any other rules that this Court may adopt restricting the use of background checks on prospective jurors. Finally, the trial court should be required to weigh the benefits of conducting a check on a given juror against that juror's expectation of privacy as against dissemination of his or her name and date of birth. See Essex Cty. Prosecutor's Office, 427 N.J. Super. at 19.

If the trial court grants a party leave to conduct a background check, jurors subject to such checks should be given

the opportunity to explain or contest the results to ensure that jurors are neither wrongfully arrested nor denied the enjoyment of their civil right to serve as a juror based on considerations that are either not accurate to that individual or do not in fact disqualify that individual from jury service. See N.J. Const. art. I, ¶ 5; N.J.A.C. 13:59-1.6; Gilmore, 103 N.J. at 525.

If this Court were to permit the State to engage in widespread, invasive background checks, and then to arrest anyone (or anyone it wants) who shows up for jury service and has an outstanding municipal warrant, so that he may be kept off the jury, it would inflict significant harm on public perceptions of the judiciary's legitimacy and impartiality.

The facts of this case uncomfortably echo the recent immigration arrests made by federal agents in courthouses throughout the country. As Chief Justice Rabner wrote with great force in response to such arrests:

A true system of justice must have the public's confidence. When individuals fear that they will be arrested . . . if they set foot in a courthouse, serious consequences are likely to follow. Witnesses to violent crimes may decide to stay away from court and remain silent. Victims of domestic violence and other offenses may choose not to testify against their attackers. Children and families in need of court assistance may likewise avoid the courthouse. . . .

To ensure the effectiveness of our system of justice, courthouses must be viewed as a safe forum.

[Letter from Stuart Rabner, Chief Justice, Supreme Court of N.J., to John F. Kelly, Sec'y, Dep't of Homeland Sec., (Apr. 19, 2017).]

New Jersey's courthouses must be safe forums, not merely for individuals to have their day in court, but for citizens to fulfill one of their most fundamental civic duties: serving on an impartial jury that complies fully with a criminal defendant's rights, and the community's interests, under New Jersey's Constitution.

CONCLUSION

For the foregoing reasons, amicus curiae the Seton Hall Law School Center for Social Justice respectfully requests that this Court conclude that the jury selection process in this case violated Gilmore, and that this Court enact rules preventing bias from tainting the jury selection process in future cases.

Respectfully submitted,

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Dated: November 30, 2020