Supreme Court of New Jersey

	:	Docket No. 84,167
	:	
STATE OF NEW JERSEY, Petitioner,	:	CRIMINAL ACTION
V.	:	On Certification to the Superior Court of New Jersey, Appellate Division, whose Opinion is
EDWIN ANDUJAR, Respondent.	:	Published at ___ N.J. Super. ___
	:	Sat Below: Hon. Ellen L. Koblitz, P.J.A.D.
	:	Hon. Mary Gibbons Whipple, J.A.D.
		Hon. Hany A. Mawla, J.A.D.

Petition for Certification on behalf of the State of New Jersey

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Statement of the Matter Involved

During jury selection in this murder trial, it was discovered that a prospective juror had been arrested twice and had an open warrant for his arrest, none of which he told the court. Once the prosecutor discovered this and told the court and the defense, trial counsel agreed with the prosecutor that the dishonest and wanted juror had to be excused for cause. So, the trial judge excused him. The judge made no further inquiry on the matter because everyone agreed the prospective juror could not serve. A fairly-selected jury then convicted defendant Edwin Andujar of first-degree murder for the brutal stabbing of his wheelchair-bound roommate Thomas Parent.

Then something unfortunate happened. The prospective juror, who everyone agreed had to be excused, was African-American, a fact that didn't really matter until appeal, when new counsel claimed the prosecutor's motion to excuse the prospective juror was racially-motivated. Although trial counsel had quickly retracted her allegation that the prosecutor's actions were race-based, appellate counsel forged ahead anyway, charging the prosecutor with "implicit racial bias" and engaging in a "racially selective" procedure. Citing out-of-state death penalty cases where racial bias did occur, and generalized studies with politically-charged titles like "stop and frisk" and "racial profiling," appellate counsel

dangled the worm of invidious discrimination over this case.

The Appellate Division panel swallowed the bait hook, line, and sinker. In a published opinion, the panel found that because the State only looked into the background of one prospective juror, and because that prospective juror was African-American, the State must have violated defendant's right to a fairly-selected jury. (Pca2). And, "[b]ecause the [trial] court made no findings of fact concerning the prosecution's selective use of a criminal record check and granted no relief to the defense whatsoever," the Appellate Division awarded defendant a new trial. (Pca35).

No basis exists for this "extreme remedy imposed by the Appellate Division." State v. Thompson, 224 N.J. 324, 347 (2016). While the panel correctly accepted the State's argument that the three-step Batson/Gilmore[1] test could be applied to a situation where a defendant seeks to challenge a prosecutor's decision to look into the background of a prospective juror, see (Pb30 to 36), the panel failed to understand both what a prima facie case is in this context, and what a court should do upon finding one.

First, a prima face case exists when there is some evidence sufficient to draw an inference that discrimination has

[1] Batson v. Kentucky, 476 U.S. 79 (1986); State v. Gilmore, 103 N.J. 508 (1986).

occurred. Thompson, 224 N.J. at 343; State v. Osorio, 199 N.J. 486, 502 (2009). But, in most circumstances, just because one challenged prospective juror is of a minority racial group does not mean the defendant has made out a prima facie case. And, in this case, the panel never found a prima facie case, at least not explicitly; at most, it found that it might have been possible for the defendant to have made a colorable argument for one. (Pca32). While the burden for a prima facie case is low, a background-check of one prospective juror because of his answers to voir dire questions, simply because he is a member of a minority group, falls short of that burden.

Second, even if there were some merit to the panel's suggestion that defendant did make out a prima facie case, the proper remedy would have been to remand the matter for the trial court to conduct the second and third steps of the Batson/ Gilmore analysis. At such a hearing, the prosecutor could have further explained her reasons for looking into this one particular prospective juror, and the trial judge could have assessed those reasons and judged the defendant's prima facie case against the prosecutor's rebuttal to determine whether the defendant carried the ultimate burden of proving by a preponderance of the evidence that the prosecutor acted on the ground of presumed group bias. Osorio, 199 N.J. at 506. The trial court could have also made other important factual

findings relevant to the third Batson/Gilmore step. See ibid. (citing even-handed application to all prospective jurors and ultimate racial composition of the jury, among others).

This is not some perfunctory exercise; "a proper Gilmore analysis must include a careful weighing of whether the reasons proffered for the challenges were applied even-handedly to all prospective jurors, against a consideration of the overall pattern of the State's use of peremptory challenges and the composition of the jury ultimately empaneled. This analysis presumes that a defendant will present information beyond the racial makeup of the excused jurors." Thompson, 224 N.J. at 348 (emphases added). The panel did not cite, and the State cannot find, a single case that grants a defendant a new trial based on a prima facie case and nothing more, especially when a remand remains a viable option. The Appellate Division cannot short-circuit this tried-and-true process in the name of expediency, or to reach a desired result. That is what occurred here.

Worse still, the panel granted defendant a new trial on a record it candidly acknowledged was ill-equipped to withstand the scrutiny demanded by this Court's precedents. The panel lamented that there was more information it wanted to know that was not part of the record, but ignored the fact that it was the defendant's trial counsel's chosen course of action that hindered the lower court's ability to more fully develop the

record on this issue. Again, once the parties and the court had a full picture of the prospective juror's background, trial counsel agreed the prospective juror had to be excused, so the trial court did not make inquiry into the prospective juror's prior arrests for domestic violence, whether he was aware that he had an open warrant, or the details surrounding that warrant. Had counsel raised the concerns defendant kept in his back pocket until appeal, the trial court could have fleshed out these issues and made a thorough record. The Appellate Division rewarded such gamesmanship by granting defendant a new trial based on the very gaps in the record his counsel was instrumental in making.

Recently, this Court found that a deferential standard of review is appropriate for a trial court's factual determinations regarding a Batson/Gilmore claim. Thompson, 224 N.J. at 344-45. "'An appellate court should not disturb the trial court's findings merely because 'it might have reached a different conclusion were it the trial tribunal' or because 'the trial court decided all evidence or inference conflicts in favor of one side' in a close case." Id. at 345 (quoting State v. Elders, 192 N.J. 224, 244 (2007), and State v. Johnson, 42 N.J. 146, 163 (1964), respectively). Such a standard "necessarily applies to the trial court's assessment of the prosecutor's candor and sincerity in the presentation of reasons for

exercising peremptory challenges." Ibid.

To get around this deferential standard of review, the appellate panel did without any objective assessment of the prosecutor's candor and sincerity, and without any findings on the issue by the trial judge; instead, the panel took a single, race-neutral decision by the prosecutor, converted it to a finding of purposeful discrimination, and awarded defendant a new trial. This was error, one warranting this Court's intervention and correction. R. 2:12-4. Not only was there no prima facie case of discrimination, but, even if there were, the proper remedy would have been to remand the case to the trial court to conduct the remainder of the Batson/Gilmore analysis. This Court should grant certification and reverse.

Question Presented

1. When a prosecutor moves without objection to strike one prospective juror for cause based on race-neutral reasons, including information learned during a background-check of the prospective juror, is a prima facie case of racial bias under Batson/Gilmore established simply because that prospective juror is African-American?
2. If so, is such a prima facie case sufficient to bypass the three-step Batson/Gilmore procedure, assume that the motion was definitively motivated by racial bias, and grant defendant a new trial?

3. Is selecting a fair and impartial jury in a criminal case part of the "administration of criminal justice," N.J.A.C. 13:59-2.1(a), such that prosecutors may conduct criminal record-checks of prospective jurors to ensure the prospective juror's fitness to serve?

Reasons Why This Court Must Grant Certification

Point I

A defendant does not establish a prima facie case under Batson/Gilmore when a prosecutor moves to strike a single prospective juror for cause based on race-neutral reasons, including information from a background-check, simply because that prospective juror is African-American.

The record below does not even satisfy a prima facie level of racial discrimination in jury selection, making the reversal of defendant's conviction inappropriate. To properly evaluate this issue, the State urges this Court to pay close attention to the prosecutor's words in her motions for cause, and the answers the prospective juror, F.G., gave during voir dire.

F.G. had many sources of bias that would cause any prosecutor or defense attorney to think F.G. would be unable to be impartial. F.G. initially stated that he knew a "host" of people who had been victims of crime, but also decided that only three were relevant. (3T66-5 to 68-5). Defendant in this case stabbed a frail victim so many times and with such vigor that

his internal organs were spilling out of the stab wounds. (9T202-8 to 11). F.G. disclosed that two of the three victims he mentioned had been murdered, one of whom was a cousin who had been stabbed to death. He had been "upset" and had "a big reaction" when he learned that the person who had stabbed his cousin was acquitted. Another of his cousins was shot to death in Kentucky, but in that case the person was locked up. F.G. also knew that both of his murdered cousins had been killed in domestic and/or family violence disputes. (3T80-2 to 83-19). F.G. also had two family members who were police officers. (3T69-18 to 22). These answers alone show a high likelihood of bias, particularly against the defendant who had stabbed Mr. Parent to death in a domestic dispute. However, the issues with F.G.'s voir dire answers do not end there.

F.G. initially claimed he knew a "host" of people accused of crime, but only wanted to go into those who were close friends; thus, he whittled that list down to "five or six." (3T66-5 to 68-5). When they got to the fifth close friend out of the six, F.G. changed his answer and said, "Uhmm, off of the top I really can't think of the fifth close friend. I'll leave it at four." (3T77-12 to 15). F.G. claimed not to know any specifics about his friends' cases; he claimed he never spoke to them about the subject, and had no opinion about the fairness of the criminal justice system "as long as I stay out of it."

(3T69-13 to 71-25; 3T72-18 to 75-3; 3T78-9 to 79-1).

During the discussion of his close friends who were accused of crimes, F.G. equated acquittals with justice: "They home, so I assume they been [treated] fairly." This was in response to a question about whether F.G. believed two of his friends who had been dealing drugs were treated fairly by the criminal justice system. (3T74-11 to 17).

Next, F.G. stated that his background, specifically his "host" of friends and family with connections to crime, would affect his decision-making in his deliberations. (3T84-2 to 8). When asked to clarify what he meant by that, he responded that the State "took his answer wrong" and said that everyone's background affects them. (3T88-13 to 89-7).

Finally, F.G. knew criminal justice terms of art that are separate and apart from common street slang. First, F.G. repeatedly used the term "CDS" when referring to drugs. (3T68-4 to 12; 3T72-5 to 13). CDS, the acronym for "controlled dangerous substances" as prescribed by Title 2C, see N.J.S.A. 2C:35-2, is not commonly used on the street by laypersons who are not involved in the criminal justice system. Second, F.G. used the term "trigger-locked," a reference to a specific law enforcement task force operation regarding gun-related crimes. (3T78-9 to 11; Pb13 n. 5). When asked what he knew that term to mean, F.G. said he knew his friend had three gun charges and

then had to "go to the feds." When asked how he knew what "trigger-locked" meant, he said that he just learned "a lot of things from the streets." (3T79-10 to 23).

However, "trigger-locked" is not a common street term, nor is it slang. Rather, it is more commonly heard amongst law enforcement personnel and those involved in the criminal justice system, making F.G.'s use of the term unusual. His knowledge of the term, his friend's offenses, and of the operation itself, is even more circumspect when F.G. had just claimed he had never spoken to the friend who got trigger-locked about his gun case at all. (3T78-9 to 79-1). Nor had he ever spoken to his law enforcement relatives about their work. (3T65-20 to 25). F.G. also used other phrases and terms such as "picked up" and "gone right for the prosecutor," and noted that a lot of his close friends live "that lifestyle," where they "hustle," that is, sell drugs. (3T76-8 to 12; 3T80-13 to 14; 3T89-24 to 90-1).

These issues, in the aggregate, caused the prosecutors to move to dismiss F.G. for cause. F.G.'s cousin had been stabbed to death in a domestic dispute, and the aggressor had been acquitted; this had caused F.G. significant upset. This is a serious source of potential bias when the facts of defendant's case mirror this situation so closely. F.G. had another cousin murdered as well, making the likelihood of further prejudice even higher. The prosecutor noted these incidents as reasons

for her for-cause challenge. (3T94-20 to 95-2). On top of this, F.G. has family members who are members of law enforcement, who he does not talk to. But bias from family is only the beginning.

F.G. assumes his close friends, who are involved in the drug-dealing lifestyle, are treated fairly by the criminal justice system when they are not incarcerated. On top of that, he noted that his background would influence his decision-making during deliberations. F.G. was also contradictory in his statements, and evasive in his answers. He changed the number of people he knew as criminally accused twice: first from a "host" to "five or six," and then again to "I'll leave it at four."

The prosecutor noted that this indicated F.G. was not being forthcoming in his answers, and, on top of his sources for bias, made him unlikely to be an impartial juror. The prosecutors felt that this made it likely that F.G. knew more people than he was letting on, and was trying to give the court a number of people that would "satisfy" it. (3T94-10 to 20).

The prosecutors also noted that F.G. had initially claimed he didn't know anything about his close friend's gun possession case, and did not talk to this friend about it, but also knew, in detail, how his friend was "trigger-locked." This is a clear contradiction, and so the prosecutor felt that F.G. was not

being "fully honest." The prosecutor also noted that F.G.'s close association with a "host" of people accused of crimes and who sold drugs called his respect for the criminal justice system into question. The prosecutors also cited to other phraseology that indicated he had more knowledge of criminal activity than he was disclosing. (3T95-1 to 96-4).

These reasons are race-neutral. At no point did the prosecutors mention F.G.'s race. They used specific examples of his words during voir dire which called his impartiality into question. These were reasonable arguments; F.G.'s answers made his honesty circumspect.

Apropos of nothing, despite these sound reasons, trial defense counsel opined that "no black man in Newark" could avoid crime or extensive contact with the criminal justice system, a claim that the prosecutor immediately and vehemently rebuked. Defense counsel then amended her position to be that "it would mean that a lot of people from Newark would not be able to serve." (3T96-7 to 97-19). Importantly, the veracity of this opinion is more than suspect; it is rank speculation at best (and unfair racial stereotyping at worst) to assume, as counsel and the Appellate Division have, that it is common for African-American men in Newark, or anyone in Newark for that matter, to know a "host" of individuals accused of, and victimized by, violent crime, or who closely associate with "a lot of people"

engaged in drug-dealing and illegal gun possession.

After this assertion, defense counsel amended her statement to "a lot of people" in Newark, because those "people" would be around other "people" who were heavily involved in criminal activity. Judge Ravin stated that he was "not making any decision about all of the people in Newark," and ruled that F.G.'s answers, and how he gave those answers, did not warrant removing F.G. for cause at that time. (3T96-7 to 98-8).

That same afternoon, doing her due diligence to ensure an honest and impartial jury for trial, the prosecutor ran a simple, name-based record-check on F.G. She discovered that she was correct about his dishonesty: F.G. had been arrested for two domestic violence offenses and had an open municipal warrant. (5T48-16 to 49-23; 5T65-17 to 67-21). F.G. had not disclosed himself as one of the "host" of people he knew who had been accused of a criminal offence once, much less twice, and had not disclosed the open warrant. This meant that he had not been candid with the tribunal when he failed to accurately answer the standard voir dire questions earlier, and that F.G. would have to be arrested. Both the defense and the State agreed that, given this new information, F.G. should be removed from jury service for cause. (5T48-16 to 49-23).

After more jury selection, the prosecutor explained her reasons for running the record-check: "I think I had a duty,

based on his responses and answering questions at sidebar, to at least do my due diligence to make sure he isn't going to taint the jury pool." She also defended herself against counsel's accusation of racism, explaining her decision was not based on race; rather, she was concerned with F.G.'s evasive, contradictory answers, his circle of close friends who are heavily connected to criminal activity, and his potential bias from having family who were victims of stabbings and murder. (5T65-17 to 67-21); accord Thompson, 224 N.J. at 347 ("[T]he better practice is to allow the State to make a record of its reasons for exercising its peremptory challenges, especially where...the prosecutor offers to do so."). Defense counsel once again opined that if having family members who were murdered in domestic disputes close friends who were drug dealers warranted striking a juror for cause, "what would that mean in terms of jury selection in general." Judge Ravin then ended the discussion, calling it "superfluous" since both parties had already agreed F.G. should be excused. (5T67-1 to 68- 12).

Although the defense lodged an allegation of racial bias, the record makes it plain that the prosecutors in this case had completely race-neutral reasons for looking into F.G.'s background. F.G was the sole prospective juror checked because of his specific answers, his specific evasiveness, his specific contradictions, his specific close associates, and his specific

familiarity with stabbing and murder victims. These, in the aggregate, made F.G. an unwise choice for jury service under the facts of defendant's case. F.G. was checked to ensure an impartial jury, filled with people who could be honest and upfront with the court; this was an ability F.G. clearly did not have, as he lied during voir dire.

For that reason, there was not even a prima facie case of racial discrimination during jury selection. No one saw any appearance of racial influence until defense counsel stated that all "black m[e]n in Newark" are associated with people heavily entrenched in criminal activity. That statement is inaccurate on its face, offensive at worst, and did not enter the prosecutors' calculus in the slightest, as she made clear. Simply put, there was no racial bias whatsoever, not even enough to satisfy a prima facie standard.

Point II

Even if a prima facie case of racial bias has been established, it is essential to have a hearing as prescribed under Batson/Gilmore. The Appellate Division improperly bypassed this mandate.

A prima facie case of discrimination does not exist in this case. But, if this Court disagrees, the proper remedy is a remand for a hearing, as prescribed by Batson, Gilmore, Osorio, and Thompson. This Court's precedents are clear: "[A] proper

Gilmore analysis must include a careful weighing of whether the reasons proffered for the challenges were applied even-handedly to all prospective jurors, against a consideration of the overall pattern of the State's use of peremptory challenges and the composition of the jury ultimately empaneled." Thompson, 224 N.J. at 348 (emphasis added); see also Osorio, 199 N.J. at 492 ("a three-step process must be employed whenever it has been asserted that a party has exercised peremptory challenges based on race or ethnicity") (emphasis added). The panel below ignored this, unilaterally decided that "must" means "may," and bypassed this essential portion of Batson/Gilmore. This was an egregious overstep by the Appellate Division and one this Court must remedy. R. 2:12-4.

Finding a prima facie case of discrimination is step one of a three-part test; a prima facie case of discrimination is merely an "inference" that such discrimination occurred, and is not determinative. See Osorio, 199 N.J. at 492. As this Court has repeatedly emphasized, when a defendant presents a prima facie case of discrimination, it automatically triggers a burden-shift to the State to justify the use of its challenges with race-neutral reasons. Ibid. At that point, "the trial court must ascertain whether that party has presented a reasoned, neutral basis for the challenge or if the explanations tendered are pretext." Ibid. (emphasis added). "Critical"

factors for a reasoned review of this question are:

> examination of the reasons proffered for the challenges; a careful weighing of whether the reasons proffered for the challenges were applied even-handedly to all prospective jurors; a consideration of the overall pattern of use of peremptory challenges; [and] a description of the composition of the venire or of the jury ultimately empaneled [sic] to hear the case.
>
> [Id. at 508-09.]

This then triggers the third step of the process, "requiring that the trial court weigh the proofs adduced in step one against those presented in step two and determine whether, by a preponderance of the evidence, the party contesting the exercise of a peremptory challenge has proven that [it] was exercised on unconstitutionally impermissible grounds of presumed group bias." Id. at 492-493 (emphasis added). These are not suggested courses of action, nor are they optional.

Here, because both defense counsel and the State agreed that F.G. should be removed for cause, no record as to step two or three was made. (5T48-16 to 49-23). Indeed, Judge Ravin explicitly said as much, stating that no further discussion of the matter would take place as the parties had agreed to excuse F.G. for cause. (5T68-4 to 12). Therefore, the prosecutor was deprived of the opportunity to place her race-neutral reasons for conducting the background-check on F.G. into the context of the entire process of jury selection. Notably, defendant has

taken steps to obscure that wider context as much as possible, as he provided on appeal only two days of jury selection transcripts, though the process took eight days. See (Pb2 n.2). Therefore, one can only assume that the wider context being hidden from the Court would thwart the allegation of racism.

The Appellate Division was eager to accept this gamesmanship, however, and used the lack of a pertinent record to decide by default that the prosecutor acted with racial bias. (Pca15 to 16; Pca34). The panel acknowledged that it had no record before it regarding the prosecutor's evenhandedness, of the racial makeup of the final jury panel, whether other members of the jury also had extensive ties with criminal activity, or whether other potential jurors grew up in "the same area of Newark" as F.G.[2] (Pca34).

Even more troubling, the Appellate Division was just as eager to ignore the lack of judicial analysis. The panel acknowledged that Judge Ravin did not make any "formal ruling" as to the issue of racial bias on the part of the prosecutor, (Pca15-16), but the panel's own confirmation bias was proof enough. It thus appears that the panel skipped the second and third steps of the Batson/Gilmore analysis to bring about the panel's desired result. That is not the rule of law, nor is it

[2] Neighborhood is irrelevant to racial bias, and it is unclear why the Appellate Division found this to be a relevant factor.

justice; steps two and three are requirements, and these requirements "presume[] that a defendant will present information beyond the racial makeup of the excused jurors." Thompson, 224 N.J. at 348 (emphases added). The Appellate Division has acted in direct opposition to this Court's directive, using F.G.'s race alone to determine whether racism was present, and then overturning defendant's murder conviction based upon incomplete analysis.

This Court disparaged this kind of behavior from the Appellate Division in Thompson, where:

> to justify vacating defendant's conviction and remanding the matter for a new trial, the Appellate Division ignored the trial court's credibility findings, canvassed the record to find an "example" of the prosecutor's supposed uneven application of peremptory challenges, and misread and misapplied Osorio's requirement that a defendant carry the ultimate burden of persuasion under Gilmore.
>
> [Id. at 348-49 (emphasis added).]

Notably, some of the race-neutral reasons for preemptive challenges in Thompson are like those here. First, a potential juror was "deliberately misleading" as to whether "he nor any member of his family had ever been charged with an offense." Id. at 336. The prosecutor in Thompson knew that juror was facing assault charges he had not disclosed, which is similar to F.G.'s failure to disclose his prior domestic violence accusations. Second, the boyfriend of another potential juror

had a weapons offense conviction prosecuted by the same office. Here, F.G. had a "host" of "close friends" prosecuted by the Essex County Prosecutor's Office. Ibid. And third, another juror had been involved in a domestic violence case that had later been dismissed. In this case, F.G. had two arrests for domestic violence. Ibid. These reasons were race-neutral in Thompson, and they are race-neutral here. The Appellate Division buried its head in the sand to avoid that fact. This Court should not.

There, as here, the only factor the defense could produce to show racial bias was the mere fact that the potential jurors in question were African-American; no other factual basis even suggesting racial bias was shown. Id. at 349. That was not enough then, and it is not enough now. The cases that come before the Appellate Division are not opportunities for the judges to apply their own preconceived notions through convoluted mental gymnastics. See, e.g., id. at 349-50 (noting this Court's "reservations" about the Appellate Division "culling" through the record to find a single instance where the State "may" have been biased to support the Appellate Division's accusation of racism).

Again, there was no prima facie case of racism here. This was a single background-check of one potential juror who gave uniquely biased answers to typical voir dire questions. Contra

id. at 346 (finding using seven out of nine preemptory strikes against African-Americans enough to establish a prima facie case). Even if the mere fact that F.G. was African-American is enough to establish a prima facie case of discrimination, that, at most, triggers steps two and three of the Batson/Gilmore analysis. A complete record must be made to properly ascertain whether the prima facie "inference" can transform into "fact." The Appellate Division should have remanded to the trial court for consideration of the remaining relevant factors. See Osorio, 199 N.J. at 508-09. It should not have considered itself both uninformed as to the pertinent facts, but also omnipotent as to the prosecutor's then-state of mind. This Court should therefore grant certification to establish whether the Batson/Gilmore three-step analysis, re-affirmed in Osorio and Thompson, is still good law, or if the new rule going forward is that the Appellate Division may unilaterally assume the intention of New Jersey's prosecutors.

Point III

Selecting a fair and impartial jury in a criminal case is part of the "administration of criminal justice," N.J.A.C. 13:59-2.1(a), such that prosecutors may conduct criminal record-checks of prospective jurors.

The Appellate Division believed that "the question of whether New Jersey laws authorize the State generally to conduct

criminal background checks on potential jurors" was not before it. That was, however, precisely what the prosecutor did in this case, and is a good measure of why the panel reversed defendant's murder conviction. (Pca20). Although it did not answer the question directly, the panel "question[ed]" in its published opinion whether conducting a background-check on a prospective juror in a criminal case "supports 'the administration of criminal justice.'" (Pca21) (quoting N.J.A.C. 13:59-2.4(b)). This is an issue of first impression in New Jersey, and one that should be considered and decided by this Court. R. 2:12-4.

The right to a fair and impartial jury is rooted in the constitution of this State. N.J. Const. Art. I, par. 9. And the jury-selection process exists to ensure the selection of a fair and impartial jury. State v. Williams, 93 N.J. 39, 61 (1983). "Jurors must be carefully selected with an eye towards their ability to determine the controverted issues fairly and impartially; and the trial court should see to it that the jury is as nearly impartial as the lot of humanity will admit." State v. Deatore, 70 N.J. 100, 105–06 (1976) (citation and internal markings omitted). So sacrosanct is the integrity of the jury that seating a biased or otherwise unqualified juror is a serious error, unamenable to harmless error review. State v. Loftin, 191 N.J. 172, 196 (2007); Gilmore, 103 N.J. at 543-44.

With that laudable goal in mind, running a record-check of a prospective juror is a permissible exercise by law enforcement to ensure the fairness of the trial and the reliability of the verdict. Ensuring a fair trial is thus, without question, a legitimate criminal justice purpose for which prosecutors may conduct a criminal background-check of prospective jurors. Other states have recognized this. See, e.g., Tagala v. State, 812 P.2d 604, 611-12 (Alaska Ct. App. 1991) ("Since the criminal record of a prospective juror is relevant for the use of challenges for cause, we conclude that the prosecutor did not violate the statute."); Commonwealth v. Cousin, 873 N.E.2d 742, 748 (Mass. 2007) ("[T]he prosecutor was authorized to check the records and bring them to the court's attention[.]"), cert. denied, 553 U.S. 1007 (2008). This Court should do the same.

Of course, doing so triggers other constitutional obligations that the State welcomes in its shared desire to secure a fair and impartial jury in criminal cases. Once the prosecutor conducts a record-check on a prospective juror, the rights to complete discovery, due process, and a fair trial are zealously guarded so long as she discloses to the defense and the court what she learns during that check and the court gives each side an opportunity to make whatever arguments they deem appropriate based on that new information. Accord State v. Second Judicial Circuit, 431 P.3d 47, 51 (Nev. 2018) (holding

that the trial court, upon application, "must order the State to disclose any veniremember criminal history information it acquires from a government database that is unavailable to the defense"); see generally State in the Interest of A.B., 219 N.J. 542, 555 (2014) (discussing this State's history of granting broad discovery "'[t]o advance the goal of providing fair and just criminal trials....'") (citation omitted). That's exactly what happened in this case. And, if there is an allegation that the prosecutor is using her ability to conduct criminal record-checks in an unconstitutional manner, the defense may raise a timely Batson/Gilmore challenge and pursue the remedies that come with a successful challenge on that basis. See State v. Andrews, 216 N.J. 271, 293 (2013).

The Appellate Division's fear that a record-check of potential jurors could have a chilling effect on jury participation is overblown. (Pca35). Historically, New Jersey has moved from a common law system in which attorneys could not voir dire prospective jurors, "to a system in which jurors are asked multiple questions about their personal lives to allow attorneys to more intelligently exercise their peremptory challenges." In re State ex rel. Essex Cty. Prosecutor's Office, 427 N.J. Super. 1, 6 (Law Div. 2012). Doing a record-check of a prospective juror is no more an invasion of privacy than when the court, using the standard jury questionnaire, asks

prospective jurors in open court and on the record whether they have ever been convicted, or even accused, of a criminal offense. (Pca4 to 5 n. 3; Pa1; Pa8). The former simply verifies the latter. And, even "if jurors have a privacy interest in their criminal histories,[3] that right certainly does not extend to lying about it under oath." (Pb29 n. 12).

This Court should therefore grant certification to address this important question as well.

Conclusion & Certification

The State respectfully requests that this Court grant certification and ultimately reverse. We hereby certify that this application is made in good faith, presents a substantial question, and is not made for purposes of delay.

Respectfully submitted,

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[3] See Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 514 n.1 (1984) (Blackmun, J., concurring) ("As to most of the information sought during voir dire, it is difficult to believe that when a prospective juror receives notice that he is called to serve, he has an expectation, either actual or reasonable, that what he says in court will be kept private....[A] trial is a public event.").