Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2014-150114-001 DT 12/18/2025

HONORABLE MONICA EDELSTEIN

CLERK OF THE COURT
K. Mysliwski
Deputy

STATE OF ARIZONA

KRISTIN LARISH
HEATHER LYNN LIVINGSTONE

v.

FRANKLIN ARNETT CLIFTON (001)

VICTORIA ELISABETH WASHINGTON
KELLIE SANFORD

CAPITAL CASE MANAGER
JUDGE EDELSTEIN

RANDALL S UDELMAN

MINUTE ENTRY

The Court has received and reviewed State's *Memorandum of Law Re: Lawful and Permissible Use of Criminal Justice Information Consistent with A.R.S. §41-1750* filed 11/18/25, Defense's *Memorandum Re: Use of Law Enforcement Databases to Conduct Juror Research* filed 11/26/25, and the State's *Reply Memorandum of Law Re: Lawful and Permissible Use of Criminal Justice Information Consistent with A.R.S. §41-1750* filed 12/1/25.

To begin, the Court emphasizes that pursuant to Arizona Code of Judicial Conduct, Rule 2.15(D) when it has "information indicating…that a lawyer has committed a violation of the Rules of Professional Conduct," it is required to take "appropriate action." Ariz. R. Sup. Ct. 81 CJC Rule 2.15(D). Moreover, quite the opposite of "sall[ying] forth…looking for wrongs to right," a trial court has an affirmative obligation pursuant to the Arizona Revised Statutes, the Arizona Rules of Procedure, and Judicial/Professional Codes of Conduct to raise and require briefing on issues it identifies as pertinent to a case over which it is presiding regardless of whether raised by a party. "The trial judge is armed with both discretionary power and rules which [he/she] may use to control proceedings." *Pool v. Superior Ct. In & For Pima Cnty.*, 139 Ariz. 98, 103-104 (1984) (*en banc*). The Arizona Supreme Court notes that a "trial judge 'should not be merely a passive observer in the trial process but has an affirmative duty to conduct the trial in such a way as to carry out the goals of the rules.'" *Id.* at 104 (quoting 1 Morris K. Udall & Joseph M. Livermore, Arizona Practice, *Law of Evidence* § 33, at 51 (2d. ed. 1982); *see also, State v. Romero*, 258 Ariz. 237, 256, ¶68, fn. 10 (Ct. App. 2024). The U.S. Supreme Court echoed this duty. "A trial judge is under a duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop…professional misconduct." *United States v. Dinitz,* 424 U.S. 600, 612 (1976). Finally, the Defense did raise the issue of the State utilizing a database—to which the Defense did not have access—to research jurors, although the Defense did so in the context of an equal protection claim.[1] Regardless, the Court's inquiry resulted from the development of the record and briefing that was intertwined with jury selection.

The Court is also required to consider the prosecution's obligations under the law. Prosecutors have special responsibilities, above and beyond those who choose to practice in other areas. *See* Arizona Rules of Professional Conduct 3.8.

> A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.

Ariz. R. Sup. Ct. 42 RPC ER 3.8, Comment 1. The Supreme Court also explained this heightened obligation owed to the public.

> [T]he prosecutor is not the representative of an ordinary litigant; [he/she] is a representative of a government whose obligation to govern fairly is as important as its obligation to govern at all. The prosecutor's interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done." Thus, "while [he/she] may strike hard blows, [he/she] is not at liberty to strike foul ones." It is the prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction just as it is [his/her] duty to use all proper methods to bring about a just conviction. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).

Pool, 139 Ariz. at 103.

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[1] It is unclear whether the Defense would have raised this issue had it known how the State conducted its inquiry into the criminal background of the Jurors. *See* Response, at 2, fn. 1 ("At the time, the Defense was unaware if a law enforcement database was used, and if so which ones.")

The Court's initial concern was triggered by the State's disclosure that it had searched a law enforcement database for personal criminal history information pertaining to two Jurors it had just unsuccessfully sought to remove for cause. Moreover, conducting a search of the restricted NCIC database, to which the Defense had no access, raised a fairness concern. These concerns were amplified because, since the abolition of preemptory strikes, motions to strike for cause are the sole means for a party to seek removal of a venireperson believed to be partial or biased. Under these circumstances, the Court's inquiry was a reasonable exercise of its duty to protect this trial's "integrity." *Dinitz*, 424 U.S. at 612.

Next, contrary to the State's attestation, the answers to the Court's questions are neither "obvious[]" or "evident" because the State cites only caselaw outside of Arizona—and nothing federal—to interpret an Arizona statute. No Arizona court has addressed the issue. What is obvious and evident is that each state has its own rules of procedure and statutes that codify what can or cannot occur in that specific state.[2] A different state court's reading of what is permissible under their own regulatory scheme—even related directly to jury selection—is hardly binding, clarifying, or instructive with respect to A.R.S. §41-1750. To underscore this point, unlike the caselaw from the cited states listed in the briefing, Arizona is the only state that has eliminated preemptory strikes with the policy purpose of disfavoring arbitrary or preference-based jury selection. Federal practice also includes preemptory challenges. In Arizona, by contrast and as noted, jurors may only be struck for hardship or cause. Neither party is permitted to eliminate a juror just because it dislikes them or perceives them to be hostile to its side. In this case, the Court ruled that the State failed to meet its burden of establishing a cause strike by a preponderance of evidence.

The briefing largely ignores the actual issue before the Court. The Court does not dispute that prosecuting agencies/law enforcement have express authority under Arizona law to utilize the NCIC database for the "administration of criminal justice" or specifically "prosecution or adjudication…of criminal offenders." The State's ability to access, use, and disseminate information from a criminal database as a whole is not the problem. In fact, the State is required to do so to meet its statutory, ethical, and Constitutional duty pursuant to *Brady*, *Giglio*, and a litany of other precedent while litigating criminal matters. Rather, the issue is the State's use of its singular access to a protected database subject to statutory limitations and restrictions for the sole purpose of investigating prospective jurors after it attempted unsuccessfully to challenge them for cause. The issue is not whether accessing the NCIC database is permissible, it is the use of that unique access in the manner exercised here.

[2] Several cases cited did not analyze whether it was permissible for the State to use the NCIC database but merely referenced that the State had access to it; a point that this Court does not dispute.

The State's primary explanation as to why the search is permissible is based on two justifications: 1) qualification, and 2) to verify truthfulness in summonsed jurors' responses. Here, the State conducted a selective search of only two out of hundreds of prospective jurors who filled out the Electronic Questionnaire. If the State believes it has broad authority under this provision, then is there a policy directive or licensing provision that establishes that the selective search of some prospective jurors falls within a prosecutor's broad authority and is consistent with A.R.S. §41-1750(G)(1) and §41-1750.01? If permissible, is it the State's position that it can access NCIC at any time after obtaining juror information either using a remote electronic jury questionnaire or when the parties have access to juror information prior to oral voir dire? Moreover, when does "permissible" become "required"? Is there an affirmative law enforcement duty as part of the "administration of criminal justice" to determine whether a prospective juror has a criminal record and is qualified to sit on a jury as part of the jury selection process? The Court understands this is the province of the Jury Commissioner's Office.[3]

Furthermore, if it is permissible to access the NCIC database as a resource during jury selection what to do with the issue of how defendants can get similar access to the information obtained through a restricted database? Here, the State shared the information with the Defense following the Court's ruling; it concedes that the Defense would not have independently been able to obtain the information. The Court attempted during oral argument to get clarification from State's Counsel regarding this same question without response. If the State has permissible access to a resource that the Defense could never get independent access to, is the Defense entitled in the standard course of trial preparation, disclosure, and discovery to request that the State investigate any prospective juror using the NCIC database once the veneer list is made available to both parties? Equity and fairness seem to dictate that the answer is "yes." In counties such as Maricopa County, jury selection has evolved with available technology to allow for the broad use of remote electronic juror questionnaires and prolonged jury selection before a juror sets foot into the courthouse. Unlike jurisprudence pertaining to prosecutorial disclosure obligations pursuant to the Confrontation Clause, there is no guidance federally or elsewhere to answer the question of whether the "prosecution or adjudication…of criminal offenders" requires the State to produce

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[3] The MCSC Jury Commissioner's Office confirmed that when a summons is issued, recipients are provided information to report if they are not qualified to serve, need to be excused, or need a deferred date. The majority of citizens self-report lack of qualification based on prior convictions without restoration of their rights; they are then removed from the potential pool for 18 months. The "Master List" of available Maricopa County residents eligible for service is generated from two primary sources: voter registration rolls and DMV records. Qualification is implied from voter registration rolls, though not necessarily from DMV records. Although the Jury Commissioner's Office "may" solicit assistance from law enforcement pursuant to statute, it is not the practice of the Jury Commissioner's Office to do so in maintaining or updating the Master List.

disclosure on potential trial jurors upon the Defense's request along with State witnesses in standard trials.

If anything, post-briefing, the Court is left with more questions.

Nevertheless,

THE COURT FINDS that a ruling on the issues raised in the State's *Motion to Reconsider* necessitated that this Court issue written findings and orders because that Juror was a potential deliberating juror participating in the ongoing trial. Although the Court originally denied the State's *Motion to Strike* this Juror thereby placing the Juror in the box, following that ruling, the Parties stipulated to dismissal of the Juror pursuant to Rule 18.5(i). The Court, therefore, need not make substantive findings on its inquiry into whether the State's actions are consistent with A.R.S. §41-1750 because there is no possibility that this Juror impacts deliberations. No issue needs to be resolved at this time to ensure that the trial itself may continue.