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Supreme Court of New Jersey

	:	Docket No. 084167
	:	
STATE OF NEW JERSEY, Petitioner,	:	CRIMINAL ACTION
		On Certification to the Superior
V.	:	Court of New Jersey, Appellate Division, whose Opinion is
EDWIN ANDUJAR, Respondent.	:	Published at 462 N.J. Super. 537
	:	Sat Below: Hon. Ellen L. Koblitz, P.J.A.D.
	:	Hon. Mary Gibbons Whipple, J.A.D.
		Hon. Hany A. Mawla, J.A.D.

Brief on behalf of the State of New Jersey in Response to the Amici Briefs

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Statement of Procedural History & Facts[1]

The State relies on the facts set forth in its Petition for Certification at (Pc7 to 14),[2] and its Counter-Statement of Procedural History and its Counter-Statement of Facts set forth in its Appellate Division brief, (Pb1 to 8).

On January 8, 2021, this Court granted the amicus curiae motions filed by the American Civil Liberties Union ("ACLU"), the Association of Criminal Defense Attorneys ("ACDL"), and the Seton Hall School of Law Center for Social Justice ("SHU"), and in its order permitted the parties to file a brief in response.

[1] The State has combined these for the Court's convenience.
[2] "Pb" refers to the State's Appellate Division brief; "Pc" refers to the State's Petition for Certification; "ACLUb" refers to the brief of amicus the American Civil Liberties Union; "ACDLb" refers to the brief of amicus the Association of Criminal Defense Attorneys; and "SHUb" refers to the brief of amicus the Seton Hall School of Law Center for Social Justice.

Legal Argument

Point I

Batson/Gilmore remains good law and applies to a prosecutor's conducting a record-check of a prospective juror. The solution to combat implicit bias in the jury selection process is to train attorneys and judges to recognize the signs of implicit bias, not to assume bias.

Amici raise several issues, most of which are addressed by the State's previous submissions. A few of their arguments, however, require further responses.

First, Batson/Gilmore[3] remains good law and should be reaffirmed by this Court. Amici propose nothing persuasive to replace it with, and their main reason for replacing it seems to be that defense motions in this area are typically unsuccessful. That doesn't mean the system is broken; it means that there is not the widespread pandemic of racism among prosecutors that they want to believe exists.

Moreover, this case is a poor vehicle for revisiting and possibly eliminating a precedent that has served this State well for almost four decades. That issue was never raised in the trial court or the Appellate Division. Amici are not free to insert new issues into a case for the first time in this Court. See Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 89

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

(2014) (refusing to consider "an argument that only the ACLU [as amicus] has mentioned"); State v. O'Driscoll, 215 N.J. 461, 479 (2013) ("'[A]s a general rule, an amicus curiae must accept the case before the court as presented by the parties and cannot raise issues not raised by the parties.'") (citation omitted).[4]

In fact, it was the State in the Appellate Division, in response to defendant's newly minted arguments, that first proposed extending the Batson/Gilmore paradigm to situations in

[4] Amici have made reference to the experience of the State of Washington in this area. See (SHUb50 to 54; ACDLb12 to 13). In 2018, Washington amended its General Rule 37 to provide that, "[i]f the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge." Wash. G.R. 37(d). Similarly, in State v. Jefferson, that state's Supreme Court found that while the trial court properly ruled that there was no purposeful discrimination, Batson was no longer sufficient and so, under the third step, a peremptory strike must be denied if "an objective observer could view race or ethnicity as a factor in the use of the peremptory strike." 429 P.3d 467, 470 (Wash. 2018). But there, the issue was raised squarely by the defendant, not an amicus, in his petition for review, id. at 470-71, and its holding built on years of its own case law that criticized Batson, id. at 475-76. Neither of those exist in this case; defendant has never raised that issue, at least not at an appropriate time, and this Court has never wavered from its commitment to Batson and Gilmore. As for any proposed amendment to our Court Rules, the State defers to this State's normal rule-making process, which has also worked well over our State's history. See State v. Robinson, 229 N.J. 44, 82 (2017) (Albin, J., concurring in part and dissenting in part) ("The rulemaking process is beneficial, even when it must proceed in an expedited and abbreviated manner. Although prosecutors and defense attorneys have widely divergent views on this subject, the voices of stakeholders and experts in the field are always enlightening.").

which a prosecutor investigates a potential juror through the permissible use of noninvasive background checks. See (Pb30 to 36). Therefore, the issue before this Court is whether the Batson/Gilmore framework should be applied to this new situation, not whether it is good law or should be replaced with something else.

Second, this Court should hold that the workable test set forth in Batson/Gilmore applies to situations where a prosecutor conducts a background check of a prospective juror.[5] While that framework typically applies to the use of peremptory challenges, it need not be so limited. Recently, in Flowers v. Mississippi, 139 S. Ct. 2228, 2243 (2019), the United States Supreme Court recognized that Batson can be applied to the investigation of prospective jurors. In that case, the Court acknowledged, as it had before, "that disparate questioning can be probative of discriminatory intent." Id. at 2247 (citing Miller-El v. Cockrell, 537 U.S. 322, 331-332 (2003)).

Similarly, in Flowers, the prosecutors asked "many more questions—and conduct[ed] more vigorous inquiry—of black prospective jurors than it did of white prospective jurors[.]" Ibid. The prosecutors also called witnesses in voir dire to refute the claims of prospective black jurors but not white

[5] SHU agrees Batson/Gilmore should apply to this situation, but the ACDL does not. See (SHUb4; ACDLb1).

ones. Id. at 2247. A prosecutor running background checks on prospective jurors in a non-evenhanded way can be just as problematic. Accord id. at 2248 ("The lopsidedness of the prosecutor's questioning and inquiry 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."). Batson/Gilmore remains a workable test to root out such discriminatory intent, even in the absence of the use of peremptory challenges. Contra (ACLUb2).

Applying that framework to this case, it is clear that defendant never set forth, let alone established, a prima facie case of discrimination by the prosecutor. The prosecutor ran a noninvasive background check on one prospective juror, F.G., based on his specific answers to certain questions during voir dire. Those answers, while largely ignored by the amici, are discussed elsewhere, (Pc7 to 12; Pb9 to 15), and need not be repeated here. Suffice it to say, the prosecutor 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 protect the ultimate criminal justice

purpose: ensuring a fair and impartial jury, filled with people who could be honest and upfront with the court.

Even if these circumstances could justify finding a prima facie case of purposeful discrimination, the correct remedy would have been to remand the matter back to the trial court for an analysis under the second and third steps of Batson/Gilmore. Accord State v. Thompson, 224 N.J. 324, 348 (2016) ("[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."); State v. Osorio, 199 N.J. 486, 492 (2009) (instructing "a three-step process must be employed whenever it has been asserted that a party has exercised peremptory challenges based on race or ethnicity"); State v. Pruitt, 430 N.J. Super. 261, 273 (App. Div. 2013) (finding a prima facie case on appeal and remanding "to the trial court for a hearing as to the basis for the prosecutor's peremptory challenge[,]" and noting that "[r]equiring the prosecutor to provide such an explanation imposes no unreasonable burden" and "serves the interests of justice by ensuring that no juror is excused from service for unconstitutional reasons."), aff'd after remand, 438 N.J. Super. 337 (App. Div. 2014) ("Because the second judge had the

opportunity to hear the prosecutor's explanation first-hand, we also owe some deference to his ability to gauge the credibility of the explanation,"), certif. denied, 221 N.J. 287 (2015).

The Appellate Division did not cite, nor could the State find, a single case that granted a defendant a new trial based on a prima facie case and nothing more, especially when a remand remains a feasible option. If this Court believes a remand is the proper remedy, it is not too late to do so.[6] Contra Osorio, 199 N.J. at 508-09 (concluding seven years was too much time for a meaningful remand); accord Thompson, 224 N.J. at 350 (distinguishing Osorio and noting that because of the extensive record on remand it was inappropriate to reverse and remand for a new trial).

Third, many of amici's arguments rest on factual omissions, misunderstandings, or misstatements. Most concerning is that no amici spends any time addressing the important issue that defense counsel consented to F.G.'s removal after the prosecutor disclosed the results of the background check and renewed her motion to remove F.G. for cause. It was not the case that F.G. was arrested and that's why was unable to serve; rather, after the decision was made to remove F.G. based on the prosecutor's renewed, and now unopposed, for-cause challenge, only then was he taken into custody, outside the presence of any other

[6] Such a remand could be ordered on an expedited basis.

prospective juror. It is absurd, not to mention insulting to a member of the bench, to characterize the prosecutor's desire to minimize any prejudice to the defendant in responding to an open warrant as "plotting with the trial judge." (ACDLb6). Of course, had counsel not consented, and had the judge considered the renewed challenge and denied it, F.G. could have possibly still served on the jury once he resolved the open warrant. But by consenting, defense counsel cut off any avenue of inquiry and thus allowed F.G. to go from a prospective juror to an ordinary citizen with an outstanding warrant. See Thompson, 224 N.J. at 350 (noting that "the acknowledged failure of defendant to counter any of the prosecutor's suggestions or raise an 'uneven application' argument made it impossible for the court to" engage in the proper analysis).

Amici wisely ignore getting into precisely what F.G. said during voir dire. As mentioned above, a detailed description of his answers with citations to the record appears elsewhere. See (Pc7 to 12; Pb9 to 15). But what amici would rather this Court do is hold that any time further investigation is undertaken by the prosecutor during jury selection, a court should look only to the color of the challenged juror as opposed to the content of his or her words. This Court should emphatically decline to do so. F.G.'s answers to the voir dire questions, on their own and in their totality, provided a sufficient basis for further

investigation. Thus, by ignoring F.G.'s words, amici ignore the only thing that matters.

Finally, a good deal of the amici briefs focus on the issue of implicit bias. The State agrees that implicit bias is a concern for the criminal justice system and this Court is not powerless to effect change in this area. The State, however, disagrees with amici's proposed solutions and offers a fairer and more workable one.

At the outset, it must be stressed that implicit bias does not mean assumed bias. In other words, not everything that is not explicit bias is implicit bias. Much, much more often than not, prosecutors are not acting in a discriminatory manner. This Court should not work from the assumption that prosecutors act in a discriminatory manner in all situations because implicit bias exists. Recognizing implicit bias should not be a blind assumption that everything a prosecutor does is racist.

Not only is such an assumption unfair and insulting, but it contradicts decades of case law in this area that holds that there is a presumption that prosecutors act on constitutionally permissible grounds. See Thompson, 224 N.J. at 340; Osorio, 199 N.J. at 501-02; Gilmore, 103 N.J. at 535. One of the reasons this Court adopted that presumption was because of its respect for prosecutors, who this Court would "not assume will shirk their obligation to do justice for the cynical cant that their

duty is to obtain a conviction...." Gilmore, 103 N.J. at 535. Implicit biases exist, but that existence does not require this Court to reverse course and now view everything a prosecutor does as somehow biased and thus constitutionally impermissible.

Rather than assumptions and hunches, the focus should be, as it has always been, on the words and actions of the prosecutor and the prospective juror(s). And the person best equipped to scrutinize those words and actions is the trial judge. Trial judges are in the best position to determine prima facie cases, to judge the prosecutor's proffered explanations for his or her conduct, and to determine whether purposeful discrimination occurred. Hence appellate courts' strong deference to trial judges' findings in this area. See Thompson, 224 N.J. at 344-45; see also Batson, 476 U.S. at 98 n. 21 (calling it "great deference"). Of course, in this case that vital inquiry was cut short by defense counsel's decision to not object to the State's second motion to remove F.G. for cause. Had counsel made her objection fully known "at the time the ruling [was] sought," R. 1:7-2, the trial court could have made detailed findings in light of the new evidence. See State v. Goodale, 740 A.2d 1026, 1030 (N.H. 1999) (finding issue preserved because defendant objected below, and so "the trial court was given an opportunity to rule on its purported error to the extent that the defendant challenges the constitutionality

of permitting the State to use criminal records during jury selection....").

Against this backdrop, the State proposes that the best way to combat the issue of implicit bias is to train the participants in the criminal justice system—prosecutors, judges, and the defense bar—on the signs and effects of implicit bias. If each of those groups are adequately trained in this area: prosecutors will be able to identify their own implicit biases and take care not to act on them when investigating or striking prospective jurors; defense attorneys will be equally aware and can challenge a prosecutor's actions and proffered reasons on that basis; and judges can view the attorneys' arguments with an understanding that implicit bias may be at work absent explicit animus, and with that understanding determine whether a remedy is required and, if so, which one.

Such training is already underway. Prosecutors are being trained on implicit bias through the Attorney General's Office.[7] Such training for police and prosecutors is also mandated by law. See N.J.S.A. 52:17B-77.13.

[7] See "AG Grewal Launches Department-Wide Diversity Initiative" (OAG Press Release 6/18/2018) (mandating implicit bias training for all prosecutors in county prosecutors' offices and the Division of Criminal Justice) (available at: https://nj.gov/oag/newsreleases18/pr20180618a.html (last accessed Jan. 22, 2021)

This Court has mandated similar training for this State's judges. See AOC Directive #14-19 (Jul. 17, 2019)[8] (establishing the "Judiciary Enhanced Education and Training Initiative" which focuses on "an enhancement of existing training for judges in the areas of sexual assault, domestic violence, implicit bias, and diversity.") (emphasis added).

As for the defense bar and their amici, this Court has the exclusive constitutional authority over all members of the bar to mandate training necessary to recognize and combat implicit bias. See N.J. Const. Art. 6, §2, par. 3. To the extent they are not doing so already, the defense bar too should join the efforts of prosecutors and judges to understand, recognize, and root out implicit bias in the criminal justice system by being trained on what implicit bias is, how to recognize it, and how to stop it from influencing decisions. This is a far better and fairer approach then simply saying that because implicit biases can exist, prosecutors must be acting on them and, in so doing, denying defendants their right to a fair trial.

Courts are also beginning to train jurors on implicit biases that may enter into their deliberations. In its recent Action Plan for Ensuring Equal Justice (2020), this Court "outlined a series of reforms it will seek to accomplish within

[8] Available at: https://www.njcourts.gov/notices/2019/n190717e.pdf (last accessed Jan. 22, 2021).

the next year in order to eliminate disparities within the court system and remove institutional obstacles to justice."[9] Some of those reforms are to expand juror orientation content regarding implicit bias, institute new model jury charges on impartiality and implicit bias, and issue new and revised mandatory model jury selection questions on recognizing and counteracting bias in the jury process.[10] Through its Action Plan, the Court has recognized that training jurors on implicit biases so they can become aware of them and not act on them is the best way to stop implicit biases from infecting jury trials. It is far superior to simply assuming jurors act in a biased way because implicit bias exists, an argument amici are pushing against prosecutors here. We can all agree that being trained on implicit biases will make better jurors, so it stands to reason that such training will make better prosecutors, lawyers, and judges, too.

[9] Press Release, Action Plan for Ensuring Equal Justice (2020), available at: https://www.njcourts.gov/pressrel/2020/pr071620b.pdf?c=YiJ (last accessed Jan. 22, 2021).

[10] The Action Plan is available at: https://www.njcourts.gov/public/assets/supremecoutactionplan.pdf (last accessed Jan. 22, 2021).

Point II

The plain language of N.J.A.C. 13:59-1.1 permits the State to run criminal background checks on prospective jurors, and the State's proposed solution safeguards against bias.

Amici claim that the empaneling of a jury for a criminal defendant's trial is not a "criminal justice purpose" under N.J.A.C. 13:59-1.1. (SHUb32-65). Some claim there should be several additional hearings or mini-trials to both (1) allow defendants to contest the content of background check results, and (2) determine whether background checks can be done at all, as prosecutors cannot be trusted, see (SHUb32-65), while others argue that the State should not be allowed to perform checks at all, see (ACDLb14-24). These assertions are baseless and undermine the utility and importance of name-based checks. The State's proposed solution calms any fears about the practice of background checks, and creates a reasonable, even-handed approach to eliminating bias of all kinds in jury selection.

N.J.A.C. 13:59-1.1 specifically defines the "administration of criminal justice" or a "criminal justice purpose" as: "The detection, apprehension, detention, pretrial and post-trial release, prosecution, adjudication, correctional supervision or rehabilitation of accused persons or criminal offenders." (emphasis added). The prosecution and adjudication of the accused person or criminal offender in this case, defendant

Edwin Andujar, was performed via his criminal trial. That trial involved jurors who, under constitutional provisions such as due process and the Sixth and Fourteenth Amendments, must be a fair and impartial group of defendant's peers. The idea that the selection of those jurors does not relate to a criminal justice purpose is contrary to the plain language of the governing provision of the Administrative Code. See U.S. Bank, N.A. v. Hough, 210 N.J. 187, 199 (2012) (noting that regulations in the Administrative Code are interpreted the same way as statutes, beginning with the plain language of the provision).

In Salmon v. Commonwealth, 529 S.E.2d 815, 818-19 (Va. App. 2000), the defendant made the same argument as to an analogous Virginia statute as SHU does here. Rejecting this contention, the court found:

> [V]oir dire of potential jurors directly involves the prosecution of a criminal case, because it is part of 'the process in which an accused is brought to justice from the time a formal accusation is made through trial and final judgment....' The Commonwealth's Attorney's use of potential jurors' criminal background information, therefore, is directly related to the prosecution of criminal cases and is authorized by [Virginia] Code [Ann.] § 19.2-389(A)(1). Thus, because the Office of the Commonwealth's Attorney is a criminal justice agency, and because the 'administration of justice' includes the prosecution of criminal cases, Code § 19.2-389(A)(1) authorizes the Commonwealth's Attorney to review the criminal background records of prospective jurors.

> (Ibid. (first quoting Phillips v. Commonwealth, 514 S.E.2d 340, 343 (Va. 1999)).]

This is persuasive reasoning. Selecting jurors is a critical part of bringing an accused to justice. The use of background checks is not some side project for the prosecutors charged with trying the case; it "is directly related to the prosecution of criminal cases[,]" and is therefore authorized by N.J.A.C. 13:59-1.1.[11]

As such, any discussion of N.J.A.C. 13:59-1.2, "Dissemination for noncriminal justice purposes" is completely beside the point. (Emphasis added); see (SHUb37-43). There can

[11] Other jurisdictions are in accord. See, e.g., Tagala v. State, 812 P.2d 604, 611-12 (Alaska Ct. App. 1991) (collecting cases and holding that the privacy and security interests of private citizens did not overcome the interests of the criminal justice system, and thus the State was authorized to perform background checks on potential jurors); Saylor v. State, 686 N.E.2d 80, 83 (Ind. 1997) (prosecution permitted to conduct criminal background checks on potential jurors; trial court's willingness to entertain discovery request from defendant to obtain the information from prosecutor assured that defendant received due process of law), cert. denied, 525 U.S. 831 (1998); Commonwealth v. Cousin, 873 N.E.2d 742 (Mass. 2007) (reviewing jurors' criminal records for the purpose of determining their qualifications falls under the Commonwealth's criminal justice obligations), cert. denied, 553 U.S. 1007 (2008); State v. Jordan, 854 N.E.2d 520, 528-29 (Ct. App. Ohio) (finding use of criminal background databases, where the prosecutor "checked the records based on suspicions it had as a result of routine inquiry during voir dire" and turned the results over to the defense at the time of the Batson hearing, violated neither the Ohio Administrative Code nor the Ohio Constitution), app. denied, 855 N.E.2d 496 (Ohio 2006).

be no real argument that a criminal trial is not the "prosecution" of a defendant. Serving as a juror in a criminal case is not merely performing some service, like when one applies for a job. (SHUb40-42). Service on a criminal jury is not akin to some civil proceeding or non-legal job search — it is the most important aspect of a criminal proceeding as those jurors directly decide whether the defendant is to be deprived of his liberty. A defendant's criminal jury trial does not just "happen to be" criminal, (SHUb38-39); it is the primary (and universally renowned) vehicle through which the criminal justice system operates.

Some amici suggest that if prosecutors can conduct criminal background checks, the prospective juror must be allowed to challenge the results at a hearing. This would be inappropriate. Such a position would no doubt result in protracted mini-trials where the attorneys and the prospective juror would squabble about the accuracy of the result. Instead, in those rare instances where the State conducts a limited background check of a prospective juror, the State will disclose to the defense and the court the results, and the parties can argue, and the judge will decide, whether the information revealed supports a challenge. Such results should be presumptively accepted absent some reason to suggest otherwise, and only in rare situations should the prospective juror be

asked to clarify his or her history, and only to the extent there is confusion present in the results themselves. Mere speculation by an attorney will not do. Anything more runs the risk of having the criminal trial devolve into a mini-trial (or several of them) about the details of the prospective juror's criminal history.

SHU baselessly claims that the State "made" F.G. unavailable by arresting him, and that the contested-information mini-trials are necessary to avoid the vagueness about what the open warrant against F.G. was for. (SHUb41, 45). It claims that F.G.'s warrant could have been for a minor outstanding municipal warrant which would not have otherwise resulted in an arrest. Maybe, maybe not. But again, had defense counsel not conceded that F.G. had to be removed for cause, further inquiry would have ensued, including looking into whether the warrant was something F.G. could dispose of without missing any future trial days, or if it was for something more serious that would cause him to be absent from the trial. This is all speculation; trial defense counsel's agreement to remove defendant is what made this information unavailable. (SHUb41). Thus this vagueness is not the fault of the State; the prosecutor furnished both the court and defense counsel with the report's contents, and as a result, defense counsel conceded, after hearing the prosecutor's argument, that F.G. must be removed and

only requested that he be arrested outside of the view of the jury. At no point did she dispute the report's contents. That concession and agreement between the parties was not the State "making" F.G. unavailable and "forcing the judge's hand" "because [the State] was going to arrest him." (ACDLb19). The State's proposed rule of putting all parties and the court on notice of the results of a search, whatever the result, with an opportunity to be heard should counsel want it, safeguards against any issues as to confusion, and serves as the best process to uncover any bias.

Amicus contends that conducting name-based background checks on prospective jurors is not a "criminal justice purpose" because the statute should be construed to mean that the State can only use background checks to investigate the underlying crime or people suspected or accused of a crime. (SHUb41). The plain language of the applicable provision of the Administrative Code is not so limited. Amicus has focused on "detection" and "apprehension," which do appear on the list in N.J.A.C. 13:59-1.1. But it totally ignores all the others, specifically "prosecution" and "adjudication." In fact, the list runs the gamut through every aspect of the criminal justice process—from "detection" to "correctional supervision and rehabilitation[.]" Ibid. Had the authors of this provision wanted to limit background checks in criminal matters, they could have easily

done so. Their decision to include every aspect of the criminal justice process supports the notion that a criminal background check may be conducted at any time, from detection to incarceration.

There are limitations. N.J.A.C. 13:59-2.4 sets forth restrictions the authors intended to impose upon criminal justice agencies, such as county prosecutors' offices, when using the information acquired from these searches:

> Access to criminal history record information for criminal justice purposes is restricted to criminal justice agencies as defined in N.J.A.C. 13:59-1.1. Criminal justice agencies shall limit their use of criminal history record information solely to the authorized purposes for which it was obtained. Criminal history record information furnished by the SBI or accessed pursuant to a "New Jersey Criminal Justice Information System User's Agreement" shall not be further disseminated for any purpose, unless such further dissemination is authorized by law.
>
> [N.J.A.C. 13:59-2.4(a) (emphasis added).]

Here, the information is to only be used for assessing the fitness of a juror to serve impartially, honestly, and fairly. Thus, the free-for-all the amici contemplate is not permitted even now. (ACDLb20-21). The Code's authors clearly intended that criminal justice agencies have access to this information for criminal justice purposes, not just those who defendant and his amici would like them to have. Ensuring the empaneling of a

fair and impartial jury to protect a criminal defendant's right to a fair trial must, therefore, be a purpose contemplated by this statute. The notion that the State engages in secret, pernicious practices regarding background checks is a bald and baseless accusation. (ACDLb3, 6). There should not be a presumption that all prosecutors are acting in bad faith; if any prosecutor is found to be doing so, there are severe penalties for such behavior.[12]

At any rate, the State's proposed practice of open notice to all parties of the results of such a search when one is performed nullifies this concern. Should the defense believe such a search was done due to implicit, explicit, or implied bias, they can so allege and begin an inquiry into the prosecutor's intentions and mental state. See Point I, ante.

Moreover, the State's proposed solutions cure the problem defendants have been concerned about as far back as In re State ex rel. Essex Cty. Prosecutor's Office, 427 N.J. Super. 1, 21-22, 25 (Law. Div. 2012). In that case, which dealt with the State obtaining prospective jurors' birthdates from the Judiciary to use to conduct a background check, "the Public

[12] In addition to the serious consequences of depriving a criminal defendant of a fair trial and the results that follow, rogue prosecutors face disciplinary action under the Rules of Professional Conduct and, in appropriate cases, prosecution for official misconduct under N.J.S.A. 2C:30-2, just to name a couple others.

Defender argued forcefully that every piece of information that is given to the State should also be given to counsel for the defendant, as a matter of essential fairness." This is the exact process the State now proposes — total transparency, not crippling inaction.

Tellingly, at the time of Essex Cty. Prosecutor's Office, "the ACDL-NJ argue[d that] 'no one can oppose confirming that all proposed jurors are qualified to serve as jurors.'" Ibid. The court in that case even acknowledged the reasons both defendants and the State can benefit from these checks: "[W]hile the State wants to protect against the seating of jurors who had lied during voir dire concerning their criminal backgrounds, defense counsel might want to protect against the seating of jurors who had lied during voir dire concerning past victimization or associations with law enforcement." Ibid. (citing Osorio, 199 N.J. at 495). Whereas now, the ACDL cannot "imagine" a circumstance in which a background check would ensure a fair trial. (ACDLb19).

It is also clear that the concerns expressed in Essex Cty. Prosecutor's Office are not presented or are rectified here. That case dealt with the State's desire to use the birth dates of prospective jurors to engage in more invasive searches than the ones performed in this case, and, more importantly, to have the judiciary disclose to the State information to facilitate

those checks; as a matter of privacy, this was not permitted, and the State has at no point renewed that application. Essex Cty. Prosecutor's Office, 427 N.J. Super. at 19. Further, the judge in that case acknowledged that, at the time, the State was offering no solution to potential bias concerns regarding running background checks. Id. at 25. That is no longer true, and in fact, the State is the only party offering a concrete solution to the issue at hand, backed by caselaw, in the spirit of fairness and transparency. See Point I, ante. The State's is a much more reasonable, solution-oriented approach than presuming racist ideation on the part of all prosecutors and punishing accordingly.

Disallowing background checks entirely is no solution, either, as the ACDL acknowledges. (ACDLb14-22). For one, that leaves the case at hand in a strange limbo, where the prosecutor engaged in a check permitted by the rules at the time which would be no longer permitted. At a minimum, should that extreme approach be adopted by this Court, the rule should be purely prospective; the prosecutor in this case acted in good faith and in accordance with the plain language of the applicable code provision at the time of trial. It would be fundamentally unfair to upend a just prosecution based on a rule announced later.

Moreover, the knowledge gleaned from these minimally

invasive checks is beneficial to both the State and defendants, see Essex Cty. Prosecutor's Office, 427 N.J. Super. at 21-22, and the State is now offering complete transparency. Defendants are therefore not left out of the process and can challenge prosecutors freely about their motivations for doing so. Judges make the ultimate decision about those motivations, thus allowing jury selection to remain in the province of judges, not lawyers. This quells any fears expressed by the amici. (ACDLb18-19); see also Salmon, 529 S.E.2d at 818-19 ("While '[i]t is always the duty of the trial court to secure a fair jury, and to avoid, if possible, any suspicion of unfairness,' it is well established in Virginia that '[t]he manner in which jury selection is conducted is within the discretion and control of the trial court, guided by statute and rule of court.'").

That prosecutors can perform these checks when defendants cannot does not lead to an unfair or unconstitutional result. The rules have expressly authorized this practice, and prosecutors, as law enforcement agents, logically have access to material information defendants do not. The ACDL even acknowledges this common circumstance. (ACDLb19-20). It is, however, the State's solemn obligation to turn that information, along with all discoverable material in its possession, over. See generally State in the Interest of A.B., 219 N.J. 542, 555 (2014) (discussing New Jersey's long-standing practice of broad

and open discovery).[13] Failure to uphold that duty, regardless of whether that failure is a result of good or bad faith, results in penalties. Ibid.

Thus, the solution the State offers is neither new, nor ineffective; it has always been that the State is burdened not only with the standard of proof, but with disclosure to defendants of material information solely in its possession. Likewise, it has always been that a failure to uphold that duty

[13] Again, other jurisdictions are in accord. See Tagala, 812 P.2d at 613 ("[W]e believe that the prosecutor should disclose to the defense, upon request, criminal records of jurors, at least in cases where the prosecution intends to rely on them."); Losavio v. Mayber, 496 P.2d 1032, 1034 (Colo. 1972) ("[Defense attorneys were seeking no more from these records than what was provided to the district attorney. As thus framed, the request of the petitioners is eminently reasonable, just and fair."); Saylor, 686 N.E.2d at 83 (acknowledging a trial court's willingness to entertain discovery request from defendant to obtain the information from prosecutor assured that defendant received due process of law); Commonwealth v. Smith, 215 N.E.2d 897, 900 (Mass. 1966) ("We believe [that] information obtained should be as available to the defendant as to the district attorney."); Goodale, 740 A.2d at 1031 ("We conclude that fundamental fairness requires that official information concerning prospective jurors utilized by the State in jury selection be reasonably available to the defendant."); but see People v. Murtishaw, 631 P.2d 446, 464 (Cal. 1981) (granting the trial court "discretionary authority to permit defense access to jury records and reports"), cert. denied, 455 U.S. 922 (1982), overruled o.g., People v. Boyd, 700 P.2d 782 (Cal. 1985). The State rejects any language in any of these cases that qualifies the defense's right to this information; New Jersey prosecutors can and will continue to disclose the results of conducted background checks without the need for a showing of good cause or an order from the trial court.

is a violation of defendant's due process rights. And it has always been that evidentiary hearings and testimony are necessary to probe for the presence of malfeasance, explicit or otherwise. Doing so in this situation would remain consistent and true to those longstanding practices.

SHU claims the State should be required to ask for leave of court to do a background check, (SHUb58-65), but again, this will surely create mini-trials for no true reason and assumes insidious reasons behind the actions of all prosecutors. The public is fully aware that by showing up for jury duty, their personal lives and their contact with the criminal justice system will be probed and revealed to assess their fitness to sit as a juror, and thus there is no chilling effect created by these checks. See United States v. Falange, 426 F.2d 930, 933 (2d Cir.) (concluding that investigating jurors would not discourage them from serving), cert. denied, 400 U.S. 906 (1970). Any assertion that all jurors will be too afraid to serve for fear of being arrested for traffic tickets is baseless. And, "[e]ven if jurors have a privacy interest in their criminal histories, that right certainly does not extend to lying about it under oath."[14]

[14] Eileen E. Rosen and Catherine M. Barber, "Criminal Background Checks of Prospective Jurors: Uncovering Unacceptable Juror Bias and Preventing Unnecessary Post-Verdict Litigation," 60-JUN Fed. Law. 54, 56 (2013).

Ensuring a fair and impartial jury is essential to due process, a right all sides have in a controversy. Amici have offered nothing outside of alarmist, baseless accusations with careful exclusion of material statements on the record to back their idea that background checks are the tool of secretive, insidiously racist prosecutors. Indeed, the utility of the checks is manifest in this case's record. F.G. was a problematic juror due to: his unusual knowledge of criminal and law enforcement operations based on his own individualized circumstances; his close, personal associations with criminal behavior; his explicitly stated outrage at an acquittal in a stabbing case in his family; and his evasive, contradictory, and ever-shifting answers about what he knew and who he knew and what he knew about them, which indicated he was being dishonest. (Pc7-12; Pb9-15). That dishonesty was verified when he was revealed to have concealed his domestic violence arrests. F.G.'s unique circumstances highlight the utility of background checks, and the danger of eliminating them.

Defendants, whatever their crimes, have a right to a panel of jurors who approach the process honestly and impartially. No defendant is done any favors by allowing deceit to persist unfettered, and surely the criminal justice system suffers when it does. The State, as discussed ante, has implemented several action plans to police the practices of its agents for implicit

bias, as has the Judiciary. Extending those practices to the process of juror selection is hardly a great leap, and one that is beneficial to all parties. Thus, the State's suggested approach of (1) extending Batson/Gilmore's reach, with all of its protections and remedies in the event of a violation, to background checks of prospective jurors, (2) requiring full disclosure of the check and its results to opposing counsel and the court, along with an opportunity to be heard if requested, and (3) continuing to implement implicit bias training, will safeguard against pernicious bias during jury selection.

Conclusion

For these reasons and those set forth in the State's previous submissions, the State respectfully requests that this Court reverse the judgment of the Appellate Division and reinstate the jury's verdict in this case.

Respectfully submitted,

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