Case No. A22A1213

IN THE COURT OF APPEALS
STATE OF GEORGIA

DUSTY SPRATLIN, *Appellant*.
v.
STATE OF GEORGIA, *Appellee*.

BRIEF OF GEORGIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF APPELLANT

JASON SHEFFIELD
President, GACDL
State Bar No. 639719

PETERS, RUBIN, SHEFFIELD
& HODGES, P.A.
2786 North Decatur Rd.
Suite 245
Decatur, GA 30033
(404) 296-5300
jasonsheffieldattorney@gmail.com

GREG WILLIS
Chairperson, GACDL
Amicus Committee
State Bar No. 766417

WILLIS LAW FIRM
6000 Lake Forrest
Dr.
Suite 375
Atlanta, GA 30328
(404) 835-5553
gw@willislawga.com

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The Interest of Amicus

The Georgia Association of Criminal Defense Lawyers (GACDL) is a private, member-funded statewide organization comprised largely of criminal defense lawyers. Its mission is to promote fairness and justice through member education, services and support, public outreach, and a commitment to quality representation for all. Consistent with its mission, GACDL has a particular interest in the proper application and development of Georgia's criminal law. This appeal involves an important question affecting routinely litigated criminal cases.

Summary of Argument

The instant case presents issues of grave matter and concern. The State's exclusive use of law enforcement and government databases presents a due process violation for every individual in a similarly situated position as Appellant. The State's review of these records during jury selection while barring the defense from accessing those same records is fundamentally unfair and gives the State an advantage during the jury selection process.

According to briefing and oral arguments, one important issue is

whether the State can rely on the work-product privilege to prevent disclosure and whether the State waived the work-product privilege in the instant matter. The list of objective facts about jurors created by an agent of the State was not work product. The document at issue does not contain the mental impressions of prosecutors or its agents – it contained information about the potential jurors' involvement with the criminal justice system including law enforcement. The State's argument that the records in the instant matter are privileged under the attorney work-product doctrine is misplaced. The application of the rules as the State has argued is an affront to fundamental fairness and justice.

Barring the defense from accessing the records that the State relied on in conducting additional research on the prospective jurors is fundamentally unfair. It also prevented the defense from challenging the State's race-neutral claims and the trial court's credibility findings about the State's claims. The State acknowledged this problem with fundamental fairness in its brief but erroneously contends that its work-product privilege supersedes Appellant's right to access these records:

> Spratlin's concern for this information is understandable, as the evidence precluded him from attacking the trial court's

> credibility determinations about Murphy and Pettit any other way. But when the State's work product is analyzed under the proper legal test, it is clear that the trial court's ruling cannot work reversal on appeal.
>
> *Brief of Appellee* at 19.

The jury selection process in Appellant's case was fundamentally unfair and the documents the State seeks to protect as work product are not the mental impressions of prosecuting attorneys. Even if they were considered work product, this privilege was waived by the State.

GACDL respectfully urges this Honorable Court to reverse the ruling of the Superior Court of Athens-Clarke County and find that (1) the trial court erred in finding that the juror information list was work product and that the State did not waive the work-product privilege; (2) the trial court erred by allowing the State to access and rely on government databases during jury selection without providing that information to Spratlin, resulting in due process violations under both the state and federal constitutions (in violation of protections of the Due Process Clauses of both the Georgia Constitution and United States Constitution including the right to a fair jury trial); and (3) the trial court

erred in finding that the State did not commit a Batson violation during Spratlin's jury selection. Spratlin was denied his constitutional right to a fair jury trial.

SUPPLEMENTAL STATEMENT OF FACTS

GACDL adopts the facts in Appellant Dusty Spratlin's ("Spratlin") Brief of Appellant as if fully stated herein. GACDL is supplementing the facts to further address the disparities during jury selection and the actions taken by Investigator Erika Murphy ("Murphy") and Victim's Advocate Christina Pettit ("Pettit"). Both Murphy and Pettit were employees of the District Attorney's Office.

The State used five of its seven peremptory strikes against black potential jurors, and of the 31 potential jurors in the final jury pool,[1] only nine were black. (V.4, R.195). At least six of the black potential jurors were added to Pettit's list of 10-12 people who needed further investigation. The additional investigation was conducted using law enforcement and government databases with information that is unavailable to the defense. Three government databases were referenced during the testimony of Murphy and Pettit, however, only two appear to be relevant for the searches that were conducted during Spratlin's jury

[1] The trial court halted jury selection at Juror 31 (Summons No. 139) (V.4, R.195).

selection. The two systems used by Murphy and Pettit were LERMS (aka New World System) and Tracker.

LERMS — Murphy testified that this is a law enforcement records and management system. (V.4, R.201). Murphy further testified that this keeps all records for police departments, including "all the data for University of Georgia Police Department, Athens-Clarke County Police Department, Clarke County Sheriff's Office, Clarke County Jail, and the state police." (Id.). Murphy testified that LERMS also includes "flags" for individuals that have had some contact with police, including mental health issues, obstruction, fighting, etc. (V.4, R.204, 207). This was the database used by Murphy.

TRACKER — Murphy testified that this is a statewide system that provides all the active and closed court cases the District Attorney's office (DA) has. (V.4, R.201). When asked by the State if Tracker is "a statewide database of any criminal case that's filed by a district attorney's office that belongs to the Tracker system," Pettit testified that she was not sure if every DA's office had it but a lot do and she knew that the Prosecuting Attorney's Council (PAC) of Georgia created Tracker. (V.9, R.38). Pettit testified that the "flags" in the system indicate that the individual has definitely had some sort of involvement in the criminal justice system. (V.4, R.228). Pettit testified that users are able to see the individual's race if they show up in Tracker. (V.9, R.32). This was the database used by Pettit.

Murphy testified that she is connected to every county and every

jurisdiction in the State of Georgia through these databases. (V.4, R.201).

On April 6, 2021, jury selection for Spratlin's trial began. Pettit, the DA's Victim's Advocate, assisted the State with trial preparations and she was given the six-page juror list with all jurors in the juror pool (around 100). (V.4, R.217). Pettit testified that when she goes over juror lists, she runs the names through Tracker and writes down anything that could be of relevance. (Id.). Pettit testified that she ran all the names on the six-page juror list through Tracker and she came up with a list of 10-12 persons that had pending cases or cases that might involve potential jurors that were on the list. (V.4, R.218). Pettit testified that she typed her list in an email or a Word document with the shorthand notes of what she had found, and her list was then sent to prosecutors. (Id.). This list created by Pettit is the document the State is objecting to on work-product grounds despite the lack of any mental impressions of the State related to the information in the database.[2]

[2] During Spratlin's Motion for New Trial hearing, Pettit testified that she typically receives a hard copy of the full juror list, but she did not have a way to make copies for Spratlin's case. Pettit's supervisor texted her pictures of the jury list and Pettit then created a separate Word

Notably, Pettit testified that of the approximate 100 potential jurors she ran through Tracker, an estimated one-third to one-fourth (about 22-25 people) came back with flags in the system. (V.4, R.226-27). Despite the large number of potential flags, Pettit chose to only include 10-12 people on her list of people who needed further investigation. Based on GACDL's understanding of the record, this was the list that Murphy then used to run criminal records checks for potential jurors using LERMS.

Of the 10-12[3] potential jurors who required further investigation, at least 6 were black: Juror 1, Juror 8, Juror 12, Juror 17, Juror 21, and Juror 25.[4] (V.4, R.194-95; V.2, R.99). The record is unclear as to whether any of the other individuals among the 10-12 on Pettit's list were black

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document with the notes of what she found on Tracker for each of the 10-12 jurors that needed further investigation. (Pettit testified at this hearing that her list contained about 12 people (V.9, R.33)). Pettit testified that she typically writes her notes on the hard copy of the jury list that she receives but she created a separate Word document in this case since she was not given a list to write on. (V.9, R.31-32). The work-product argument made by the State has been consistently rejected by courts across the country; it applies both to the Word document created by Pettit as well as jury lists with Pettit's and/or any other State agent's handwritten notes about the juror's involvement with the criminal justice system.

[3] Murphy testified that it was between 10-15 people.

[4] These are the juror numbers found on the Panel List starting at V.2, R.100.

due to the State's sustained objections to Spratlin's requests to access the list. The State struck 5 of the jurors from Pettit's list and all were black: Juror 1, Juror 8, Juror 12, Juror 17, and Juror 25.

Pettit testified that some people would show up in Tracker without a middle name but the juror list did contain a middle name so there was no way for her to fully confirm that it was the same person. (V.4, R.226-27). The State's attorney could easily confirm if it was the same person by asking questions about what was showing in the database during *voir dire*, however, that would have then been helpful to Spratlin because he would know at least some of the information in the database about that potential juror.

When the State asked about the investigation of Juror 1, a black female, Pettit testified that she had to do some digging because she discovered that the spelling of Juror 1's name was different than what was listed on the juror list and that it did not contain a hyphen.[5] (V.4, R.219). It is unclear why Pettit chose to dig further into Juror 1 to confirm

[5] Note: Pettit testified that the name she found in the system did not contain an "H" at the end; however, the transcript shows that the name Juror 1 gave at the beginning of *voir dire did* contain an "H" at the end. (V.4, R.55).

that was the correct person but not the others who showed/did not show a middle name. It is also unclear whether anyone in the DA's office ever attempted to ask Juror 1 about the correct spelling of her name to confirm or dispel the discrepancies found by Pettit.

Responding to the trial court's question about how she decided to "whittle" the list of 22-25 people with flags down to 10-12, Pettit testified that she based it on the charges and their involvement. Pettit stated that if they were a witness and not a defendant – she looked to what the charges were and how they played a role in the case. For potential jurors with multiple cases as the defendant, she would make a note of that or if there were any open cases. (V.4, R.227). All notes appear to be objective facts from the databases.

Although Pettit used Tracker to search every person on the juror list, the State only questioned Pettit about the searches she conducted on two potential jurors on her list: Juror 1 and Juror 8. Pettit testified that after "do[ing] a little bit of digging" on Juror 1, she found that Juror 1 is the family member of a deceased victim in an active murder case in the DA's office. (V.4, R.219-20). In the table on Page 18 of Brief of Appellee,

the State failed to mention that Pettit testified Juror 1 was the *family member of the victim*, a fact that could have been favorable to the State considering that Spratlin's case involved allegations of domestic abuse. It is likely that the State inaccurately characterized Pettit's testimony about Juror 1 in order to fabricate a race-neutral reason for striking Juror 1: "(P): Witness in a pending murder case." As for Juror 8, Pettit testified that she located an active case in the DA's office and that she could not recall all the charges, but she believed some involved cruelty to children. (V.4, R.220).

After Pettit ran the individuals through the system and created her list, she met with prosecutors to go through the list again. Murphy then joined the meeting. Based on GACDL's understanding of the record, the names on Pettit's list of 10-12 people with flags were read aloud to Murphy who then entered the names into the LERMS database. (V.4, R.219).

Below is a summary of Murphy's findings for each of the potential jurors at issue in this case, as well as a summary of *voir dire* of the jurors with relevant facts.

Juror #[6]	MURPHY TESTIMONY	FACTS FROM *VOIR DIRE*
1	Located theft by conversion accusation from 2014; "the report states that she was stealing money from her mother's social security."[7] (V.4, R.203).	• Served on jury (V.4, R.55) • Involved in case pending at DA's office (V.4, R.65) • Visited family in jail 6 years ago (V.4, R.64) • Testified in criminal trial about 6 years ago (V.4, R.67-68) • Donated to domestic violence relief programs (V.4, R.81) • Knew Juror 8 (Id.)
8	Flagged for mental health, officer safety, fighting expert.[8] Murphy testified that Pettit shared the information about Juror 8's pending criminal case. (V.4, R.204-206).	• Served on grand jury (V.4, R.57) • Visited jail a while before (V.4, R.65) • Knew Juror 1 (V.4, R.81)
12	Several prior arrests for criminal damage to property from 2009-2010; his last arrest was for manufacturing drugs in	• Never been on jury before (V.4, R.58) • Had dealings with law enforcement (V.4, R.60-61) • Visited Athens-Clarke

[6] These numbers are from the Panel List beginning on V.2, R.100.

[7] This testimony implies that the government databases provide not only records of criminal charges or cases pending but the associated police reports.

[8] Note: These flags do not necessarily mean that the individual was charged or convicted of a crime. They simply reflect the notes entered by law enforcement after the individual has had some form of contact with police. These are records that are unavailable to defendants because they are not part of law enforcement/government agencies.

	2015. (V.4, R.206).	County jail (V.4, R.65)
17	Located a report for harassing calls; [9] she was a suspect for forgery; and a suspect for burglary. (V.4, R.206).	• Never been on a jury before (V.4, R.88) • Visited family member in jail probably over 5 years before; person was not incarcerated at the time of *voir dire*. (V.4, R.99)
25	Located an arrest for financial card theft in 2010 and arrest for simple battery. (V.4, R.209).	• Never been on a jury before (V.4, R.150) • Ex-boyfriend was law enforcement (V.4, R.167)

The jurors all expressed that they were capable of remaining fair and impartial despite their answers during *voir dire.*

As indicated in Footnote 9, Juror 17 did not raise her hand or admit in any way that she had been involved with law enforcement during *voir dire*, despite the information about harassing calls and suspected burglary that Murphy located in the system. Nor did Juror 25 indicate any involvement with law enforcement during *voir dire* aside from her

[9] The State seeks to characterize Juror 17's involvement with harassing phone calls as "indicating safety concerns based on prior interactions with law enforcement." *Brief of Appellee* at 18. However, this is purely conjecture. This testimony only came about after the State asked Murphy if, based on her involvement with similar cases, harassing phone calls can involve domestic violence. Murphy's response to this question was "usually." (V.4, R.208-09). There was no questioning of Juror 17 to determine whether that was accurate in her case.

past relationship with an officer.

The State's "race-neutral" reasons for striking Juror 17 are based on conjecture and information in the government databases that was unavailable to the defense. Spratlin never explored these issues during *voir dire* with Juror 17 because he was not aware of the information the State relied on in the databases. The opportunity to inquire into Juror 17's involvement with law enforcement was available during *voir dire,* however, the State sought to circumvent the *voir dire* process by conducting its own investigation into prospective jurors outside the presence of the trial court. Because the State failed to ask questions about the information in the database, Spratlin never knew about this information. Spratlin was unable to delve further into the information that the State obtained from its databases regarding each of the prospective jurors because the State did not provide that information to the defense and because it was only revealed during the Batson challenge.

Spratlin was also not able to view all the records for every other juror Petit ran through Tracker before "whittling" her list down to 10-12

people. This information only became available to Spratlin after the Batson challenge was raised and only information about the jurors at issue in the Batson challenge was revealed to Spratlin. There could have been information in the system for other jurors, including those selected, that would have been helpful to Spratlin during *voir dire* in asking questions and making decisions on which jurors to strike. The State arbitrarily sought to delve further into the criminal backgrounds of potential jurors instead of using *voir dire* as an opportunity to obtain this information directly from the juror. The State intentionally and strategically refused to ask about information in the databases during *voir dire*, likely in an effort to ensure that Spratlin did not know about the information during *voir dire*.

Below is a table with a summary of the relevant testimony from *voir dire* of the selected jurors.[10] Note that Juror 7, a white woman: had experience with law enforcement on a criminal case; was unhappy about the outcome of the case; had visited someone in jail more than five years prior; was subpoenaed as a witness in a criminal case; and had called

[10] The Juror Nos. in this table are based on the Jury List found on V.2, R.99.

police to report a crime. The State had no issue with selecting Juror 7 to sit on the jury over Juror 17. The State claimed the race-neutral reason for striking Juror 17 was because she was a suspect in a few cases (but never charged/accused or convicted). The State also had no issue with sitting Juror 5 who had experience with police in some form or fashion and had visited the jail 4-5 years prior.

Juror #	Summons #	FACTS FROM VOIR DIRE TESTIMONY
1	18	• Served on jury (V.4, R.56) • Sister is a lawyer (V.4, R.78) • Donates to domestic violence relief programs (V.4, R.80)
2	33	• Never been on jury (V.4, R.56) • Witness to a crime - called police and made a statement; was not called as a witness (V.4, R.80)
3	47	• Never been on jury (V.4, R.57)
4	49	• Served on jury (V.4, R.57-58) • Niece went to school with someone that works in the DA's office (V.4, R.75-76)
5	63	• Never been on jury (V.4, R.58) • Experience with police in some form or fashion (V.4, R.61) • Visited someone she knew in the detention center 4-5 years ago (V.4, R.66)
6	69	• Never been on jury (V.4, R.58)

		• Donates to domestic violence relief programs (V.4, R.81) • Worked for business involving corporate law (V.4, R.79)
7	**79**	• Never been on jury (V.4, R.88) • Had experience with law enforcement - criminal case; not happy with the outcome of the case (V.4, R.93) • Visited someone in jail more than 5 years ago (V.4, R.98) • Witness in a criminal case – was subpoenaed; was happy with the verdict but not the overall outcome (V.4, R.104-05) • Called police to report a crime in 2010, gave statement, was witness, called to court (V.4, R.123)
8	96	• Never been on jury (V.4, R.89) • Visited prison about 4 years prior (V.4, R.101) • Knew an officer in her neighborhood (V.4, R.121) • Reported a crime and made statement but was not called as witness (V.4, R.124-25)
9	105	• Never been on jury (V.4, R.91) • Donates to domestic violence relief programs (V.4, R.129)
10	112	• Never been on jury (V.4, R.151)
11	114	• Served on jury (Id.)
12	117	• Served on jury (Id.)
13	124	• Never been on jury (Id.)

ARGUMENT AND CITATION OF AUTHORITY

Introduction

As this Honorable Court noted during oral arguments, this issue is a matter of first impression in Georgia courts. Several other courts have addressed this issue and have found that the State's reliance on such records during jury selection without providing the same information to the defense gives rise to due process violations. They have also specifically addressed and rejected any claim of work-product privilege raised by prosecutors.

> [E]ven if we consider the State's work product argument, we do not believe the raw information from the criminal history databases contains "the mental processes of the attorney." …
>
> Rather, in accessing these databases, **the prosecution is merely capitalizing on its relationship with government entities that systematically acquire detailed information on individuals who enter the criminal justice system. As the quantity and quality of that information continue to increase, unilateral State access will increasingly disadvantage defendants.**
>
> State v. Second Jud. Dist. Ct. in & for Cnty. of Washoe, 431 P.3d 47, 50-51 (2018) (emphasis added) (footnotes and citations omitted).

See also Losavio v. Mayber, 496 P.2d 1032, 1034 (1972)(emphasis added) ("[T]he reasons advanced for denying these annotated lists of

prospective jurors to the public defender's office, or, for that matter, to any defense attorney, are completely devoid of merit. … **Neither are they in any conceivable way 'work product.'**"); Tagala v. State, 812 P.2d 604, 613 (Alaska Ct. App. 1991) ("If the state is entitled to examine criminal records of jurors for jury selection, it is fair for the defense to have access to the same information."); State v. Bessenecker, 404 N.W.2d 134 (1987) ("We agree with the reasoning of those courts that generally have allowed defendants equal access to jurors' rap sheets obtained by the county attorney. We believe that considerations of fairness and judicial control over the jury selection process requires this result. If a rap sheet is thus acquired by court order [after a prosecutor has shown reasonable basis for believing the record will contain information pertinent to the individual's role as a juror and unlikely to be disclosed otherwise], it must also be made available to the defendant unless good cause is shown to the contrary."); People v. Murtishaw, 631 P.2d 446, 465 (1981) (finding that the trial courts have discretionary authority to permit the defense access to jury records and investigation reports that are available to the prosecution. "[P]rosecutors in case after case will have substantially more information concerning prospective jurors than

do defense counsel. Such a pattern of inequality reflects on the fairness of the criminal process."), *superseded by statute on other grounds as stated in* People v. Boyd, 700 P.2d 782, 790 (1985); and Com. v. Smith, 350 Mass. 600, 603 (1966) ("[T]he practice of using police officers to gather appropriate information about prospective jurors should be subject to the general supervision of the trial court and that the information obtained should be as available to the defendant as to the district attorney.")

It is fundamentally unfair and a due process violation under both the state and federal constitutions to allow the State to utilize government databases during jury selection without providing that information to the defendant, including Appellant Spratlin. It is unclear whether prosecutors are even authorized, statutorily or otherwise, to use these databases for jury selection. Even if they are, it is unconstitutional for these databases to be used by the State without providing defendants the same access.

The fundamental unfairness resulting from the State's ability to rely on law enforcement and other government databases during jury selection will remain an ongoing issue for defendants in Spratlin's position until our appellate courts prevent it like in most other states.

"[F]undamental fairness requires that official information concerning prospective jurors utilized by the State in jury selection be reasonably available to the defendant." State v. Goodale, 740 A.2d 1026, 1030-31 (1999) (emphasis added).

GACDL maintains that the notes the State claims are work product are, in fact, not work product at all. However, even if this Honorable Court were to find that they are work product, the State waived any work-product privilege when it called witnesses to the stand to discuss the notes.

I. IT IS FUNDAMENTALLY UNFAIR TO ALLOW PROSECUTORS TO ACCESS AND RELY ON INFORMATION IN LAW ENFORCEMENT/GOVERNMENT DATABASES DURING JURY SELECTION WHILE PRECLUDING THE DEFENSE FROM ACCESSING THOSE SAME RECORDS.

GACDL expresses grave concern over the State's ability to access extensive law enforcement and other government databases that are inaccessible to the defense during jury selection. By accessing these databases and precluding the defense from having access to this same information, the State has an advantage during the jury selection process over the accused. These databases provide prosecutors with information

unavailable to the general public including defendants who have the time and resources to conduct their own independent investigations into potential jurors. The State has an even greater advantage over indigent defendants because public defenders are further constrained by limited time and resources with heavy caseloads.

At trial, it is the rights, liberty, and, at times, the life of the accused that are at stake. The State's ability to access these databases during jury selection and bar the defense from accessing that information, whether for Batson purposes or otherwise, presents an issue of fundamental fairness for every defendant. Permitting the State to rely on these records during jury selection without requiring the State to provide those same records to the defense (apart from confidential/privileged information about victims/witnesses) is a due process violation, as it gives the State an unfair advantage during jury selection. This prevents the accused from having a fair trial that they are constitutionally guaranteed by both federal and state constitutions.

In Losavio v. Mayber, 496 P.2d 1032 (1972), the Colorado Supreme Court addressed this issue when public defenders sought to access criminal records of prospective jurors that the State relied on during jury

selection. Prior to the decision in Losavio, it was common practice for the police department to provide the district attorney's office with the conviction records for prospective jurors. The DA's office would deliver a list of prospective jurors for each term of the district and county courts to the police department, and the police would check their records for each of the individuals listed.

The police would note any convictions in traffic and criminal cases beside each name on the prospective juror list and then return a copy with the notes to the DA's office where they were "made available to the trial deputies for their use in the jury selection process." Id. at 1033. This is nearly identical to Murphy and Pettit's roles during Spratlin's jury selection where both were tasked with running names through law enforcement/government databases before providing their findings to prosecutors.

The Losavio case held that: "Under the evidence in this case, **we can perceive of no other conceivable purpose for these lists than as a substitute for *voir dire* examination at trial, and as a possible check upon the truthfulness of a juror's answer on *voir dire***." Losavio, 496 P.2d at 1033 (emphasis added). The Court examined the

state's public records laws and found that the police records and files the public defenders were seeking fell within the prohibited disclosures outlined in the statutes. Notably, however, the Court found that these police records contained more than just criminal convictions, just as the databases relied on by the State in the instant matter contained more than just criminal records.[11]

The Court noted that these records also:

> contain[ed] certain investigatory information concerning the individual, including complaints received from or about the person, his arrest record, and other information about the person from a variety of sources, including informations [*sic*]. **The disclosure of such information to either the defense or prosecution in the circumstances here under consideration goes far beyond the stated purposes for which the jury lists are used by the prosecution** and would be used by the petitioners as public defenders, if made available to them.

Id. at 1034 (emphasis added).

Looking to the public defenders' request for these records, the Court found that:

> **they were seeking no more from these records than what was provided to the district attorney.** As thus

[11] Most concerning in Spratlin's case are the "flags" in the databases indicating mental health concerns police have observed – something that rises well beyond involvement in a criminal case.

> framed, the request of the petitioners is eminently reasonable, just and fair. In our view, **the reasons advanced for denying these annotated lists of prospective jurors to the public defender's office, or, for that matter, to any defense attorney, are completely devoid of merit.**
>
> **Once these lists are given to the prosecution, they can no longer be classified as 'internal matters,' or as affecting only the internal operations of the police department.** In this regard, See generally, *United States v. Mackey, D.C.*, 36 F.R.D. 431 (1965) and *United States v. Hasiwar*, 299 F.Supp. 1053 (S.D.N.Y.1969).
>
> **Neither are they in any conceivable way 'work product.'** *United States v. Anderson*, D.C., 34 F.R.D. 518 (1963); *Richards-Wilcox Manufacturing Co. v. Young Spring & Wire Corp., D.C.*, 34 F.R.D. 212 (1964).
>
> Id. (Emphasis added).

The Court noted that the chief of police "apparently had no objection to supplying the requested lists to the public defender until he conferred with the district attorney," just as Pettit agreed to supply her notes to Counsel for Spratlin before the State objected on work-product grounds. Id. at 1035. (V.4, R.224). The Court in Losavio ultimately concluded that "defense attorneys are entitled to obtain this type of information from the prosecution in accordance with Crim.P. 16(c) if such information is in the possession of the prosecution. **The requirements of fundamental fairness and justice dictate no less**." Id. (Emphasis added). Losavio

was decided using logic and reason about fairness. It is directly on point and as the Court found there, in no conceivable way can these records be considered work product as the State is claiming in the instant matter.

In 2018, the Nevada Supreme Court held that, "as a matter of first impression, upon a motion by the defense, the district court must order the State to disclose any veniremember criminal history information it acquires from a government database that is unavailable to the defense." Second Jud. Dist. Ct. in & for Cnty. of Washoe, 431 P.3d at 47. This case came before the Nevada Court after a defendant sought an order compelling the State to provide the criminal histories of veniremembers before jury selection. Despite the State's refusal to provide the information, the Nevada Supreme Court ordered the State to disclose the information.

The record in Second Jud. Dist. Ct. is almost identical to the instant record. The courts in the Second Judicial District released a list of veniremembers to both parties several days before jury selection commenced. The State relied on government databases to access criminal histories for those veniremembers that are not available to defendants. Id. at 49. The State in Second Jud. Dist. Ct. did not dispute

either allegation – just as the State in the instant matter did not dispute that (1) it relied on government databases during Spratlin's jury selection, and (2) the databases contain information that is unavailable to defendants.

The defendant in Second Jud. Dist. Ct. correctly claimed that the resulting disparity put him at a disadvantage during jury selection. The State countered by arguing that the defendant was not disadvantaged because he could obtain equivalent information through commercial databases or *voir dire*. Id. The argument by the State failed. The State argues in the instant matter Spratlin's cross-examination of the State's witnesses regarding their searches was sufficient. However, Spratlin was *not* given the opportunity to obtain the equivalent information through the State's databases nor was Spratlin able to inquire into matters that were learned *after voir dire*.

The district court in Second Jud. Dist. Ct. granted the defendant's motion and ordered the State to "'disclose the criminal histories the State gathers, if any, for potential venire members'" to the court who would then provide those records to the defense. "The district court further explained that 'it believes in the fundamental right to fair play,'" and that

'[a]llowing only the State to use the criminal histories of potential jurors creates a disparity.'" Id. If it were true that defendants could get this same information from a commercial source then that further demonstrates that the State's arguments are misleading and why this information should be provided to all defendants where the State is utilizing this information during jury selection.

On appeal, the State sought to bar the district court from compelling disclosure of the criminal records. The Nevada Supreme Court looked to the district court's order and found that it contained a single factual finding: "'[a]llowing only the State to use the criminal histories of potential jurors creates a disparity.'" The Court then held that:

> The parties' stipulations support this finding. That is, **the State concedes that it prepares for voir dire by acquiring veniremember information using at least one government database that is unavailable to defendants. Such unilateral access to a resource the State finds useful for jury selection indeed creates a disparity between the two sides.** *See People v. Murtishaw,* 631 P.2d 446, 465 (1981) ("[P]rosecutors in case after case will have substantially more information concerning prospective jurors than do defense counsel"), *superseded by statute on other grounds as stated in People v. Boyd,* 700 P.2d 782, 790 (1985).

The remaining question is whether this disparity can be corrected. As the State correctly notes, our judicial system does not *require* parity of information between prosecution and defense. *See generally Kyles v. Whitley,* 115 S.Ct. 1555 (1995) (acknowledging that "the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense"). And while the State attempts to categorize the veniremember information as its work product, this argument was not made before the district court and is therefore inappropriately presented to this court. *See Archon Corp. v. Eighth Judicial Dist. Court,* 133 Nev. ——, 407 P.3d 702, 708 (2017).

However, even if we consider the State's work product argument, we do not believe the raw information from the criminal history databases contains "the mental processes of the attorney." *Floyd v. State,* 42 P.3d 249, 257 (2002) (internal quotation marks omitted), *abrogated on other grounds by Grey v. State,* 178 P.3d 154, 160 (2008); *see also Losavio v. Mayber,* 496 P.2d 1032, 1034 (1972) (holding that veniremember criminal histories are not "in any conceivable way work product" (internal quotation marks omitted)). **Rather, in accessing these databases, the prosecution is merely capitalizing on its relationship with government entities that systematically acquire detailed information on individuals who enter the criminal justice system. As the quantity and quality of that information continue to increase, unilateral State access will increasingly disadvantage defendants**. *See Artiga-Morales,* 335 P.3d at 182 (Cherry, J., dissenting); *see also Tagala v. State*, 812 P.2d 604, 613 (Alaska Ct. App. 1991) ("If the state is entitled to examine criminal records of jurors for jury selection, it is fair for the defense to have access to the same information."); *Murtishaw*,

631 P.2d at 465 ("Such a pattern of inequality reflects on the fairness of the criminal process.").

Thus, we agree with Ojeda, the district court, and a growing number of other states that unilateral access to government databases provides the State with an unfair advantage which demands our attention.

Second Jud. Dist. Ct. in & for Cnty. of Washoe, 431 P.3d at 50–51 (emphasis added) (footnotes and citations omitted).

In 2021, the New Jersey Supreme Court came to a similar conclusion after a defendant claimed that his right to a fair trial had been denied "because racial discrimination infected the jury selection process." State v. Andujar, 254 A.3d 606, 610 (2021). The juror at issue in Andujar was a black male who the State questioned extensively during voir dire regarding his association and knowledge of the criminal justice system. The State sought to have the juror struck for cause, claiming that his "background, associations, and knowledge of the criminal justice system were problematic," and the State suggested that he had been evasive. Andujar, 254 A.3d at 610.

After the trial court rejected the State's argument and found that the juror could be fair and impartial, the State chose to run a criminal history check on the juror – "[i]t did not investigate any other prospective

jurors in that way." Id. at 611. The State conducted a similar investigation in the instant matter, however, the State in Spratlin's case conducted additional inquiries into the 10-12 potential jurors on Pettit's list – at least six of whom were black.

The record check in Andujar revealed that the juror had two prior arrests that did not result in convictions and an outstanding warrant from a municipal court for simple battery. "Nothing in the results disqualified [the man] from serving as a juror." Id. When court resumed the following day, the State had already taken steps to have the juror arrested for the outstanding warrant. The juror was then removed from the jury panel and arrested; the outstanding charges against him were dismissed two months later. Id.

In finding that Andujar's "right to be tried by an impartial jury, selected free from discrimination, was violated," the New Jersey Supreme Court held:

> Courts, not the parties, oversee the jury selection process. On occasion, it may be appropriate to conduct a criminal history check to confirm whether a prospective juror is eligible to serve and to ensure a fair trial. **That decision, though, cannot be made unilaterally by the prosecution.** Going forward, we direct that any party seeking to run a criminal history check on a prospective juror must present a

> reasonable, individualized, good-faith basis for the request and obtain permission from the trial judge. **We refer to a check of a government database that is available to only one side. The results of the check must be shared with both parties and the court, and the juror should be given an opportunity to respond to any legitimate concerns raised.**
>
> That standard was not met here. Nor is there anything in the record that justified the State's decision to selectively focus on F.G. and investigate only his criminal record. Based on all of the circumstances, we infer that F.G.'s removal from the jury panel may have stemmed from implicit or unconscious bias on the part of the State, which can violate a defendant's right to a fair trial in the same way that purposeful discrimination can. . . .
>
> **This appeal highlights the critical role jury selection plays in the administration of justice. It also underscores how important it is to ensure that discrimination not be allowed to seep into the way we select juries.**
>
> Andujar, 254 A.3d at 611 (emphasis added).

The New Hampshire Supreme Court addressed a similar issue in State v. Goodale, 740 A.2d 1026 (1999) where Goodale claimed that the trial court erred by allowing the State to use criminal records of potential jurors during jury selection while denying the defendant equal access to those records. When a member of the venire was selected to be on a

defendant's jury panel, the practice of the county attorney's office in Goodale was to compare the selected juror's questionnaire to the juror's criminal record. If there were any omissions by the juror about their criminal record in the questionnaire, the State would then inform the trial court and the defendant of the omission. Goodale, 740 A.2d at 1029.

Prior to trial, Goodale objected to the State's use of criminal records in the jury selection process, arguing that he did not have access to that information, and "thus the State was 'in a position [to] engineer the jury pool to be more favorable to its interests.' The defendant argued that his rights to fundamental fairness and to an impartial jury would be violated if the State were permitted 'to draw a jury based on information ... unavailable to [him].'" Id.

The practice of prosecutors in Goodale was more generous than that in the instant matter and the cases previously discussed. The prosecutors in Goodale would *voluntarily* share omissions or discrepancies with the trial court and defense after comparing the selected juror questionnaires to their criminal records.

In Spratlin's case, the prosecutors only provided this information to Spratlin *after* the Batson challenge was first raised and *after* the State

had relied on these databases in ferreting out potential jurors. Even more concerning is that, in Spratlin's case, the State only disclosed information about the jurors at issue in Spratlin's Batson challenge. This means that discrepancies from *voir dire* and the record searches for *all* jurors, including those selected, were not disclosed to the defense at *any time*, aside from the five black jurors struck by the State. In contrast, the prosecutors in Goodale voluntarily provided this information to the trial court and defense. The State in the instant matter is erroneously arguing that Spratlin's right to access this information is superseded by its claim of work-product privilege. That cannot be so.

The prejudice claimed by Goodale was that "by virtue of the State's unequal access to the records is that with knowledge of the criminal records of the unselected members of the venire, the State is in a better position to know who might replace a selected juror in determining whether to exercise a peremptory challenge." Id. at 1030. The State in the instant matter had an unfair advantage because of its unequal access and superior knowledge of records of all potential veniremembers during jury selection.

The New Hampshire Supreme Court agreed and found that this

practice constituted a violation of Goodale's right to due process.

> Principles of fundamental fairness guide our analysis of the defendant's due process claim. *See Graf*, 143 N.H. at ——, 726 A.2d at 1277. "A fundamentally unfair adjudicatory procedure is one, for example, that gives a party a significant advantage or places a party in a position of prejudice or allows a party to reap the benefit of his own behavior in placing his opponent at an unmerited and misleading disadvantage." *Id.* (quotation omitted).
>
> In this case, both the State and the defendant agree that the defendant could not have acquired the criminal records under State law. *See* RSA 106–B:14, I (Supp.1998); *N.H. Admin. Rules*, Saf–P 403.04. Moreover, pursuant to the State's practice, discrepancies between the criminal records and the questionnaires of members of the venire are not disclosed to defendants unless the venire members are selected to be on the jury panel. **Thus, to the extent that the members of the defendant's venire failed to disclose such information on their questionnaires, the trial court's order permitted the State access to information that was unavailable to the defendant. This procedure conferred on the State a significant advantage in determining whether to exercise its peremptory challenges.**
>
> We disagree that the defendant had no interest in knowing the criminal histories of the potential replacement jurors. "**While a defendant may not have exactly the same motive for wanting access to this information, a defendant obviously seeks to obtain the same amount and type of information that the State possesses in exercising peremptory challenges**." *State v. Bessenecker*, 404 N.W.2d 134, 138 (Iowa 1987).

> 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.** *See id.*; *Losavio v. Mayber*, 178 Colo. 184, 496 P.2d 1032, 1035 (1972) (en banc); *cf. Commonwealth v. Smith*, 215 N.E.2d 897, 901 (1966); *Tagala v. State*, 812 P.2d 604, 612 (Alaska Ct.App.1991). Accordingly, the trial court erred in allowing the State to use criminal records of members of the venire during jury selection that were unavailable by law to the defendant.
>
> Goodale, 740 A.2d at 1030–31 (emphasis added) (footnotes and citations omitted).

The State in the instant matter is using the information in the databases to select jurors because the State believes that the information is helpful. If the State truly wishes to prosecute criminal cases in a constitutional and just manner, it should concede that it is fundamentally unfair to prevent defendants from accessing the same government database records the State relies on during jury selection.

In the Brief of Appellee, the State cited Foster v. State, 258 Ga. 736 (1988), arguing that its juror notes were protected as work product and therefore, are not discoverable. The State appears to be unaware of the United States Supreme Court's holding in Foster v. Chatman, 578 U.S.

488 (2016), a case involving the same appellant and case as Foster v. State.

In Foster v. Chatman, notes similar to those in dispute in Spratlin's case were pivotal in the Supreme Court reversing Foster's conviction due to the State's racially motivated strikes of black jurors. Unfortunately, the relief was ordered 28 years after the Georgia Supreme Court's decision. Foster's appellate counsel obtained the notes through open records requests long after the trial had ended and after the State had repeatedly asserted that their reasons for striking black jurors were race neutral.

The notes that were disclosed in the open records request were not disclosed to the trial court or during any of the Georgia proceedings. What was revealed in the notes was a stark contrast to the evidence and race-neutral claims presented by the State while the case was pending before Georgia's courts. The notes in Foster revealed that the State was in fact referencing the jurors' race on the jury list which the State had consistently denied. It was clear based on the State's notes in Foster that the race of prospective jurors was extremely important to the State in

how it was striking jurors.

Foster's case serves as a perfect example of why this Honorable Court should not accept the State's assertion that the juror list created by Pettit is privileged as any form of work product. In Foster v. Chatman the United States Supreme Court repeatedly looked to the prosecution's file in finding that the State had relied on race in exercising its peremptory strikes despite its repeated claims to the contrary. "The *contents of the prosecution's file* [ ] plainly belie the State's claim that it exercised its strikes in a 'color-blind' manner." Foster, 578 U.S. at 513 (emphasis added, punctuation omitted). "[T]he focus on race *in the prosecution's file* plainly demonstrates a concerted effort to keep black prospective jurors off the jury." Id. at 514 (emphasis added). "The *prosecution's file* fortifies our conclusion that any reliance on Hood's religion was pretextual." Id. at 511 (emphasis added).

In addition, the Supreme Court found that **courts must look to *all* circumstantial evidence and circumstances regarding racial animosity when considering a race-neutral Batson claim**, which would include the notes about jurors that the State in the instant matter

is claiming is work product.

> Despite questions about the background of particular notes, we cannot accept the State's invitation to blind ourselves to their existence. **We have "made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted**." *Snyder,* 552 U.S., at 478, 128 S.Ct. 1203.
>
> As we have said in a related context, "[d]etermining whether invidious discriminatory purpose was a motivating factor **demands a sensitive inquiry into such circumstantial ... evidence of intent as may be available**." *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). At a minimum, we are comfortable that all documents in the file were authored by *someone* in the district attorney's office. Any uncertainties concerning the documents are pertinent only as potential limits on their probative value.
>
> Foster, 578 U.S. at 501 (emphasis added).

The Court went on to find that:

> There are **also the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file**. Considering all of the circumstantial evidence that "bear[s] upon the issue of racial animosity," we are left with the firm conviction that the strikes of Garrett and Hood were "motivated in substantial part by discriminatory intent." *Snyder,* 552 U.S., at 478, 485, 128 S.Ct. 1203.
>
> Foster, 578 U.S. at 512–13 (emphasis added).

The State's reliance on Foster v. State for the purposes of its work-product argument is misplaced, and the holding in Foster v. Chatman demonstrates why Spratlin's access to the information is necessary.

The State claims that juror notes created by an agent of the State are privileged under the work-product doctrine. These notes did not contain the mental impressions of the prosecutors or its agents. Nor did they contain any trial strategies or other material that may be considered work product. Pettit testified that the list at issue contained information that she located in the Tracker database regarding the 10-12 potential jurors she believed needed further investigation. Her list contained "just [her] notes, [her] basically like shorthand notes on what [she] found[]" regarding pending cases or cases that might have involved parties from the full juror list. (V.4, R.218) Any claim by the State that this document is protected as work product is misplaced. The trial court's findings regarding work-product privilege were erroneous and must be reversed.

II. THE TRIAL COURT ERRED BY DENYING SPRATLIN'S BATSON CHALLENGE.

GACDL adopts all arguments contained in Enumeration 1 as if fully stated herein.

At the heart of this nation's adversarial system is the accused's right to a fair trial before an impartial jury of their peers. While some of the racial animosity that justify Batson challenges has waned in the decades since the United States Supreme Court first issued its opinion, defendants throughout the nation continue to experience racial disparities in the jury selection process. These cases are appealed regularly, but because of the stringent standards of a successful Batson challenge, a large majority of these challenges fail.[12]

Prosecutors may perceive Batson challenges as a personal attack on their character because, to succeed on a Batson challenge, a defendant must allege that the prosecutor has relied on racial bias in striking jurors. This bias can range from unconscious in the mind of the attorney to intentional and deliberate, but the negative results are the same. Nobody

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[12] See Bellin, Jeffrey and Semitsu, Junichi P., *Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, College of William & Mary Law School Faculty Publications (2011). https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2275&context=facpubs;
See also *Panelists call Batson a failure, offer solutions,* American Bar Association (March 2017), https://www.americanbar.org/news/abanews/publications/youraba/2017/march-2017/panelists-call--i-batson--i--a-failure--offer-solutions/.

wants to be accused of being racist, and a prosecutor may genuinely believe that they are acting without any partiality towards or against a certain race. However, there are implicit and unconscious biases that can cloud the judgement of prosecutors during jury selection that cannot be ignored simply because prosecutors claim to be acting without bias.

As with most, if not all, Batson challenges, the State claims that its reasons for using five of its seven peremptory strikes to remove black jurors during Spratlin's jury selection were race neutral. These claims by the State are often difficult for defendants to overcome.

> [O]ur research demonstrates that in almost any situation a prosecutor can readily craft an acceptable neutral explanation to justify striking black jurors because of their race. This is especially true when only a single or a few jurors are struck because it is less obvious that a pattern of striking blacks is involved.
>
> Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. MICH. J. L. REFORM 229, 236 (1993) https://repository.law.umich.edu/mjlr/vol27/iss1/4.

However, a review of the record in Spratlin's case shows that the race-neutral reasons given by the State and its misplaced work-product argument do not sufficiently satisfy the State's burden.

i. *The State's Use of Government Databases During Jury Selection Constituted Additional Inquiry into Prospective Jurors In Violation of Spratlin's Constitutional Rights.*

"In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many." Flowers v. Mississippi, 139 S. Ct. 2228, 2241 (2019). "[E]ach removal of an individual juror because of his or her race is a constitutional violation. Discrimination against one defendant or juror on account of race is not remedied or cured by discrimination against other defendants or jurors on account of race." Id. at 2242. "'[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination.' 476 U.S. at 97, 106 S.Ct. 1712." Id. at 2246.

> [W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Miller-El v. Dretke, 545 U.S. 231, 252 (2005).

The United States Supreme Court's holding in Flowers

acknowledged that disparate questioning or additional inquiry into prospective jurors during *voir dire* can provide added context for the trial court when evaluating whether discrimination occurred.

> Why did the State ask so many more questions—**and conduct more vigorous inquiry**—of black prospective jurors than it did of white prospective jurors? No one can know for certain. But this Court's cases explain that **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.** See *Miller-El I*, 537 U.S. at 331–332, 344–345, 123 S.Ct. 1029. In other words, **by asking a lot of questions of the black prospective jurors or conducting additional inquiry into their backgrounds, a prosecutor can try to find some pretextual reason—any reason—that the prosecutor can later articulate to justify what is in reality a racially motivated strike**. And by not doing the same for white prospective jurors, by not asking white prospective jurors those same questions, the prosecutor can try to distort the record so as to thereby avoid being accused of treating black and white jurors differently. **Disparity in questioning and investigation can produce a record that says little about white prospective jurors and is therefore resistant to characteristic-by-characteristic comparisons of struck black prospective jurors and seated white jurors. Prosecutors can decline to seek what they do not want to find about white prospective jurors**.
>
> **A court confronting that kind of pattern cannot ignore it.** 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. **The prosecutor's dramatically disparate questioning of black and white prospective jurors—at least if it rises to a certain level of disparity—<u>can supply a clue that the prosecutor may have been seeking to paper the record and disguise a discriminatory intent</u>**. See *ibid*.
>
> To be clear, disparate questioning or investigation alone does not constitute a *Batson* violation. The disparate questioning or investigation of black and white prospective jurors may reflect ordinary race-neutral considerations. **But the disparate questioning or investigation can also, along with other evidence, inform the trial court's evaluation of whether discrimination occurred.**
>
> <u>Flowers</u>, 139 S. Ct. at 2247–48 (emphasis added).

The Court's acknowledgment of a prosecutor "conducting additional inquiry into the[] [prospective jurors'] backgrounds" in <u>Flowers</u> is analogous to the State in the instant matter conducting additional inquiries into the backgrounds of the 10-12 people Pettit investigated. Spratlin was never given an opportunity to investigate or ask jurors about the information in the databases of which he was not aware. In <u>Flowers</u>, at least defendant was aware of the additional questioning and information that the State used to falsely claim race-neutral reasons to strike jurors.

Of the 10-12 potential jurors on Pettit's list, at least six were black, and five of the black jurors from Pettit's list were struck by the State. There were only nine black jurors in the final list of 31 potential jurors. Notably, Pettit testified that prior to "whittling" her list down to 10-12 people, there were about 22-25 potential jurors that came back with flags in the system. Pettit chose not to investigate some individuals further to determine whether they were the same person she located in the Tracker system, except Juror 1, a black female, who Pettit had to "do a little bit of digging" on to confirm her name. (V.4, R.219). The record does not reflect any attempt by the DA's office to confirm or dispel Pettit's findings regarding the correct spelling of Juror 1's name with Juror 1.

Pettit testified that Tracker shows the individual's race if they have been entered into the system. (V.9, R.32). Pettit's reasons for believing only 10-12 potential jurors needed further investigation, at least six of whom were black,[13] may appear race-neutral on their face. However, they give rise to the inference that Pettit's decision may have "stemmed from

[13] The number of black jurors on Pettit's list could be more than six, however, this remains unclear due to the State's work-product argument.

implicit or unconscious bias on the part of the State, which can violate a defendant's right to a fair trial in the same way that purposeful discrimination can." Andujar, 254 A.3d at 611. Whether the State was motivated by bias in creating Pettit's list must be further investigated by reviewing the notes and other information that the State possesses. The State's attempt to block Spratlin from accessing Pettit's list has further muddied the already clouded waters.

In Flowers, the Court acknowledged that it is reasonable for the State to ask follow-up questions "or to investigate the relationships of jurors to the victims, potential witnesses, and the like," however, it found that "[t]he difference in the State's approaches to black and white prospective jurors was stark." Flowers, 139 S. Ct. at 2247. The Court noted that white prospective jurors who were acquainted with the Flowers' family or defense witnesses were not questioned as extensively by the State or investigated, and that "[w]hite prospective jurors who admitted that they or a relative had been convicted of a crime were accepted without further inquiry by the State." Id.

The pattern of the prosecutors in Flowers is similar to the State's

decision to allow Juror 7 (Summons #79), a white female, to sit on Spratlin's jury despite her previous experience being called as a witness in a criminal case, her unhappiness with the overall outcome of the case, her involvement with law enforcement by reporting a crime, and her visiting the jail more than five years prior. The State claimed to strike Juror 1, a black female, because she was allegedly accused of Theft by Conversion (an issue that was never addressed during *voir dire*), because she was a "[w]itness in a pending murder case," because she had been a previous juror and witness and because she had met with personnel in the District Attorney's Office. *Brief of Appellee* at 18.

Juror 1 was not simply a "witness in a pending murder case," as the State seeks to characterize Juror 1's involvement in the active case. Juror 1 was the *family member of a deceased victim* in an incident involving domestic violence. This fact could have been favorable to the State considering that Spratlin's case involved allegations of domestic abuse. This is the same juror that Pettit chose to "do a little digging" on because of discrepancies in her name, as opposed to the other jurors with common names that Pettit chose not to investigate.

"If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." Miller-El, 545 U.S. at 232. Although Juror 1 differs from Juror 7 in that, Juror 1 was a witness for the State in a case that was pending in the District Attorney's office at the time of *voir dire*, the facts of her involvement with the criminal justice system are closely related to those of Juror 7, a white woman that the State did not strike.

"[A] defendant is not required to identify an *identical* white juror for the side-by-side comparison to be suggestive of discriminatory intent. Miller-El II, 545 U.S. at 247, n. 6, 125 S.Ct. 2317." Flowers, 139 S. Ct. at 2248–49 (emphasis in original). Moreover, the State's allegations that Juror 1 was accused of Theft by Conversion were never addressed during *voir dire* and this was only discovered when the trial court addressed the Batson challenge. The record is unclear as to whether the State conducted the same investigation into Juror 7 or any of the other non-black jurors due to the State's refusal to share this information pursuant to its work-product objection.

The State also took issue with Juror 17, a black female struck by the State, because, as the State claims, Juror 17 was allegedly a "suspect in several cases, including forgery; a recent charge of burglary; and harassing phone calls, which may indicate a domestic situation." *Brief of Appellee* at 18. The State has mischaracterized the record by listing "a recent charge of burglary" in its reasons for striking Juror 17. There was never any testimony that Juror 17 had been *charged* with burglary or any other crime for that matter. Murphy only testified that Juror 17 was a *suspect* for burglary and the other alleged crimes. (V.4, R.206).

The State seeks to characterize Juror 17's involvement with harassing phone calls as "indicating safety concerns based on prior interactions with law enforcement." *Brief of Appellee* at 18. However, this is purely conjecture. The State failed to ask either of its witnesses if the case involved safety concerns. Murphy testified that, based on her involvement with similar cases, harassing phone calls can indicate domestic violence. (V.4, R.208-09).

There was no questioning of Juror 17 to determine whether any of this was true nor did Murphy testify that she had confirmed this

harassing phone calls case involved safety concerns. Murphy expressed a general opinion that harassing phone calls "usually" involve domestic violence. "**A 'State's failure to engage in any meaningful *voir dire* examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination**.'" Flowers, 139 S. Ct. at 2249 (citing *Miller-El II*, 545 U.S. at 246, 125 S.Ct. 2317 (emphasis added) (internal quotation marks omitted).

The State did not question Pettit about what she located in Tracker regarding Juror 17. While stating its reasons for the strikes orally before the trial court, the State **specifically declined** to give a reason for striking Juror 17: "And I'll move on to juror number 17, Ms. [ ]. I'm sorry. I'll skip that one." (V.4, R.230). This may appear to be a minor omission, but when considered cumulatively, this is evidence that the State relied on race in exercising a peremptory strike against Juror 17. "**When a prosecutor misstates the record in explaining a strike, that misstatement can be another clue showing discriminatory intent**." Flowers, 139 S. Ct. at 2250 (emphasis added).

> **The State's pattern of factually inaccurate statements about black prospective jurors suggests that the State intended to keep black prospective jurors off the jury**. See *Foster*, 578 U. S., at ——, 136 S.Ct., at 1754; *Miller-El II*, 545 U.S. at 240, 245, 125 S.Ct. 2317.
>
> To be sure, the back and forth of a *Batson* hearing can be hurried, and prosecutors can make mistakes when providing explanations. That is entirely understandable, and mistaken explanations should not be confused with racial discrimination. **But when considered with other evidence of discrimination, a series of factually inaccurate explanations for striking black prospective jurors can be telling**. So it is here.
>
> Id. (Emphasis added).

The State obtained the information about Juror 17's alleged involvement with these incidents by utilizing government databases that were unavailable to Spratlin. By accessing government databases to obtain jurors' criminal and law enforcement records, the State was effectively seeking to bypass the *voir dire* process, in violation of Spratlin's constitutional right to a fair trial.

> **[W]e can perceive of no other conceivable purpose for these lists than as a substitute for *voir dire* examination at trial, and as a possible check upon the truthfulness of a juror's answer on voir dire**.
>
> Losavio, 496 P.2d at 1033 (emphasis added).

The State maintains that it has a race-neutral reason for striking five of the black jurors from Pettit's list, however, this is belied by the record. The State did not show cause to exercise a peremptory strike against Juror 17 or Juror 1. When comparing Juror 1's answers during *voir dire* to Juror 7's answers, it shows that the Juror 1 was struck because she was black. The State's sole basis for striking Juror 17 was Murphy's findings in the LERMS database that was unavailable to Spratlin. Due to the State's failure to provide this information pursuant to its work-product objection, it remains unclear whether the State conducted additional inquiries into the non-black prospective jurors, including Juror 7, a white female who was selected, over Juror 1, a black female who the State excluded from the jury.

ii. *Even if this Honorable Court Finds That Pettit's List Is Protected as Work Product, the State Waived Any Privileges to the List When It Called Murphy and Pettit to Testify.*

As discussed in detail under Enumeration 1, the notes about potential jurors at issue are not work product because they do not contain the mental impressions of prosecutors or their agents. This is supported by a large body of case law addressing this same issue. Pettit's testimony

indicated that the list she created simply contained what she located in the Tracker system about the 10-12 jurors that she believed needed further investigation. It was "raw information from the criminal history databases" that the Nevada Supreme Court, and several other courts, have consistently declined to protect as work product. Second Jud. Dist. Ct. in & for Cnty. of Washoe, 431 P.3d at 50.

However, even if this Honorable Court were to find that Pettit's list and notes were protected as work product, the State waived any privilege in reference to the notes and documents when it called Pettit and Murphy to testify during Spratlin's Batson challenge. Pursuant to O.C.G.A. §24-6-612(a):

> If a witness uses a writing to refresh his or her memory while testifying, an adverse party shall be entitled to have the writing produced at the hearing or trial, to inspect it, to cross-examine the witness on such writing, and to introduce in evidence those portions of such writing which relate to the testimony of the witness.

In 2021, the California Supreme Court addressed this issue in People v. Superior Court (Jones), 499 P.3d 999 (2021), again rejecting the prosecutors' work-product argument. The defendant in Superior Court (Jones) ("Jones") raised a Batson challenge after he was sentenced to

death, claiming that prosecutors had used peremptory strikes to discriminate against potential jurors. Jones was seeking access to the prosecutor's jury selection notes, but the prosecutors in Jones argued that their jury selection notes were protected from disclosure as work product. The trial court and the Court of Appeal rejected the prosecutor's work-product argument.

The California Supreme Court rejected the argument as well, finding that:

> the prosecutor had relied on an undisclosed juror rating system to explain his reasons for the challenged peremptory strikes. **By putting the rating system at issue, the prosecutor impliedly waived any claim of work product protection over notes containing information about the system**. The District Attorney may not now invoke attorney work product protection to withhold information necessary to the fair adjudication of Jones's *Batson/Wheeler* claim.

Jones, 499 P.3d at 1001.

The facts of Jones are nearly identical to those in the instant matter. In rejecting the prosecutors' work-product argument, the trial court found that Jones "was entitled to any notes 'that could possibly impeach' the prosecutor's comments during the *Batson/Wheeler* hearings. **The**

court observed that without such material, Jones would be unable to address the legitimacy of the prosecutor's reasons for striking prospective jurors." Id. at 1003 (emphasis added). These circumstances are analogous in Spratlin's case where Spratlin was unable to challenge the credibility of the State's witnesses due to the prosecutors' work-product objection.

The prosecutors in Jones petitioned for a writ of mandate and/or prohibition vacating the trial court's order – the Court of Appeals summarily denied the petition. The California Supreme Court affirmed, finding that:

> Even if we assume that jury selection notes are protected work product as defined by Code of Civil Procedure section 2018.030, subdivision (a), we nonetheless agree with the courts below that the prosecutor in this case impliedly waived any work product protection when he justified his peremptory challenges by putting in issue information the District Attorney now seeks to withhold as confidential in postconviction discovery.
>
> Although the work product statute does not directly address the issue of waiver, it is well established that work product protection, like other forms of privilege, can be waived through conduct. … Waiver may be found where the privilege holder, without coercion, discloses a significant part of the

communication to another person. (*Labor & Workforce Development Agency v. Superior Court* (2018) 19 Cal.App.5th 12, 35–36, 227 Cal.Rptr.3d 744; cf. Evid. Code, § 912, subd. (a) [setting out the same waiver standard for enumerated forms of privilege, not including work product protection].)

An implied waiver may also be found when a party "has put the otherwise privileged communication directly at issue and ... disclosure is essential for a fair adjudication of the action." (*Southern Cal. Gas Co. v. Public Utilities Com.* (1990) 50 Cal.3d 31, 40, 265 Cal.Rptr. 801, 784 P.2d 1373, citing *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 609, 208 Cal.Rptr. 886, 691 P.2d 642 (*Mitchell*).)

Much like the work product doctrine itself, this second theory of implied waiver is premised on the need to protect the integrity of the judicial proceeding. **The cases recognize that allowing one party to rely on a document to establish key facts while simultaneously shielding that same document from the other side works an unfair adversarial advantage.** Considerations of basic fairness accordingly "may require disclosure of otherwise privileged information or communications where [a party] has placed in issue a communication which goes to the heart of the claim in controversy." (*Mitchell*, *supra*, 37 Cal.3d at p. 604, 208 Cal.Rptr. 886, 691 P.2d 642.)

Courts have found implied waiver in a variety of litigation contexts. In *Nobles*, for example, the United States Supreme Court rejected an argument that criminal defense counsel could simultaneously rely on a testifying defense investigator to impeach the credibility of a critical prosecution witness while also claiming the investigator's report was protected by

the work product doctrine. The court explained: "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. **But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. ... [ ] ... Respondent, by electing to present the investigator as a witness, waived the privilege with respect to matters covered in his testimony**. Respondent can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination." (*Nobles*, *supra*, 422 U.S. at pp. 238–240, 95 S.Ct. 2160, fn. omitted.)

Wellpoint Health Networks, Inc. v. Superior Court (1997) 59 Cal.App.4th 110, 68 Cal.Rptr.2d 844 is also instructive. The plaintiff in *Wellpoint* brought an employment discrimination action in which the employer raised an affirmative defense based on corrective action it had taken in response to an internal investigation. The plaintiff sought production of the investigative reports. Overruling the employer's claims of privilege, the Court of Appeal concluded the plaintiff was entitled to the reports. It reasoned that the "adequacy or thoroughness of a defendant's investigation of plaintiff's claim," while typically "irrelevant" to most civil actions, is highly relevant "*if* the employer chooses to defend by establishing that it took reasonable corrective or remedial action." (*Id.* at p. 126, 68 Cal.Rptr.2d 844, italics added.) By raising this defense, the employer had "inject[ed] into the

lawsuit ... an issue concerning the adequacy of the investigation," resulting in waiver of the work-product doctrine. (*Id.* at p. 128, 68 Cal.Rptr.2d 844.) "If a defendant employer hopes to prevail by showing that it investigated an employee's complaint and took action appropriate to the findings of the investigation, then it will have put the adequacy of the investigation directly at issue, and cannot stand on the attorney-client privilege or work product doctrine to preclude a thorough examination of its adequacy. **The defendant cannot have it both ways. If it chooses this course, it does so with the understanding that the attorney-client privilege and the work product doctrine are thereby waived**." (*Ibid.*) ...

Here, the prosecutor invoked an undisclosed juror rating system in justifying his use of peremptory challenges at the second step of the *Batson/Wheeler* inquiry. **Had the prosecutor instead relied solely on a straightforward listing of juror characteristics, the prosecutor's reasons could have been questioned by the defense and judged against the trial court's own observations. <u>But the defense and trial court had no way of confirming or evaluating the prosecutor's claims that he used a race-neutral rating system they had never seen</u>**. Unlike an attorney who simply glances at her or his notes to recall a particular answer provided during voir dire, for example, **a striking attorney who makes this sort of "testimonial use" of undisclosed writings gains an unfair adversarial advantage by doing so**. (*Nobles*, *supra*, 422 U.S. at p. 239, fn. 14, 95 S.Ct. 2160.) **Effectively the striking attorney has placed in issue information that goes to the heart of the question before the court,**

whether there has been discrimination in jury selection. Under our cases, that choice is one that constitutes waiver of any claim that the information may be withheld as protected work product.

The District Attorney protests that there could have been no effective waiver because any disclosure or invocation of protected information was coerced. (See *Regents of University of California v. Superior Court* (2008) 165 Cal.App.4th 672, 679, 81 Cal.Rptr.3d 186.) The District Attorney stresses that an attorney provides a justification for striking the challenged prospective jurors only at the request of the court — a request compelled by *Batson*, and therefore one that the attorney is hardly free to refuse. All of this is true, but **it hardly follows that a striking attorney must explain the challenged strikes by invoking an otherwise confidential rating system she or he believes to be protected work product**.

Here, when the trial court asked the prosecutor to defend the challenged strikes, the prosecutor did not simply cite concerns about the prospective jurors' occupations, volunteer activities, or other characteristics established through voir dire. Instead, the prosecutor pointed to the documented results of a purportedly color-blind numerical rating system devised by the prosecution and offered detailed explanations regarding the low scores multiple prosecution team members had given each of the struck jurors. Considering this record of the *Batson*/*Wheeler* hearings at trial and the waiver principles we have discussed, we conclude that the District Attorney's assertion of work product protection is not a basis

for overturning the postconviction trial court's disclosure order. **The point, in the end, is simple: A striking attorney cannot both stand on such a rating system and assert privilege over it**.

For these reasons, we reject the District Attorney's argument that work product protection categorically bars disclosure of jury selection notes in postconviction discovery. **Here there has been an implied waiver of any claim to work product protections and so the jury selection notes are subject to disclosure**. This is true for notes revealing a clear focus on impermissible discrimination, such as the notes in *Foster*, as well as those that might not, on their own, reveal a discriminatory purpose but that would tend to support the *Batson/Wheeler* challenge when aggregated with other evidence or notes.

We recognize, however, that disclosure of jury notes, like disclosure of any other attorney writing, can risk unnecessary incursion on the confidentiality of attorney work product beyond the scope of the matter now at issue. Though the notes may illuminate an attorney's opinions and impressions of prospective jurors — the matter specifically at issue in a *Batson/Wheeler* claim — they may also reveal opinions and impressions of the case and legal strategy.

To the extent the District Attorney raises concerns about overbroad discovery in this context, the law offers answers. Attorneys resisting what they view as overbroad discovery efforts may "make a preliminary or foundational showing that disclosure would reveal ... 'impressions, conclusions, opinions,

> or legal research or theories[ ]' (§ 2018.030, subd. (a)[ ])" unrelated to jury selection, and "[u]pon an adequate showing, the trial court should then determine, by making an in camera inspection if necessary, whether absolute work product protection applies to some or all of the material." (*Coito*, *supra*, 54 Cal.4th at pp. 495–496, 142 Cal.Rptr.3d 607, 278 P.3d 860.) In this way, the trial court may ensure on a "case by case" basis (*id.* at p. 495, 142 Cal.Rptr.3d 607, 278 P.3d 860) that necessary redactions are made to protect core work product that is not relevant to the *Batson/Wheeler* challenge at issue.
>
> Jones, 499 P.3d at 1007–10 (emphasis added) (citations and footnotes omitted).

Permitting the State to utilize government databases during jury selection without providing that information to the defense is a due process violation on its own. The State is now seeking approval from this Honorable Court to further violate Spratlin's rights by deferring to Pettit's jury selection list as the cause for using its peremptory strikes against nearly every black juror while simultaneously preventing Spratlin from accessing the list to dispel the State's claims.

The State has acknowledged the importance of Spratlin accessing the State's juror list, but simultaneously argues erroneously for work-product protection. In Foster v. State, the record supported the Georgia

Supreme Court's decision in 1988, but that decision was based on false and misleading claims by the State of race-neutral reasons for its strikes of jurors. Armed with the notes of the State from its jury selection, Foster was successful approximately 28 years later in Foster v. Chatman. Foster v. Chatman demanded the opposite result of the same trial where the United States Supreme Court found that the prosecutor's notes were extremely important in determining that the State was striking jurors based on race.

CONCLUSION

GACDL respectfully urges this Honorable Court to reverse the ruling of the Superior Court of Athens-Clarke County and find that (1) the trial court erred in finding that the juror information list was work product and that the State did not waive the work-product privilege; (2) the trial court erred by allowing the State to access and rely on government databases during jury selection without providing that information to Spratlin, resulting in due process violations under both the state and federal constitutions (in violation of protections of the Due Process Clauses of both the Georgia Constitution and United States Constitution including the right to a fair jury trial); and (3) the trial court

erred in finding that the State did not commit a Batson violation during Spratlin's jury selection. Spratlin was denied his constitutional right to a fair jury trial.

CERTIFICATION

This submission does not exceed the page limit imposed by Rule 24.

RESPECTFULLY SUBMITTED November 1, 2022.

s:/ Greg Willis
Greg Willis
Chairperson, GACDL
Amicus Committee
State Bar No. 766417

Willis Law Firm
6000 Lake Forrest Dr.
Suite 375
Atlanta, GA 30328
(404) 835-5553
gw@willislawga.com

JASON SHEFFIELD
President, GACDL
State Bar No. 639719

PETERS, RUBIN, SHEFFIELD
& HODGES, P.A.
2786 North Decatur Rd.
Suite 245
Decatur, GA 30033
(404) 296-5300
jasonsheffieldattorney@gmail.com

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing BRIEF OF GEORGIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (GACDL) AS AMICUS CURIAE IN SUPPORT OF APPELLEE upon all interested parties by U.S. Mail, with adequate postage affixed to ensure delivery, and by email, addressed as follows:

Deborah Gonzalez
Samuel D'Entremont
Office of the District Attorney
Western Judicial Circuit
325 E Washington St # 125
Athens, GA 30601
Deborah.Gonzalez@accgov.com
Gerald.Henderson@accgov.com

Benjamin Pearlman
Office of the Public Defender
Western Judicial Circuit
440 College Avenue North
Ste. 220
Athens, GA 30601
wcpubdef@gmail.com

(Signatures on the following page.)

This 31st day of October, 2022.

s:/ Jason Sheffield
Jason Sheffield
President, GACDL
State Bar No. 639719

Peters, Rubin, Sheffield &
Hodges, P.A.
2786 North Decatur Rd.
Suite 245
Decatur, GA 30033
(404) 296-5300
jasonsheffieldattorney@gmail.com

s:/ Greg Willis
Greg Willis
Chairperson, GACDL
Amicus Committee
State Bar No. 766417

Willis Law Firm
6000 Lake Forrest Dr.
Suite 375
Atlanta, GA 30328
(404) 835-5553
gw@willislawga.com