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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

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| THE STATE OF ARIZONA,<br><br>Plaintiff,<br><br>vs.<br><br>FRANKLIN ARNETT CLIFTON,<br><br>Defendant. | CR2014-150114-001<br><br>STATE'S REPLY MEMORANDUM OF LAW RE: LAWFUL AND PERMISSIBLE USE OF CRIMINAL JUSTICE INFORMATION CONSISTENT WITH A.R.S. §41-1750<br><br>(Assigned to Judge Monica Edelstein) |

There is nothing improper about the State's use of NCIC in this case, nor was the application of A.R.S §41-1750 raised by anyone until this Court's minute entry required briefing on the subject. (Docket #1049). The defense brief (DB at p.2) indicates they "did raise the issue of potential use of law enforcement databases to research jurors." However, what the defense raised was a concern about "equal protection issues." (10/30, Tr. P.41). That is not the same issue.

The State's Memorandum filed on November 18th answered the Court's inquiry. The State provided numerous cases illustrating the practice (and necessity) of researching jurors to verify their eligibility or the accuracy of their answers during voir dire. The defense claims that "none of those [cases] cited stand for the proposition that this is lawful conduct…" (DB. p.7). The defense may have overlooked portions of the State's pleading, including the citation to *Salmon v. Commonwealth*, 529 S.E.2d 815, 819 (2000) specifically holding that the prosecutor's use of potential jurors' criminal background information was "directly related to the prosecution of criminal cases," and Virginia's corresponding statute "authorizes the Commonwealth's attorney to review the criminal background records of prospective jurors."

Similarly, the claim that the verification of eligibility of jurors "is the job of the Jury Commissioner's Office" (DB. p.4-5) is not correct. A review of the relevant statutes in Title 21 of Arizona Revised Statutes, the language in Rule 18.3(a), and the routine voir dire questions touching on eligibility contradict this claim. In fact, A.R.S. §21-314(E) implicitly acknowledges that while a jury commissioner "may investigate," the position is limited in its ability to verify the accuracy of a juror's answers. "The jury commissioner… **may investigate** the accuracy of the answers to the questionnaire and may **call on law enforcement agencies** and **the county attorney** for assistance in an investigation." (emphasis added).

The defense also claims that the plain language of A.R.S §41-1750 does not support the use of NCIC to verify a juror's eligibility or veracity during jury selection amid a criminal prosecution. The defense argues that "jury selection" or related terms are not found in the statute. Of course, neither are the terms "witness," "sentencing ranges," "other act evidence" or "*Brady* information." Yet the defense concedes prosecutors "certainly can run background checks on defendants and *witnesses* for prosecution purposes. Their research in that capacity determines *sentencing ranges*, *other act evidence*, as well as *Brady information."* (DB., pp. 5-6, emphasis added). Unless one believes that jury selection is not part of the "administration of criminal justice," then the plain meaning of those words permits the State to use NCIC as it did here. Likewise, the defense suggestion that prospective jurors "certainly should not be subjected to criminal background checks" (DB. p.6) is incorrect. The additional case law and analysis below demonstrate why "background checks" during jury selection can be a necessary component in the administration of criminal justice.

Because the prosecution cannot appeal a *not guilty* verdict impacted by a biased juror or one who is later discovered to have been ineligible for jury service, most case law examines the impact of juror dishonesty on the *defendant's* rights. As the California Supreme Court noted, "The ability of a defendant…to examine the prospective jurors during voir dire is thus significant in protecting the defendant's right to an impartial jury. Of course, the efficacy of voir dire is dependent on prospective jurors **answering truthfully** when questioned." *In re Hitchings*, 860 P.2d 466, 472 (Cal. 1993) (emphasis added).

There is an entire body of case law examining instances where criminal defendants or civil litigants challenge their verdict based on dishonesty by a juror during voir dire. This case law further demonstrates that background checks of prospective jurors are sometimes a necessity. The standard often applied in these cases is found in *McDonough Power Equip., Inc. v. Greenwood*, where the U.S. Supreme Court stated, “We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.” 464 U.S. 548, 556, (1984).

There are numerous cases applying this standard to challenges by a defendant convicted after a jury trial. It is worth noting some of those cases where a juror’s omission *of criminal history* played a role in the challenge. The State’s Memorandum already cited the well-known case of former Illinois Governor George Ryan in *U.S. v. Warner*, 498 F.3d 666 (7th Cir. 2007). The issue also arose after another high-profile verdict in *U.S. v. Martha Stewart*, 317 F. Supp. 2d 432, 436 (S.D.N.Y. 2004). In *Stewart*, the court examined allegations that a juror “deliberately failed to disclose that he had been arrested and arraigned for assaulting his former girlfriend.” *Id.* at 438. Ultimately, Stewart was unable to show that the information would have provided a sufficient basis for a challenge for cause. *Id.* at 439. *See also United States v. Ross*, 263 F.3d 844, 847 (8th Cir. 2001) (after conviction, Ross moved for a new trial because a juror failed to disclose in voir dire that she had been accused of felonies and convicted of misdemeanors. Applying *McDonough*, the defendant was denied relief).

To be sure, a juror’s misstatements or lies concerning criminal history can play a role in undoing a guilty verdict. For example, convicted murderer Paul Green won a new trial caused in part by a juror's "misstatements about his felon status." *Green v. White*, 232 F.3d 671, 675-676 (9th Cir. 2000). In *Lamar v. State*, 583 So. 2d 771, 773 (Fla. Dist. Ct. App. 1991), the defendant won a new trial for an unrelated reason, but the appellate court noted that the trial court failed to consider misconduct by a juror. It was held that Lamar should have been permitted to argue regarding a juror who lied during voir dire about her arrest record and not disclosing the coincidental fact that she had been represented by Lamar's attorney during her prior felony conviction. *Id.*

Interestingly, at least one court noted that where a juror withheld their criminal history that juror was nonetheless fair *for the defendant*. In *Allen v. State*, 749 N.E.2d 1158, 1164 (Ind. 2001), a juror should have disclosed that she had "several brushes with the law" including arrests in 1961, 1976 and 1982. Ultimately, it was determined that Allen suffered no harm because his attorney would not have moved to exclude the juror even if he knew about the juror's misstatements. In fact, the Indiana Supreme Court noted:

> It is also plausible that the post-conviction court inferred that because the juror herself had been a defendant in a criminal proceeding, she might have had more empathy for Allen than would a potential juror who had never been arrested or tried. That is, the post-conviction court could infer from the record **she was the type of juror that the State-and not Allen-would strike from the jury panel**.

*Id.* at 1165–66 (emphasis added). This brings the State to a critical point.

With case law focused on the rights of the accused, it should not be overlooked that voir dire is equally important to the public and the administration of justice by the prosecution. Moreover, victims have rights to justice and due process and to be treated with fairness. *Ariz. Const. art. II, § 2.1*. Permitting a potential juror to make material omissions and lie under oath during voir dire thwarts those rights. In *Clark v. United States*, the U.S. Supreme Court affirmed a former juror's conviction for contempt of court after it was discovered she had concealed information in order to be seated on a jury deciding a case in which her former employer was a defendant. The court observed:

> The judge who examines on the voir dire is engaged in the process of organizing the court. If the answers to the questions are willfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only. His relation to the court and to the parties is tainted in its origin; it is a mere pretense and sham. What was sought to be attained was the choice of an impartial arbiter. What happened was the intrusion of a partisan defender.

289 U.S. 1, 11 (1933). *See also Forbes v. State*, 933 So. 2d 706, 708 (Fla. Dist. Ct. App. 2006) (prospective juror found guilty of criminal contempt for responding untruthfully to questions concerning prior arrests and failing to disclose a pending criminal charge during jury selection.) *See also People v. Campbell*, 727 N.Y.S.2d 74, 75 (2001) (prospective juror in criminal case committed criminal contempt of court by not revealing the full extent of his arrest record and in response to questions by the prosecutor.)

NCIC as a tool is subject to the restrictions set forth in A.R.S. §41-1750 and 28 C.F.R. Part 20. Those restrictions were honored here. However, an NCIC search is not as comprehensive as some may think. Generally, for the prosecution team, the value of NCIC's criminal history search is as a starting point. It is a tool that *points* to where public records showing a conviction or arrest may be found, such as a police agency or court jurisdiction. Once those public records are obtained (such as a police report or municipal court plea agreement), they can be disclosed and utilized in the criminal justice process. Contrary to what the defense may believe, NCIC does not contain copies of actual "traffic tickets, police reports…," etc. (DB. p.7). Moreover, the defense is mistaken in its claim that the State obtained "a diversion conviction that had been sealed." The State has verified that it did not obtain any documents that were sealed.

Just as prosecutors may properly use NCIC to check a witness' criminal history for a criminal justice purpose (i.e. Evid. Rule 609 disclosure), so too may prosecutors verify that prospective jurors are eligible to serve and have provided accurate answers in voir dire. This is especially true in Arizona, the one state that has eliminated peremptory challenges. A lawyer's concern stemming from vague, evasive or contradictory answers by a prospective juror regarding prior police interaction could, in the past, be dealt with by the exercise of a peremptory challenge. That is no longer true.

As previously mentioned in the State's brief, some courts have implemented guidelines or conditions for the use of NCIC in the context of jury selection. However, any discussion regarding the future establishment of such guidelines is more appropriately handled in a different forum. Any finding that the State violated A.R.S. §41-1750 will be factually and legally inaccurate.

Submitted December 1, 2025.

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BY: /s/ Ryan Green
Ryan Green
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Copy e-mailed/e-filed December 1, 2025, to:

The Honorable Monica Edelstein
Judge of the Superior Court

Randall Udelman
Attorney for Crime Victim

Victoria E Washington
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BY: /s/ Ryan Green
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