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Invaluable Tool vs. Unfair Use of Private Information: Examining Prosecutors' Use of Jurors' Criminal History Records in Voir Dire

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Invaluable Tool vs. Unfair Use of Private Information: Examining Prosecutors' Use of Jurors' Criminal History Records in Voir Dire

Lance Salyers*

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I. Introduction

Consider the following hypothetical scenario: The government has charged the defendant with the felony of possession of cocaine with intent to distribute, and a jury trial is set to begin. During jury selection, the court asks the potential jurors whether any of them is a convicted felon. All the prospective jurors deny any felony convictions. The prosecutor then asks whether any of the prospective jurors has been arrested or convicted of any criminal offense. Again, all the potential jurors answer in the negative. At the conclusion of voir dire,¹ twelve jurors sit in the jury box ready to hear the case. Juror *X* is a convicted felon, although his answer to the court's question was not a lie intended to deceive the court. *X* simply thought his conviction for grand larceny was not a felony because his guilty plea resulted only in a fine. *X* thought all felonies required a jail sentence of a year or more. Juror *Y*'s criminal history includes a conviction for misdemeanor possession of marijuana. *Y* chose to deny this conviction because he disagrees with the government's policy of criminalizing the recreational use of drugs. *Y* also did not see the need to embarrass himself in open court by admitting his drug use. Juror *Z* has never been convicted of a crime. However, *Z* once was arrested for prostitution. *Z* denied this arrest because she did not want to humiliate herself by admitting to an arrest for such a degrading crime, particularly when the

1. See BLACK'S LAW DICTIONARY 1575 (6th ed. 1990) (defining voir dire as "the preliminary examination which the court and attorneys make of prospective jurors to determine their qualification and suitability to serve as jurors").

prosecutor had dropped the charges. In addition, *Z* views her arrest as resulting from nothing less than police entrapment.

An impartial jury is the "touchstone of a fair trial."² Like the defendant, the government has a right to an impartial jury.³ However, in the scenario described above, the potential for juror bias against the government's case is high.⁴ Not only does Juror *X*'s felony conviction create a potential for bias against the government,⁵ it disqualifies him from jury service.⁶ *X*'s ineligibility could provide the basis for an appellate court to overturn any conviction the defendant may receive.⁷ The experiences of Juror *Y* and Juror *Z*, while not disqualifying them from jury service, may cause them to be prejudiced against the government's case. *Y*'s feelings about the illegality of drug use may adversely affect his consideration of the government's case against the defendant. Likewise, *Z*'s distrust of the tactics that the police used in her case may cause her to view unfairly the government's evidence against the defendant with extreme suspicion.

In order to uncover these potential biases, prosecutors use lists containing the names of prospective jurors to check their criminal histories.⁸ Prosecutors then use that information as a basis for removing jurors in voir dire.⁹ Despite the important implications of this practice,¹⁰ neither courts nor legal scholars have devoted much attention to answering the fundamental question of whether prosecutors should use the criminal history records of potential jurors

2. See *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) ("One touchstone of a fair trial is an impartial trier of fact — 'a jury capable and willing to decide the case solely on the evidence before it'.").

3. See *infra* notes 61-67 and accompanying text (discussing how defendant's right to impartial jury applies to government's prosecution).

4. See *infra* Part III.A (discussing how juror's criminal convictions and arrests increase potential for bias against government).

5. See *infra* Part III.A (discussing how juror's criminal conviction increases potential for bias against government).

6. See *infra* note 81 and accompanying text (discussing fact that felony conviction almost universally disqualifies person from jury service).

7. See *infra* notes 84-86 and accompanying text (discussing effect juror's disqualification may have on defendant's conviction).

8. See *infra* Part III (discussing why prosecutors use jurors' criminal history records in voir dire).

9. See *infra* note 76 and accompanying text (discussing use of criminal history information by prosecutors as basis for removing juror either by peremptory strike or by challenge for cause).

10. See *infra* Part III (discussing implications of prosecutors' use of jurors' criminal history records in voir dire on government's right to impartial and qualified jury); *infra* Part V (discussing implications of prosecutors' use of jurors' criminal history records in voir dire on jurors' right to informational privacy and on defendant's right to fair trial).

in voir dire.¹¹ Many state courts, as well as some federal circuit courts, have answered the secondary question of whether the defendant has a right to disclosure of jurors' criminal records in the prosecutor's possession.¹² But only three states – Iowa,¹³ Alaska,¹⁴ and Missouri¹⁵ – have answered the primary question of whether prosecutors even can use the records in voir dire.¹⁶ Recently, however, this question has surfaced in Virginia, where Chief Judge James H. Chamblin of Virginia's Twentieth Judicial Circuit issued an order prohibiting Virginia's prosecutors from engaging in the common practice of conducting criminal and driving history checks on prospective jurors.¹⁷

Legal scholars also have failed to examine adequately the question of prosecutors' use of jurors' criminal records in voir dire. Commentators discussing information about jurors have focused almost exclusively on the privacy rights of jurors in the context of voir dire questioning,¹⁸ public and

11. See *infra* notes 12-24 and accompanying text (discussing failure of courts and legal commentators to examine adequately question of prosecutors' use of jurors' criminal history records in voir dire).

12. See *infra* notes 298-301 and accompanying text (discussing various approaches courts have used to examine whether defendants have right to disclosure of jurors' criminal history records).

13. See *State v. Bessenecker*, 404 N.W. 2d 134, 135-38 (Iowa 1987) (en banc) (concluding that state law prohibited county attorneys from obtaining rap sheets of all prospective jurors except by virtue of court order, in which case juror's rap sheet also must be available for defendant's use); *infra* Part IV.A (discussing *Bessenecker*).

14. See *Tagala v. State*, 812 P.2d 604, 611-13 (Alaska Ct. App. 1991) (concluding that prosecutor's use of criminal history records in voir dire did not violate state law regulating these records); *infra* Part IV.B (discussing *Tagala*).

15. See *State v. McMahan*, 821 S.W.2d 110, 112-13 (Mo. Ct. App. 1991) (finding State may use arrest records of potential jurors in voir dire); *infra* Part IV.C (discussing *McMahan*).

16. See *infra* Parts IV.A-C (discussing *Bessenecker*, *Tagala* and *McMahan*). *Bessenecker*, the Virginia case, does not provide a definitive answer because it currently only applies to the 20th Judicial Circuit in Loudoun County, not to the entire Commonwealth. See *infra* Part II (discussing Chief Judge Chamblin's order). The author acknowledges the possibility that various state courts may have local rules or standing orders regarding the practice of investigating jurors' criminal histories for voir dire. However, this Note will limit its analysis to appellate court decisions.

17. See Order at 1, In Re: Use of Jury Lists (Cir. Ct. of Loudoun County, Va., June 2, 1998) (prohibiting use of jury lists to conduct criminal history or driving record checks on prospective jurors); *infra* Part II (discussing Chief Judge Chamblin's order and resulting litigation).

18. See David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMP. L. REV. 1, 16-19 (1997) (discussing implications on jurors' privacy interests by invasive voir dire questioning and various attempts to limit this questioning). See generally Michael R. Glover, *The Right to Privacy of Prospective Jurors During Voir Dire*, 70 CALIF. L. REV. 708 (1982) (discussing jurors' right to privacy and conflicting right of parties to impartial jury in context of voir dire questioning).

press access to voir dire,¹⁹ limiting disclosure of juror identities,²⁰ and post-trial interviews.²¹ One commentator briefly discusses pre-trial investigations of jurors,²² but focuses most of his attention on the use of state and private investigators to investigate the jurors themselves, on whether the investigations affect a juror's ability to be impartial, and on whether the opposing party has a right to disclosure of the information that the state gains from the investigation.²³ Even when commentators actually examine the use of jurors' criminal history records by prosecutors, they confine their analysis to the context of discovery rules and attempt to decide whether the defendant has a right to disclosure of jurors' criminal history records by the prosecutor.²⁴ Yet the more important question of whether any use of criminal history records is proper for voir dire purposes remains largely unanswered.

This Note examines prosecutors' use of jurors' criminal history records in voir dire through the prism of Chief Judge Chamblin's order. Part II discusses the circumstances surrounding Chief Judge Chamblin's order.²⁵ Part III discusses the two reasons why prosecutors use jurors' criminal history records in voir dire.²⁶ Part IV analyzes the decisions of the courts in Iowa,

19. See Weinstein, *supra* note 18, at 19-24 (discussing implications on juror privacy of conflicting rights of defendant and public to have access to voir dire questioning of jurors). See generally Michael P. Malak, *First Amendment—Guarantee of Public Access to Voir Dire*, 75 J. CRIM. L. & CRIMINOLOGY 583 (1984) (examining Supreme Court's decision in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), regarding public access to voir dire and problems facing trial courts in applying *Press-Enterprise's* standard); Jennifer Sweeney Buckley, Casenote, *Press-Enterprise Co. v. Superior Court: A Juror's Right to Privacy*, 1985 DET. C.L. REV. 649 (examining *Press-Enterprise* decision).

20. See Weinstein, *supra* note 18, at 25-32 (examining reasons for and problems with recent judicial and legislative proposals for limiting access to jurors' identities). See generally Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123 (1996) (arguing that, where feasible, use of anonymous juries will enhance participation in jury service, reliability of voir dire process, quality of jury deliberations, and fairness of criminal verdicts by alleviating juror fears about safety and privacy).

21. See Weinstein, *supra* note 18, at 38-41 (discussing judicial and legislative attempts to protect jurors' privacy from encroachment by post-trial publicity).

22. See *id.* at 33-38 (noting common practice of investigating jurors and various attempts to protect juror privacy by limiting these investigations).

23. *Id.* at 37.

24. See generally Jeffrey F. Ghent, Annotation, *Right of Defense in Criminal Prosecution to Disclosure of Prosecution Information Regarding Prospective Jurors*, 86 A.L.R.3D 571 (1986) (discussing majority rule that defendant does not have right to discovery or disclosure of information about jurors in prosecutors' possession); 23 AM. JUR. 2D *Depositions and Discovery* § 441 (1983) (same).

25. See *infra* Part II (discussing situation surrounding Chief Judge Chamblin's order).

26. See *infra* Part III (discussing reasons why prosecutors use jurors' criminal history records in voir dire).

Alaska, and Missouri, giving particular attention to how all three courts looked to their states' statutory schemes regulating criminal history records for guidance.²⁷ Part IV concludes with a comparison of these statutory schemes and an analysis of the statutory scheme in Virginia.²⁸

Part V examines Chief Judge Chamblin's reasons for issuing his order prohibiting the use of jurors' criminal history records in voir dire.²⁹ Part V.A analyzes how this use of jurors' criminal history records implicates the right to privacy.³⁰ Part V.B discusses the possibility of unfairness to the defendant that may result from allowing prosecutors to use jurors' criminal history records in voir dire.³¹ In conclusion, Part VI first argues that courts should look to the statutory schemes regulating criminal history records to determine whether the legislature has given prosecutors the authority to use jurors' criminal history records in voir dire.³² Part VI then argues that jurors' right to privacy is insufficient to prohibit prosecutors from using criminal history records in voir dire.³³ Finally, Part VI proposes that courts should remedy unfairness by requiring prosecutors to disclose jurors' criminal history records to the defendant when, as a result of special circumstances, the defendant has a valid interest in using those records in voir dire.³⁴

II. Chief Judge Chamblin's Order in Loudoun County, Virginia

In Virginia, it is a common practice for the state prosecutors, formally known as Commonwealth's Attorneys, to check the criminal records – and even the driving records – of potential jurors in preparation for conducting voir dire.³⁵ However, on June 2, 1998, Chief Judge James H. Chamblin issued

27. See *infra* Part IV.A-C (analyzing approach courts utilized in *Bessenecker, Tagala*, and *McMahan*).

28. See *infra* Part IV.D (comparing statutory schemes regulating criminal history records in Iowa, Alaska, and Missouri, and analyzing similar scheme in Virginia).

29. See *infra* Part V (examining Chief Judge Chamblin's reasons for issuing his order).

30. See *infra* Part V.A (discussing development of right to informational privacy and applying this right to use of jurors' criminal history records in voir dire).

31. See *infra* Part V.B (examining situations when allowing only prosecutor to use jurors' criminal history records in voir dire is unfair to defendant).

32. See *infra* Part VI (arguing that courts should look first to statutes regulating criminal history records to determine if legislature intended to give prosecutors authority to use jurors' criminal history records in voir dire).

33. See *infra* Part VI (arguing that jurors' privacy interest in criminal history records is not sufficient to justify prohibiting prosecutors from using these records in voir dire).

34. See *infra* Part VI (proposing that courts remedy unfairness by requiring prosecutors to share jurors' criminal history records with defendant when special circumstances give defendant valid interest in using these records).

35. See *Judge Bans Juror Background Searches*, ROANOKE TIMES, June 4, 1998, § B, at

an order prohibiting this practice in the Twentieth Judicial Circuit in Loudoun County.³⁶ The issue initially arose out of a case in which the defense attorney filed a motion petitioning the court to require the Commonwealth of Virginia (Commonwealth) to provide the defendant with information regarding the criminal histories of potential jurors that the prosecutor had obtained from the Virginia Criminal Information Network (VCIN).³⁷ The trial judge in that case, Judge Thomas D. Horne, questioned the propriety of conducting background checks on potential jurors and threatened to sanction anyone who continued the practice.³⁸ Judge Horne later retreated from this position.³⁹

In a later case, three jurors failed to reveal their felony arrests in response to the Commonwealth's Attorney's questioning.⁴⁰ One of these three jurors was a convicted felon.⁴¹ The defendant in that case made a motion seeking to prohibit the Commonwealth from conducting background checks on jurors.⁴² Judge Horne subsequently asked Chief Judge Chamblin to review the matter to determine the appropriateness of a rule limiting the practice of using jury lists to investigate the criminal and driving records of prospective jurors.⁴³

Less than one week later, Chief Judge Chamblin responded by issuing an Order that detailed a new procedural rule for the Circuit Court of Loudoun County.⁴⁴ The rule prohibited the practice of using jury lists to conduct

5 (noting routine nature of accessing criminal history records of potential jurors); *see also* Order, *supra* note 17, at 2 (same).

36. *See* Order, *supra* note 17, at 1 (prohibiting use of jury lists to conduct background checks in Circuit of Loudoun County).

37. Petition for Appeal at 4, In Re: Use of Jury Lists (Va. August, 1998). VCIN is a state-wide computer network operated by the Virginia State Police. *Judge Bans Juror Background Searches*, *supra* note 35.

38. Petition for Appeal, *supra* note 37, at 4.

39. *See id.* at 4-5 (noting that Judge Horne later indicated he would not interfere with Commonwealth's Attorney in setting office policy regarding practice of conducting background checks on potential jurors).

40. Commonwealth's Motion to Reconsider, to Vacate, to Stay the Court's Order Pending an Appeal or an Application for Extraordinary Relief, or, in the Alternative, to Modify the Order to Require That, When the Commonwealth Obtains NCIC and DMV Records of Venirepersons, She Shall Provide These Records to the Defendant at 9, In Re: Use of Jury Lists (Cir. Ct. of Loudoun County, Va. June, 1998).

41. *Id.* One juror had been convicted of being an accessory after the fact to a hate crime. *Id.* Another juror had been represented by the Office of the Public Defender, which was representing the defendant. *Id.* The third juror had two felony arrests and at least two aliases. *Id.*

42. Petition for Appeal, *supra* note 37, at 4.

43. Order, *supra* note 17, at 2.

44. *See id.* at 1 (issuing new rule regarding use of jury lists for Circuit of Loudoun County). Chief Judge Chamblin based his authority to order such a rule on Virginia Code § 8.01-345, which he cited as granting the authority to create procedural rules necessary to ensure that jury selection and service comports with the requirements of law. *Id.*

criminal record or driver history checks of potential jurors.⁴⁵ In a memorandum attached to and incorporated by the Order, Chief Judge Chamblin provided two basic reasons for his decision: (1) to prevent the Commonwealth from obtaining an impermissible advantage over the defendant,⁴⁶ and (2) to protect a juror's right to a reasonable expectation of privacy in the information available from VCIN and the Department of Motor Vehicles (DMV).⁴⁷

The Commonwealth responded with a motion asking Chief Judge Chamblin either to withdraw the order, to postpone its enforcement at least until the Commonwealth had an opportunity to appeal the order, or to modify the order to allow the background searches so long as the Commonwealth gave the information to the defendant.⁴⁸ After taking the motion under advisement at the end of the hearing on June 11, 1998, and after the Commonwealth filed another motion attempting to postpone the enforcement of the order

45. *Id.* Chief Judge Chamblin's order reads as follows:

[I]t is hereby ORDERED that the following procedural Rule concerning jury lists is hereby promulgated:

No person, including any party or counsel, involved in any trial by jury in the Circuit Court of Loudoun County shall use any list of prospective jurors to conduct criminal record checks or driver history checks on any prospective juror.

This Rule is effective upon entry of this order, and shall apply to all cases, civil and criminal, now pending or hereafter filed in the Circuit Court of Loudoun County.

Id.

46. *See id.* at 4-5 (stating that Commonwealth's Attorney should not be allowed to use information in voir dire to which defendant does not have access).

47. *Id.* at 3, 4. Fairness to the defendant and juror privacy were the two major reasons Chief Judge Chamblin gave for issuing his order. *See* Petition for Appeal, *supra* note 37, at 15 (listing fairness to defendant and juror privacy as two major reasons that Chief Judge Chamblin gave); *Judge Bans Juror Background Searches*, *supra* note 35 (same). Thus, this Note will focus on these two factors. Chief Judge Chamblin did mention briefly other reasons for his order. *See* Order, *supra* note 17, at 4 (discussing reasons supporting Chief Judge Chamblin's Order). According to Chief Judge Chamblin, the purpose of voir dire is not to put a prospective juror on trial to see if that juror is qualified. *Id.* Jury questionnaires ask potential jurors, among other things, whether they ever have been convicted of a felony. *Id.* These questionnaires, and a party's opportunity during voir dire to verbally ask potential jurors the same questions, are the mechanisms that Virginia law establishes for determining a juror's qualifications. *Id.* The premise underlying this system is that a prospective juror will answer truthfully and accurately questions asked in the jury selection process. *Id.* Also, the court, not the parties or counsel, has the duty of ensuring that the jury selection process complies with the law. *Id.* By conducting outside checks on the jurors' qualifications, a party or counsel "usurps needlessly" the court's duty, exhibiting some distrust in the court's ability to fulfill its duty. *Id.* Because these reasons are local in nature, this Note will not consider them in its discussion.

48. *See* Commonwealth's Motion to Reconsider, *supra* note 40, at 1 (petitioning Chief Judge Chamblin to reconsider or vacate order, or stay court order until Commonwealth filed an appeal, or modify order to simply require Commonwealth to disclose criminal history data of jurors to defendant).

pending further hearings, the court issued a ruling on July 14, 1998 denying the Commonwealth's motions.⁴⁹

The Commonwealth sought relief from the Supreme Court of Virginia, filing Petitions for Writs of Mandamus and Prohibition as well as a Petition for Appeal.⁵⁰ In its appeal, the Commonwealth argued that Chief Judge Chamblin's order violated the doctrine of separation of powers by prohibiting the Commonwealth's Attorney from accessing criminal history data for voir dire purposes because the Legislature unambiguously had authorized that practice.⁵¹ The Commonwealth also contended that the order interfered with its constitutional right to secure an impartial and unbiased jury,⁵² that due process did not require absolute equality between the defendant and the prosecution,⁵³ and that the order did not protect jurors' privacy because the information the Commonwealth's Attorney sought was a matter of public record and because Virginia law requires jurors to disclose this information.⁵⁴ Finally, the Commonwealth argued that the Order was overly broad because its language did not limit its application to the state's computerized databases but included the Commonwealth's Attorney's own files.⁵⁵ The Virginia Supreme Court rejected all three of the Commonwealth's Petitions, dismissing the Petition for Appeal on the ground that the court lacked jurisdiction.⁵⁶

III. Prosecutors' Reasons for Using Jurors' Criminal History Records in Voir Dire

The purpose of voir dire is to protect the fairness of the trial by ensuring an impartial jury.⁵⁷ Voir dire plays a critical role in seating an impartial jury by exposing possible biases prospective jurors may harbor, either knowingly or unknowingly.⁵⁸ In addition, voir dire serves as a mechanism for ensuring

49. Petition for Rehearing at 2, In Re: Use of Jury Lists (Va. Oct., 1998).

50. *Id.*

51. Petition for Appeal, *supra* note 37, at 16-17 (citing VA. CODE ANN. § 19.2-389 (Michie 1950)).

52. *Id.* at 7.

53. *Id.* at 8.

54. *Id.*

55. *Id.* at 11-12.

56. Petition for Rehearing, *supra* note 49, at 2-3.

57. See *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (stating "[o]ne touchstone of a fair trial is an impartial trier of fact . . . Voir dire examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors."); VA. SUP. CT. R. 3A:14 (requiring court to question potential jurors to determine whether they harbor bias or prejudice against either government or defendant).

58. See *McDonough Power Equip.*, 464 U.S. at 554 (noting voir dire's role in protecting right to impartial jury by exposing jurors' biases, both known and unknown); *Rosales-Lopez*

that people who are disqualified from jury service do not serve as jurors.⁵⁹ Prosecutors cite these two fundamental functions of the jury selection process as reasons for using jurors' criminal history records in voir dire.⁶⁰

A. To Ensure an Impartial Jury

In responding to Chief Judge Chamblin's order, the Commonwealth asserted that it had a right to an impartial jury equal to the right of any defendant.⁶¹ The government does have a recognized right to an impartial jury.⁶² The Sixth Amendment to the United States Constitution guarantees the right to a trial by an impartial jury.⁶³ Textually, this guarantee applies only to the accused.⁶⁴ However, the United States Supreme Court has recognized that the Sixth Amendment's underlying goal of jury impartiality applies with equal force to the government's prosecution.⁶⁵ Likewise, although the text of Virginia's constitutional guarantee of an impartial jury applies only to the accused,⁶⁶ the Virginia Supreme Court has placed a duty on trial courts to determine through voir dire whether a person has a bias against either the Commonwealth or the accused.⁶⁷

The Commonwealth argued that Chief Judge Chamblin's order improperly interferes with its right to an impartial jury by depriving the Commonwealth of an invaluable resource that helps reveal potential bias.⁶⁸ A

v. United States, 451 U.S. 182, 188 (1981) (stating "[v]oir dire plays a critical function" in ensuring criminal process honors defendant's right to impartial jury).

59. See VA. SUP. CT. R. 3A:14 (allowing court or counsel to ask any question of potential juror relevant to that person's qualifications).

60. See Commonwealth's Motion to Reconsider, *supra* note 40, at 7-11 (arguing for use of jurors' criminal records in detecting juror bias against Commonwealth and convicted felons who are ineligible for jury service); Petition for Appeal, *supra* note 37, at 23-28 (same).

61. Commonwealth's Motion to Reconsider, *supra* note 40, at 9-10.

62. See *infra* notes 63-68 and accompanying text (discussing United States and Virginia Supreme Court's recognition of government's right to impartial jury).

63. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.").

64. See *id.* (guaranteeing right of accused to trial by impartial jury).

65. See *Holland v. Illinois*, 493 U.S. 474, 483 (1990) (stating "[a]lthough the [Sixth Amendment's] guarantee runs only to the individual and not to the State, the goal it expresses is jury impartiality with respect to both contestants: neither the defendant nor the State should be favored"); *Hayes v. State*, 120 U.S. 68, 70 (1887) (stating "impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.").

66. See VA. CONST. art. I, § 8 (guaranteeing right of accused to trial by impartial jury).

67. See VA. SUP. CT. R. 3A:14 (requiring trial courts to determine whether jurors can be impartial regarding both accused and Commonwealth).

68. Petition for Appeal, *supra* note 37, at 28.

juror convicted of a crime is likely to harbor animosity towards the government, regardless of whether the crime was a felony or misdemeanor.⁶⁹ The potential for this animosity to ripen into a bias against the government's case increases when the crime underlying the juror's conviction is similar to the crime for which the defendant stands charged.⁷⁰ This potential for bias also exists in jurors who have been arrested but not convicted of a crime.⁷¹ Simply being arrested, even if the charge is not prosecuted, can cause a person to lose a job,⁷² to incur substantial legal fees and other financial losses,⁷³ and to suffer mental and emotional anguish from the humiliation of the arrest experience.⁷⁴ A juror's criminal history record provides prosecutors with a comprehensive list of the juror's experiences with the criminal justice system.⁷⁵ This information enables prosecutors either to use a peremptory strike to remove the juror or to question the juror further about the juror's criminal history to establish a basis for striking the juror for cause.⁷⁶ Thus, Commonwealth's Attorneys, like other prosecutors,⁷⁷ regard criminal history

69. See *id.* at 27 (arguing that people who have been arrested or convicted likely will harbor bias against Commonwealth as result of their experience, unfairly affecting Commonwealth's ability to obtain conviction).

70. See *id.* (listing various scenarios in which juror may harbor bias against Commonwealth because of similarity between crime underlying juror's conviction and crime for which defendant stands charged).

71. See *id.* (noting that potential for bias exists in jurors who have been arrested but not convicted of crime). One of Chief Judge Chamblin's concerns about the Commonwealth Attorney's use of VCIN records was that those records would show not only convictions but also exposure to the criminal justice system of any kind, including unprosecuted arrests. Order, *supra* note 17, at 5.

72. See *Sopp v. Gehrlein*, 232 F. Supp. 881, 882 (W.D. Pa. 1964) (noting plaintiff's claim in civil rights action that plaintiff's employer fired plaintiff after learning of plaintiff's arrest); *Roselle v. Acosta*, No. 933532, 1994 WL 902990, at *1 (Mass. Super. Ct. Sept. 14, 1994) (same).

73. See *Shalna v. Bensalem Township Police Dep't*, Civ. A. No. 87-1793, 1988 WL 71420, at *1 (E.D. Pa. June 30, 1988) (noting that plaintiff in civil rights action had to spend \$6,500 in legal fees and lost \$36,000 in compensation because of arrest and subsequent actions by police and prosecutors).

74. See *id.* (noting plaintiff's claim that arrest caused discomfort and mental and emotional anguish); see also *Sopp*, 232 F. Supp. at 882 (noting plaintiff's experience of having to be fingerprinted as result of arrest and degrading nature of sexual crime for which police charged plaintiff).

75. See *infra* note 234 and accompanying text (listing types of information contained in criminal history records).

76. Petition for Appeal, *supra* note 37, at 28.

77. See *Tagala v. State*, 812 P.2d 604, 611 & n.4 (Alaska Ct. App. 1991) (concluding juror's criminal records are relevant to prosecutor's use of challenges for cause, which prosecutors can base on fact that challenging party has accused person in criminal prosecution in previous two years according to Alaska Crim. Rule 24(c)(11)(ii)); *State v. Bessenecker*, 404 N.W. 2d 134, 135 (Iowa 1987) (en banc) (noting parties' stipulation that county attorney used

records as an invaluable tool in protecting the government's right to an impartial jury.⁷⁸

B. To Ensure a Qualified Jury

In addition to ensuring an impartial jury, voir dire provides a mechanism for the parties or the court to remove potential jurors who are ineligible for jury service regardless of their ability to be impartial.⁷⁹ In Virginia, a felony conviction disqualifies a person from serving on a jury unless the state has restored that person's civil rights.⁸⁰ This rule is not unique to Virginia; criminal convictions of some form almost universally disqualify a person from jury service.⁸¹

criminal history data to remove jurors from panel for potential bias against State); *State v. Jackson*, 450 So. 2d 621, 628 (La. 1984) (stating that criminal records of jurors may be useful to State in challenging jurors with bias against State).

78. See *Petition for Appeal*, *supra* note 37, at 28 (arguing that Chief Judge Chamblin's order improperly interferes with Commonwealth's right to impartial jury by prohibiting Commonwealth's use of resource that is helpful in discovering juror bias).

79. See VA. SUP. CT. R. 3A:14 (allowing court or counsel to ask any question of potential juror relevant to that person's qualifications).

80. VA. CONST. art. II, § 1; VA. CODE ANN. § 8.01-338 (Michie 1950).

81. See 28 U.S.C. § 1865 (1994) (disqualifying person from jury service if convicted of or facing pending charges for crime punishable by imprisonment for more than one year and civil rights have not been restored); ALA. CODE § 12-16-60 (1975) (disqualifying person from jury service if convicted for crime involving moral turpitude); ALASKA STAT. § 09.20.020 (Michie 1994) (disqualifying person from jury service if convicted of felony without unconditional discharge); ARIZ. REV. STAT. § 21-201 (1990) (disqualifying person from jury service if convicted of felony unless civil rights have been restored); ARK. CODE ANN. § 16-31-102 (Michie 1987) (disqualifying person from jury service if has been convicted of felony and has not been pardoned); CAL. CIV. PROC. CODE § 203 (West Supp. 1999) (disqualifying person from jury service if convicted of felony unless civil rights have been restored); CONN. GEN. STAT. ANN. § 51-217 (West 1985) (disqualifying person from jury service if convicted of felony within last seven years, or currently facing pending felony charges, or currently in custody of Commissioner of Correction); DEL. CODE ANN. tit. 10, § 4509 (1974) (disqualifying person from jury service if convicted of felony unless civil rights have been restored); D.C. CODE ANN. § 11-1906 (1995) (disqualifying person from jury service if convicted of felony unless civil rights have been restored or if currently facing pending felony or misdemeanor charges); FLA. STAT. § 40.013 (1998) (disqualifying person from jury service if convicted of felony unless civil rights have been restored); GA. CODE ANN. § 15-12-163 (1994) (same); HAW. REV. STAT. § 612-4 (1993) (disqualifying person from jury service if convicted of felony unless pardoned); IDAHO CODE § 2-209 (1998) (disqualifying person from jury service if ineligible to vote because of criminal conviction); IND. CODE § 33-4-5-7 (1998) (disqualifying person from jury service if convicted of felony unless civil rights have been restored); KAN. STAT. ANN. § 43-158 (1993) (disqualifying person from jury service if convicted of felony within previous ten years); KY. REV. STAT. ANN. § 29A.080 (Banks-Baldwin 1992) (disqualifying person from jury service if convicted of felony unless pardoned); LA. CODE CRIM. PROC. ANN. art. 401 (West 1991) (disqualifying person from jury service if under indictment for or convicted of felony unless

pardoned); MD. CODE ANN., CTS. & JUD. PROC. § 8-207 (1998) (disqualifying person from jury service if charged with or convicted of crime punishable by fine of more than \$500 or imprisonment for more than six months, or both, unless pardoned); MASS. GEN. LAWS ch. 234A, § 4 (1986) (disqualifying person from jury service if convicted of felony within last seven years, or currently facing pending felony charges, or currently in custody of correctional institution); MICH. COMP. LAWS ANN. § 600.1307a (West 1996) (disqualifying person from jury service if under sentence for felony conviction at time of jury selection); MINN. R. CRIM. P. 26.02, Subd. 5 (listing felony conviction as valid challenge for cause unless juror's civil rights have been restored); MISS. CODE ANN. § 13-5-1 (1972) (disqualifying person from jury service if convicted of infamous crime); MO. REV. STAT. § 494.425 (1996) (disqualifying person from jury service if convicted of felony unless civil rights have been restored); MONT. CODE ANN. § 3-15-303 (1997) (disqualifying person from jury service if convicted of felony or other high crime); NEB. REV. STAT. § 25-1601 (1995) (disqualifying person from jury service if convicted of crime punishable by imprisonment in adult correctional facility); NEV. REV. STAT. § 6.010 (1997) (disqualifying person from jury service if convicted of felony or other infamous crime); N.H. REV. STAT. ANN. § 500-A:7-a (Supp. 1998) (disqualifying person from jury service if convicted of felony which has not been annulled); N.J. STAT. ANN. § 2B:20-1 (West 1999 Pamphlet) (disqualifying person from jury service if convicted of indictable offense under any state or federal law); N.M. STAT. ANN. § 38-5-1 (Michie 1998) (disqualifying person from jury service if convicted of felony); N.Y. JUD. LAW § 510 (McKinney 1992) (same); N.C. GEN. STAT. § 9-3 (1986) (disqualifying person from jury service if convicted of felony unless citizenship has been restored); N.D. CENT. CODE § 27-09.1-08 (1991) (disqualifying person from jury service who has lost right to vote due to imprisonment in penitentiary or conviction of crime that by law disqualifies person); OHIO REV. CODE ANN. § 2313.42 (West 1994) (providing that conviction of crime that disqualifies person from jury service is good cause for challenging that person as juror); OKLA. STAT. ANN. tit. 38, § 28 (West 1999) (disqualifying person from jury service if convicted of felony unless civil rights have been restored); OR. REV. STAT. § 10.030 (1997) (disqualifying person from jury service if convicted of felony within prior 15 years); 42 PA. CONS. STAT. ANN. § 4502 (West 1981) (disqualifying person from jury service if convicted of crime punishable by imprisonment of more than one year unless pardoned); R.I. GEN. LAWS § 9-9-1.1 (1997) (disqualifying person from jury service if convicted of felony unless sentence and probation or parole have been completed); S.C. CODE ANN. § 14-7-810 (Law. Co-op. 1976) (disqualifying person from jury service if convicted of crime punishable by imprisonment of more than one year unless pardoned); S.D. CODIFIED LAWS § 16-13-10 (Michie 1995) (disqualifying person from jury service if convicted of felony unless civil rights have been restored); TENN. CODE ANN. § 22-1-102 (1994) (disqualifying person from jury service if convicted of infamous crimes or crimes of theft, perjury, or subordination of perjury); TEX. GOV'T CODE ANN. § 62.102 (West 1998) (disqualifying person from jury service if convicted of felony or legally accused of felony or crime of theft); UTAH CODE ANN. § 78-46-7 (1996) (disqualifying person from jury service if convicted of felony unless expunged); VT. R. JURY SELECT 25 (disqualifying person from jury who has been imprisoned for felony conviction); WASH. REV. CODE ANN. § 2.36.070 (West 1988) (disqualifying person from jury service if convicted of felony unless civil rights have been restored); W.VA. CODE § 52-1-8 (1994) (disqualifying person from jury service who has lost right to vote because of criminal conviction or has been convicted of perjury, false swearing, or other infamous crime); WIS. STAT. ANN. § 756.02 (West 1981) (disqualifying person from jury service if convicted of felony unless civil rights have been restored); WYO. STAT. ANN. § 1-11-102 (Michie 1997) (same). *But see* COLO. REV. STAT. ANN. § 13-71-105 (West 1997) (listing qualifications of jurors without reference to juror's criminal history); 705 ILL. COMP. STAT. 305/2 (West 1992) (same); IOWA CODE ANN. § 607A.4 (West 1996) (same); ME. REV. STAT. ANN. tit. 14, § 1211 (West 1980) (same).

Prior to the issuance of Chief Judge Chamblin's order, the Commonwealth's Attorney for Loudoun County issued a policy statement declaring that his office conducted criminal and driving background checks of potential jurors in order to ensure that convicted felons did not serve as jurors.⁸² The Commonwealth responded to the order by asserting an interest in removing convicted felons and other legally disqualified people from the jury.⁸³ This interest arises from the possibility that a court could overturn a defendant's conviction upon a showing that the presence of an unqualified juror "probably caused him injustice."⁸⁴ This concern is even more acute for federal prosecutors because a defendant in a federal case only needs to show that a juror failed to answer accurately a material question that, if answered correctly, would have been a valid basis for a challenge for cause.⁸⁵ Discovering that a juror was a convicted felon would be a valid challenge for cause and thus could lead to the defendant receiving a new trial.⁸⁶

The inability to use jurors' criminal records forces the courts and the litigants to rely on jurors to answer jury questionnaires and voir dire questions accurately. But, as the Commonwealth pointed out, self-reporting is not always an effective means of discovering prior felony convictions.⁸⁷ Neither the prohibition of convicted felons from voting⁸⁸ nor from purchasing firearms⁸⁹ is enough to prevent felons from denying their prior convictions, even though these denials are crimes themselves.⁹⁰ Virginia's prosecutors routinely

82. Order, *supra* note 17, at 2.

83. See Commonwealth's Motion to Reconsider, *supra* note 40, at 2 n.2 (giving reasons why Commonwealth has interest in ensuring only qualified people serve as jurors).

84. *Id.* (citing *Mighty v. Commonwealth*, 438 S.E.2d 495, 496 (Va. Ct. App. 1993) and listing various ways presence of convicted felon on jury could probably cause injustice against defendant).

85. See *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984) (giving two-part test for granting defendant new trial because of juror's mistaken, although honest, answer to voir dire question).

86. See 28 U.S.C. § 1865 (1994) (making conviction of crime punishable by more than one year disqualification from jury service); *United States v. Langford*, 990 F.2d 65, 67 (2d. Cir. 1993) (noting that felony conviction is automatic disqualification from jury service).

87. See Commonwealth's Motion to Reconsider, *supra* note 40, at 9 (noting that felons commonly violate law by denying felony conviction in order to serve as jurors, purchase firearms, or register to vote).

88. See VA. CONST. art. II, § 1 (disqualifying convicted felons from voting unless civil rights have been restored).

89. See VA. CODE ANN. § 18.2-308 (Michie 1950) (prohibiting convicted felons from possessing firearms).

90. See VA. CODE ANN. § 24.2-1016 (Michie 1950) (making person who willfully gives false material statement on voter registration application guilty of Class-5 felony of election fraud); VA. CODE ANN. § 24.2-418 (Michie 1950) (requiring applicant for voter registration to disclose whether applicant has ever been convicted of felony); VA. CODE ANN. § 18.2-308.2:2 (Michie 1950) (making false material statement given willfully and intentionally on consent

encounter and prosecute convicted felons for unlawfully acquiring firearms, and the Office of Voter Registration routinely confronts convicted felons who attempt to register to vote.⁹¹ The same is true of the prohibition of felons from serving on juries as well; background checks periodically reveal jurors with felony convictions.⁹²

At least one state legislature has recognized the utility of checking jurors' criminal histories as a means of ensuring a qualified jury. Massachusetts explicitly provides courts, jury commissioners, and court clerks with the authority to check jurors' criminal history records for the limited purpose of ensuring that the jurors are qualified.⁹³ Although a system like Massachusetts's addresses the prosecutor's fears that convicted felons may be sitting on juries, it fails to uncover jurors who are otherwise qualified but harbor a bias against the government.

Virginia law permits a party to present "any competent evidence" to support an objection to a juror, regardless of whether it is based on bias or disqualification.⁹⁴ From the prosecutor's perspective, a juror's criminal history record is competent evidence, if not the most competent evidence, to show a juror's impartiality and disqualification.⁹⁵ The question then becomes whether the laws regulating criminal history records allow prosecutors to make use of these records in voir dire.

IV. Judicial Precedent: Courts Look to the Statutory Schemes Regulating Criminal History Records for the Answer

Although Chief Judge Chamblin did not have the benefit of Virginia precedent discussing whether prosecutors could use jurors' criminal history records while conducting voir dire, courts in Iowa, Alaska, and Missouri have addressed this issue.⁹⁶ In each case, the courts looked to the statutory schemes regulating the use of criminal history records to find the answer.⁹⁷ Although

form required for purchase of firearm punishable as Class-5 felony; requiring consent form to solicit information from purchaser identical to information required by firearms transaction record required by Bureau of Alcohol, Tobacco and Firearms of U.S. Department of Treasury); 27 C.F.R. § 178.124 (requiring firearms transaction record to include signature that seller has no reason to believe that buyer is legally prohibited from receiving firearm to be sold).

91. VA. CODE ANN. § 18.2-308.

92. See Commonwealth's Motion to Reconsider, *supra* note 40, at 8-9 (discussing how background checks on jurors' criminal histories have revealed convicted felons among jury panel).

93. MASS. GEN. LAWS ch. 234A, § 33 (1986).

94. See VA. CODE ANN. § 8.01-358 (Michie 1950) (stating that "party objecting to any juror may introduce any competent evidence in support of the objection").

95. See Petition for Appeal, *supra* note 37, at 19-21 (arguing that juror's criminal and driving records clearly are competent evidence within meaning of Virginia Code § 8.01-358).

96. See *infra* Parts IV.A-C (discussing decisions of Iowa, Alaska, and Missouri courts).

97. See *infra* Parts IV.A-C (discussing decisions of Iowa, Alaska, and Missouri courts).

the statutory provisions of these three states are quite similar,⁹⁸ the three courts arrived at two different conclusions.⁹⁹

A. The Supreme Court of Iowa – State v. Bessenecker

In *State v. Bessenecker*,¹⁰⁰ the Supreme Court of Iowa became the first state appellate court to decide whether prosecutors could use jurors' criminal records in voir dire.¹⁰¹ In *Bessenecker*, the defendant challenged the county attorney's practice of using the rap sheets of all potential jurors during voir dire.¹⁰² The defendant argued that this practice violated the statutes regulating the use and the dissemination of criminal history records because investigating jurors is not one of the county attorney's prescribed duties under the statutes.¹⁰³

The court observed that although none of the statutorily prescribed duties of the county attorney explicitly included investigating jurors' criminal histories,¹⁰⁴ the county attorney did have the express duty to prosecute viola-

98. See *infra* Part IV.D (comparing statutory provisions of Iowa, Alaska, and Missouri).

99. See *infra* Parts IV.A-C (discussing decisions of Iowa, Alaska, and Missouri courts).

100. 404 N.W.2d 134 (Iowa 1987).

101. See *State v. Bessenecker*, 404 N.W. 2d 134, 135-38 (Iowa 1987) (en banc) (concluding that state law prohibited county attorneys from obtaining rap sheets of all prospective jurors except when obtained by court order, in which case county attorney must make juror's rap sheet available to defendant). In *Bessenecker*, the defendant, charged with second-degree theft, challenged the county attorney's proposed use of all the prospective jurors' rap sheets during voir dire. *Id.* at 135. The trial court sided with the State in concluding that this use of criminal history data did not violate § 692.2(3)(a), which governed the dissemination and use of criminal history data. *Id.* at 136. The court, in overruling the trial court's decision, took note of Chapter 692's cautious tone indicating a legislative purpose to protect the individual against unwarranted circulation of his or her rap sheet. *Id.* at 137. The court concluded that the objectives of Chapter 692 dictated an interpretation of § 692.2(3)(a) that precluded the county attorney from obtaining jurors' rap sheets. *Id.* at 138. The court did create a caveat: The county attorney can obtain a court order to access the criminal records of a juror "when there is a reasonable basis for believing that the rap sheet may contain information that is pertinent to the individual's selection as a juror and that is *unlikely* to be disclosed through voir dire or through juror questionnaires." *Id.* (emphasis added). The court went on to state explicitly that it agreed with the reasoning of various jurisdictions that have held that fairness requires that the defendant have equal access to a juror's rap sheet when the county attorney obtains it. *Id.* at 138-39.

102. *Id.* at 135.

103. *Id.* at 136. At the time of *Bessenecker*, Iowa law limited the dissemination of criminal history records to "criminal justice agencies" for "official purposes in connection with prescribed duties." IOWA CODE § 692.2(1)(a), (3)(a) (1993). This is no longer true under Iowa law. See IOWA CODE § 692.2 (Supp. 1999) (lacking language limiting dissemination of criminal history records to criminal justice agencies for only "official purposes in connection with prescribed duties"). However, for purposes of analysis, this Note will refer to the law regarding the dissemination of criminal history records that was in force in Iowa at the time of the *Bessenecker* decision.

104. *Bessenecker*, 404 N.W.2d at 136 (citing IOWA CODE § 331.756 (1993), which lists duties of county attorney).

tions of state law and the implied duty to do so competently.¹⁰⁵ Attorneys also investigated jurors as part of a recognized practice to gather information that would aid in the intelligent use of voir dire objections to jurors.¹⁰⁶ In fact, so long as the jurors were not aware of these investigations, they were acceptable.¹⁰⁷ However, the court did not believe that performing an implied duty or following a common practice was sufficient to satisfy the requirements of § 692.2(3)(a),¹⁰⁸ which limits the use of criminal history records to the performance of a prescribed duty.¹⁰⁹

The court recognized a legislative purpose to protect individuals from unwarranted circulation of their rap sheets, as evidenced by the cautious tone of the statutory scheme regulating criminal history records.¹¹⁰ Accordingly, an interpretation of § 692.2(3)(a) precluding the county attorney from acquiring the rap sheets of all potential jurors would best fulfill that legislative purpose.¹¹¹ The court also noted that jury questionnaires and individual voir dire questioning provided the same information.¹¹² Thus, the county attorney did not have an overwhelming need to obtain jurors' rap sheets.¹¹³ However, the court created a caveat allowing the county attorney to access the criminal history information of an individual juror by court order if the county attorney could show a reasonable basis for believing that the rap sheet might contain information pertinent to selecting the individual as a juror that voir dire or juror questionnaires were unlikely to disclose.¹¹⁴ The court also held that if the county attorney obtains a juror's rap sheet by court order, fairness requires that the county attorney give the information to the defendant unless the county attorney can show good cause to the contrary.¹¹⁵

Three judges dissented in *Bessenecker*.¹¹⁶ They agreed that the defendant should have equal access to criminal history data that the county attorney uses during voir dire.¹¹⁷ The dissenters, however, argued that requiring the county attorney to obtain a court order to acquire a juror's criminal history records

105. *Id.* (citing IOWA CODE § 331.756(1) (1993)).

106. *Id.*

107. *Id.* at n.1.

108. *See id.* (distinguishing "performing an implied duty or following a common practice" from "complying with an authoritative rule or direction").

109. *See supra* note 103 (quoting language of § 692.2(3)(a)); *infra* notes 156-59 and accompanying text (examining provisions of Iowa Code regulating use of criminal history records).

110. *State v. Bessenecker*, 404 N.W.2d 134, 137 (Iowa 1987) (en banc).

111. *Id.* at 138.

112. *Id.* at 137.

113. *Id.*

114. *Id.* at 138.

115. *Id.* at 139.

116. *Id.*

117. *Id.* (Wolle, J., dissenting).

was both a misinterpretation of the relevant statutes and impractical.¹¹⁸ They argued that selecting a qualified and competent jury free from bias or prejudice was a part of the county attorney's statutorily-prescribed duty to prosecute violations of the law.¹¹⁹ Thus, § 692.2(3)(a) authorized the use of criminal history records as a tool of *voir dire*.¹²⁰ The dissenters argued that although the statute did not provide explicitly for investigations of jurors' criminal backgrounds, the public and the courts certainly expect a county attorney to perform that task.¹²¹

The dissent concluded by highlighting the impracticality of the majority's special-case rule: Without prior access to a juror's criminal history, a prosecutor will struggle to make the showing necessary to obtain a court order.¹²² When a juror is a complete stranger, the prosecutor usually will not have a reason to believe that the juror's criminal record contains pertinent information that is not likely to be disclosed during *voir dire*.¹²³ A prosecutor most needs a juror's rap sheet when the prosecutor does not have a reasonable basis to suspect the contents of a juror's criminal record.¹²⁴

B. *The Court of Appeals of Alaska*¹²⁵ – *Tagala v. State*

Four years after *Bessenecker*, *Tagala v. State*¹²⁶ raised the question of whether prosecutors could use jurors' criminal records in *voir dire* before the Court of Appeals of Alaska.¹²⁷ In *Tagala*, the defendant challenged his conviction

118. See *id.* at 139-40 (Wolle, J., dissenting) (dissenting on grounds that there is no statutory basis for majority's prohibition of use of juror's criminal history data except in "special cases involving individual jurors" and that this special case rule is impractical).

119. *Id.* at 140 (Wolle, J., dissenting).

120. *Id.* (Wolle, J., dissenting).

121. *Id.* (Wolle, J., dissenting).

122. *Id.* (Wolle, J., dissenting).

123. *Id.* (Wolle, J., dissenting).

124. *Id.* (Wolle, J., dissenting).

125. The Court of Appeals is Alaska's intermediate court of appeals, having appellate jurisdiction over decisions of the trial courts subject to the review of the Alaska Supreme Court. See ALASKA STAT. § 22.07.020 (Michie 1998) (establishing Court of Appeals' jurisdiction).

126. 812 P.2d 604 (Alaska Ct. App. 1991).

127. See *Tagala v. State*, 812 P.2d 604, 611-13 (Alaska Ct. App. 1991) (concluding that prosecutor's use of criminal history records in *voir dire* did not violate state laws regulating these records). In *Tagala*, the defendant challenged his conviction for first degree murder on numerous grounds, one of which was the State's use of the computerized criminal records system to conduct criminal background checks on at least twenty-six jurors. *Id.* at 611. Relying on the Iowa Supreme Court's decision in *State v. Bessenecker*, the defendant claimed that the prosecutor's actions violated the statute that governed the use of the state's computer system and the access, use, and dissemination of criminal justice information. *Id.* The statute limited dissemination of criminal justice information to law enforcement agencies for law enforcement purposes. *Id.* (citing ALASKA STAT. § 12.62.030(a) (repealed 1994)). The defendant argued that *voir dire* was not a proper law enforcement purpose because it did not involve crime prevention

tions for first-degree murder and tampering with physical evidence, claiming that it was unlawful for the state to use its computer system to conduct criminal background checks on potential jurors.¹²⁸ Like the defendant in *Bessenecker*, the defendant in *Tagala* argued that voir dire was not an authorized use of criminal history records because voir dire was not a law enforcement purpose as required by Alaska Statutes § 12.62.030(a).¹²⁹ The defendant also cited *Bessenecker* in arguing that the whole statutory scheme demonstrated a concern to protect the privacy and security of private citizens including prospective jurors.¹³⁰ The State argued that voir dire constituted a lawful purpose under § 12.62.030(a) because Alaska Criminal Rule 24(c)(11)(ii) permitted challenges of jurors who have been the subject of a prior criminal prosecution, and the law allowed the State to obtain the information necessary to make those challenges.¹³¹

After noting that the practice of conducting criminal background checks on potential jurors by prosecutors was common in Alaska as well as in other states,¹³² the court quickly dispatched with the defendant's statutory argument.¹³³ At the time of *Tagala*, Alaska law defined "law enforcement purpose" to include "activities of criminal prosecution."¹³⁴ Therefore, because jurors' criminal records are relevant to challenging jurors for cause, the prosecutor did not violate § 12.62.030(a).¹³⁵ The court also required the prosecutor to disclose to the defendant, upon request, the results of background checks done on prospective jurors.¹³⁶ To do otherwise would place "a premium on 'gamesmanship' to the subversion of the trial's search for truth."¹³⁷ However, the court

or control. *Id.* However, the statutory definition of law enforcement expressly includes "activities of criminal prosecution." *Id.* at 612 (quoting ALASKA STAT. § 12.62.070(6) (repealed 1994)). The court then concluded that because criminal records of jurors are relevant for the use of challenges for cause, the prosecutor in *Tagala's* case did not violate state law. *Id.* The court went on to declare that fundamental fairness requires disclosure of juror's criminal record to the defendant. *Id.* According to the court, to do otherwise "places a premium on 'gamesmanship' to the subversion of the trial's search for truth." *Id.*

128. *Id.* at 611. After questioning by defense counsel, the prosecutor admitted that the police had obtained printouts of the criminal histories of "at least twenty-six prospective jurors" and shared the information with her. *Id.*

129. *Id.* Alaska law at the time of *Tagala* limited the access to and use of criminal history records to "law enforcement agencies . . . for law enforcement purposes." ALASKA STAT. § 12.62.030(a) (repealed 1994).

130. *Tagala v. State*, 812 P.2d 604, 611 (Alaska Ct. App. 1991).

131. *Id.*

132. *Id.*

133. *Id.* at 612.

134. *Id.* (quoting ALASKA STAT. § 12.62.070(6) (repealed 1994)).

135. *See id.* (referring to provision of § 12.62.030(a) limiting use of criminal history records to "law enforcement purposes").

136. *Id.*

137. *Id.*

qualified its conclusions by stating that the opinion should not necessarily be the final word regarding a prosecutor's use of jurors' criminal records and by suggesting that the criminal rules committee address the issue.¹³⁸

*C. The Missouri Court of Appeals*¹³⁹ – State v. McMahan

Less than a year after *Tagala*, Missouri joined Alaska in validating the prosecutorial practice of investigating the criminal histories of potential jurors.¹⁴⁰ In *State v. McMahan*,¹⁴¹ the Missouri Court of Appeals had to decide whether Missouri law prohibited prosecutors from using the arrest records of prospective jurors during voir dire.¹⁴² The defendant in *McMahan* claimed that the State's use of jurors' arrest records in voir dire violated the laws governing the access to and use of these records.¹⁴³ The defendant also claimed that this use of jurors' arrest records gave the State an unfair advantage in voir dire.¹⁴⁴ This argument foreshadows some of the reasoning underlying Chief Judge Chamblin's order.¹⁴⁵

Like the courts of Iowa¹⁴⁶ and Alaska,¹⁴⁷ the Missouri court looked to the

138. *Id.* at 613 n.6.

139. The Missouri Court of Appeals is Missouri's intermediate-level court with general appellate jurisdiction. *See* MO. CONST. art. V, §§ 1, 3 (establishing court of appeals and granting general appellate jurisdiction in all cases except those within exclusive jurisdiction of Missouri Supreme Court).

140. *See supra* Part IV.B (discussing Alaska's decision allowing prosecutors to use jurors' criminal history records in voir dire).

141. 821 S.W.2d 110 (Mo. Ct. App. 1991).

142. *See* State v. McMahan, 821 S.W.2d 110, 112 (Mo. Ct. App. 1991) (stating defendant's argument that State violated laws by accessing jurors' arrest records for voir dire). In *McMahan*, the defendant claimed the State's use of jurors' arrest records violated Missouri law governing those records and gave the State an unfair advantage in jury selection. *Id.* The court consulted the relevant statutes and noted that § 610.120 expressly provides that the courts and law enforcement agencies can use the arrest records in prosecution. *Id.* at 113. Because the statute granted the State the authority to use the arrest records for purposes of prosecution, the court dismissed the defendant's claim without examining whether the arrest records gave the State an unfair advantage. *Id.*

143. *Id.* Missouri law limits the access to and use of arrest records to "law enforcement agencies . . . for purposes of prosecution." MO. REV. STAT. § 610.120(1) (1986).

144. *McMahan*, 821 S.W.2d at 112.

145. *See infra* Part V.B (discussing Chief Judge Chamblin's concern that allowing Commonwealth's Attorney to use jurors' criminal history records in voir dire would put defendant at unfair disadvantage).

146. *See* State v. Bessenecker, 404 N.W.2d 134, 136-38 (Iowa 1987) (en banc) (examining provisions of Iowa Code § 692, which regulates criminal history records); *supra* notes 104-111 and accompanying text (discussing Iowa Supreme Court's focus on statutes regulating criminal history records).

147. *See* Tagala v. State, 812 P.2d 604, 611 (Alaska Ct. App. 1991) (examining provisions of ALASKA STAT. § 12.62.030(a), which regulates criminal history records); *supra* notes 134-35

statutes governing the access and use of arrest records to decide if the State had the authority to use arrest records during voir dire.¹⁴⁸ The *McMahan* court wasted little time in determining that the State's use of jurors' arrest records did not violate Missouri law.¹⁴⁹ The law limiting access to and use of these arrest records specifically exempted courts and law enforcement agencies when they use the records for purposes of prosecution.¹⁵⁰ Thus, the court reasoned that because the statute did not limit the use of arrest records to the prosecution of the arrestee, it fully authorized the State to use the arrest records of potential jurors in voir dire.¹⁵¹ The court simply ignored the defendant's claim that the State had an unfair advantage in voir dire as a result of having access to jurors' arrest records.¹⁵² In a later decision, the Missouri Court of Appeals examined the claim of unfair advantage and concluded that absent a statutory provision to the contrary, defendants have no right to disclosure of jurors' arrest records.¹⁵³

D. Comparison and Analysis of the Statutory Schemes Regulating Jurors' Criminal History Records

1. Comparing the Statutory Schemes in Iowa, Alaska, and Missouri

The courts in *Bessenecker*, *Tagala*, and *McMahan* examined the relevant statutes governing the use and dissemination of criminal history records to determine whether the prosecutors had the authority to use those records in voir dire.¹⁵⁴ The statutes that these courts examined all contained similar provisions allowing prosecutors to use criminal history records for purposes

and accompanying text (discussing Alaska Court of Appeals's focus on statutes regulating criminal history records).

148. See *State v. McMahan*, 821 S.W.2d 110, 112-13 (Mo. Ct. App. 1991) (examining provisions of MO. REV. STAT. §§ 610.100, 610.120 (1986)).

149. See *id.* (concluding prosecutor's use of jurors' arrest records did not violate Missouri law).

150. *Id.* at 113 (quoting MO. REV. STAT. § 610.120 (1986)).

151. *Id.*

152. See *id.* (dismissing defendant's claim without analyzing whether State's use of jurors' arrest records gave State unfair advantage in voir dire).

153. See *State v. White*, 909 S.W.2d 391, 394 (Mo. Ct. App. 1995) (deciding that statutes do not obligate prosecutor to disclose jurors' arrest records to defendant because statutes do not require such disclosure and defendant has no general right to discovery outside of statutory provisions).

154. See *Tagala v. State*, 812 P.2d 604, 611-12 (Alaska Ct. App. 1991) (examining ALASKA STAT. § 12.62.030(a) (repealed 1994), which governs dissemination of criminal history records); *State v. Bessenecker*, 404 N.W.2d 134, 135-38 (Iowa 1987) (en banc) (examining IOWA CODE § 692.2 (1993), which governs dissemination of criminal history records); *State v. McMahan*, 821 S.W.2d 110, 112-13 (Mo. Ct. App. 1991) (examining MO. REV. STAT. §§ 610.100, 610.120 (1986), which govern dissemination of arrest records).

of prosecution.¹⁵⁵ In Iowa, the relevant provisions of § 692.2 of the Iowa Code limit access to criminal history records to "criminal justice agencies . . . for official purposes in connection with prescribed duties."¹⁵⁶ Section 692.1(7) defines a criminal justice agency to include a government agency whose principal function is the prosecution of criminal offenders.¹⁵⁷ Because the principal function of Iowa's county attorneys is to prosecute violations of the law, this definition necessarily includes prosecutors.¹⁵⁸ Therefore, in Iowa, prosecutors can use criminal history records for purposes of prosecution.¹⁵⁹

At the time of the *Tagala* decision, Alaska Statute § 12.62.030(a) limited access to and use of criminal history records to "law enforcement agencies . . . for law enforcement purposes."¹⁶⁰ Section 12.62.070 defined a law enforcement agency as a "public agency" whose principal function is "activities pertaining to law enforcement."¹⁶¹ The legislature defined law enforcement as "any activity relating to . . . the enforcement of criminal law, including, but not limited to . . . activities of criminal prosecution."¹⁶² Therefore, as a public agency whose function is to prosecute criminal offenses,¹⁶³ a prosecutor can use criminal history records for any activity relating to criminal prosecutions.¹⁶⁴

155. Compare *infra* notes 155-59 and accompanying text (examining provisions of Iowa Code regulating access to and use of criminal history records), with *infra* notes 160-64 and accompanying text (examining provisions of Alaska Statutes regulating access to and use of criminal history records), and *infra* notes 165-70 and accompanying text (examining provisions of Missouri Revised Statutes regulating access to and use of arrest records).

156. IOWA CODE § 692.2(1)(a), (3)(a) (1993).

157. *Id.* § 692.1(7).

158. See *id.* § 331.756(1) (listing county attorney's duty to prosecute violations of law first).

159. See *id.* § 692.2(3)(a) (allowing use of criminal history records for "official purposes in connection with prescribed duties").

160. ALASKA STAT. § 12.62.030(a) (repealed 1994).

161. *Id.* § 12.62.070(7) (repealed 1994).

162. *Id.* § 12.62.070(6) (repealed 1994).

163. See *Tagala v. State*, 812 P.2d 604, 611-12 (Alaska Ct. App. 1991) (accepting prosecutor as "law enforcement agency" without comment). Unlike Iowa, Alaska does not provide a comprehensive list of duties for its local prosecutors. However, Alaska law does provide a list of duties for its Attorney General, which includes the duty to "prosecute all cases involving violation of state law." ALASKA STAT. § 44.23.020(b)(3) (Michie 1996). The Alaska Attorney General has stated that local prosecutors are "subordinates" of the Attorney General. 1985 Alaska Op. Att'y Gen. 61 (1985), available in 1985 WL 70137, at *4. Thus, it is reasonable to conclude that the function of prosecutors is to prosecute criminal offenses, in light of the prosecutor's position as a subordinate of the Attorney General and the court's tacit approval of this conclusion in *Tagala*.

164. See ALASKA STAT. §§ 12.62.030(a), 12.62.070(6) (repealed 1994) (allowing use of criminal history records for "law enforcement purposes," which include activities of prosecution).

In Missouri, Missouri Revised Statutes § 610.100 mandates the closure of certain arrest records¹⁶⁵ and specifically states that the exceptions to closure listed in § 610.120 apply to these arrest records.¹⁶⁶ Section 610.120 provides that "law enforcement agencies" can access closed records "for purposes of prosecution."¹⁶⁷ Although the Missouri legislature did not see fit to define explicitly "law enforcement agencies" as the Alaska legislature had,¹⁶⁸ the Missouri legislature's inclusion of "purposes of prosecution" indicates an intent to include prosecutors within the exception provided for "law enforcement agencies."¹⁶⁹ Thus, Missouri's statutory scheme allows prosecutors to use arrest records for the purpose of prosecution.¹⁷⁰

Despite the similarity of the statutory schemes of Iowa, Alaska, and Missouri, the Alaska Court of Appeals and the Missouri Court of Appeals reached a different conclusion than did the Iowa Supreme Court as to whether the respective statutory scheme allowed prosecutors to use criminal history records in voir dire.¹⁷¹ The question that caused this disagreement was whether the

165. See MO. REV. STAT. § 610.100(2) (1988) (providing that arrest records are "closed records" if state failed to charge person arrested with criminal offense within thirty days of arrest). Although the Missouri legislature has amended the language of § 610.100 since the *McMahan* decision, the substantive provisions remain the same. Compare *State v. McMahan*, 821 S.W.2d 110, 112 (Mo. Ct. App. 1991) (quoting § 610.100), with MO. REV. STAT. § 610.100(2) (1988).

166. MO. REV. STAT. § 610.100(2) (1988).

167. *Id.* § 610.120(1).

168. See *supra* notes 161-64 and accompanying text (discussing how Alaska Statutes defined "law enforcement agencies" and "law enforcement purposes" to include activities of prosecutor).

169. See *McMahan*, 821 S.W.2d at 113 (citing exception for law enforcement agencies for purposes of prosecution as reason for concluding statute allowed State to use closed arrest records of jurors in voir dire). *But cf.* MO. REV. STAT. § 589.417(1) (1988) (listing prosecutors and law enforcement agencies separately). Although § 589.417(1) does list prosecutors as separate from law enforcement agencies, it does so in the context of providing that *only* prosecutors, courts, and law enforcement agencies shall have access to the described records, which the statute explicitly provides are not public records. *Id.* Thus, if the legislature deemed prosecutors worthy of such exclusive access, along with courts and law enforcement agencies, to the records which § 589.417(1) describes, it is reasonable to infer the same legislative intent with respect to closed arrest records, particularly in light of the fact the legislature included "prosecution" as a proper use of these closed arrest records.

170. See MO. REV. STAT. § 610.120(1) (1988) (allowing access to and use of closed arrest records for "purposes of prosecution").

171. See *Tagala v. State*, 812 P.2d 604, 612 (Alaska Ct. App. 1991) (allowing prosecutors to use criminal history records in voir dire); *State v. Bessenecker*, 404 N.W.2d 134, 138 (Iowa 1987) (en banc) (prohibiting prosecutors from using criminal history records in voir dire); *State v. McMahan*, 821 S.W.2d 110, 113 (Mo. Ct. App. 1991) (allowing prosecutors to use arrest records in voir dire); *supra* note 111 and accompanying text (discussing *Bessenecker* decision); *supra* notes 134-35 and accompanying text (discussing *Tagala* decision); *supra* note 150 and accompanying text (discussing *McMahan* decision).

statutes considered voir dire a proper purpose of prosecution.¹⁷² Both the Alaska Court of Appeals and the Missouri Court of Appeals concluded that prosecutors could use criminal history records in voir dire because they could use the records for prosecution purposes; neither court believed that it was necessary to examine the precise relationship between conducting voir dire and prosecuting criminal cases.¹⁷³ In contrast, the Iowa Supreme Court decided that conducting voir dire merely fulfilled an *implied* duty of the prosecutor and was not within the prosecutor's prescribed duty to prosecute.¹⁷⁴ Therefore, prosecutors could not use criminal history records in voir dire because voir dire, as an implied duty, was not sufficient to satisfy the requirements of § 692.2(3)(a).¹⁷⁵

The Iowa Supreme Court's conclusion is debatable for two reasons. First, the court recognized that a prosecutor's express duty to prosecute included an implied duty to do so competently.¹⁷⁶ The court also viewed voir dire as fulfilling this implied duty of competence.¹⁷⁷ The nexus between an express duty and its included implied duties could be seen as sufficient to satisfy the broad language of § 692.2(3)(a) – "for official purposes *in connection with* prescribed duties."¹⁷⁸ Second, a juror's felony conviction is a valid basis for challenging that juror for cause in Iowa.¹⁷⁹ The Court of Appeals of Alaska in *Tagala* looked to a similar provision in Alaska's Criminal Rules as

172. Compare *supra* notes 133-34 and accompanying text (discussing Alaska Court of Appeals's conclusion that voir dire was activity of prosecution), and *supra* notes 149-50 and accompanying text (discussing Missouri Court of Appeals's conclusion that voir dire was activity of prosecution), with *supra* notes 104-09 and accompanying text (discussing Iowa Supreme Court's analysis and conclusion that voir dire did not fall within prescribed duty of county attorney to prosecute violations of law).

173. See *Tagala*, 812 P.2d at 113 (concluding prosecutor could use criminal history records in voir dire because statute defined "law enforcement purpose" to include "activities of criminal prosecution" without discussing whether voir dire should be considered activity of prosecution); *McMahan*, 821 S.W.2d at 113 (concluding prosecutor could use arrest records in voir dire because statute included "purposes of prosecution" within allowable uses of arrest records without discussing whether voir dire should be considered purpose of prosecution).

174. See *Bessenecker*, 404 N.W.2d at 136 (concluding intelligent use of challenges merely fulfills implied duty of prosecutor to prosecute competently, but is not part of prescribed duty to prosecute).

175. See *supra* notes 104-09 and accompanying text (discussing Iowa Supreme Court's analysis in *Bessenecker* of connection between voir dire and county attorney's express duty to prosecute violations of law); *supra* note 155 and accompanying text (discussing language of § 692.2(3)(a)).

176. See *supra* note 105 and accompanying text (discussing Iowa Supreme Court's characterization of relationship between duty to prosecute and duty to prosecute competently).

177. See *State v. Bessenecker*, 404 N.W.2d 134, 136 (Iowa 1987) (en banc) (discussing voir dire activity as performing implied duty of competence).

178. IOWA CODE § 692.2(3)(a) (1993) (emphasis added).

179. IOWA R. CRIM. P. 17(5)(a).

a basis for allowing prosecutors to use jurors' criminal history records in voir dire.¹⁸⁰

2. Analyzing the Statutory Scheme in Virginia

Virginia's statutory scheme is quite similar to those in Iowa, Alaska, and Missouri.¹⁸¹ However, Chief Judge Chamblin's lack of attention to that statutory scheme stands in stark contrast to the statutory analysis that the courts undertook in *Bessenecker*, *Tagala*, and *McMahan*.¹⁸² In its response to Chief Judge Chamblin's order, the Commonwealth of Virginia grounded its argument that Virginia law gives the Commonwealth the authority to use criminal history data during voir dire¹⁸³ on Virginia Code § 19.2-389, which governs the dissemination of criminal history data.¹⁸⁴ Section 19.2-389(A)(1) provides that criminal history data can be disseminated to "criminal justice agencies . . . for the purposes of the administration of criminal justice."¹⁸⁵

Similar to the Alaska statute,¹⁸⁶ the Virginia statute clarifies its intent by defining the key terms of § 19.2-389(A)(1).¹⁸⁷ Section 9-169 defines criminal

180. See *supra* notes 134-35 and accompanying text (discussing Alaska Court of Appeals's reasoning in *Tagala* that prosecutors could use jurors' criminal history records in voir dire because they were relevant to use of challenges for cause).

181. Compare *supra* notes 155-69 and accompanying text (discussing statutory schemes in Iowa, Alaska, and Missouri), with *infra* notes 185-92 and accompanying text (discussing statutory scheme in Virginia).

182. Compare *supra* notes 104-11, 133-34, 149-50 and accompanying text (discussing statutory analysis used by courts in *Bessenecker*, *Tagala*, and *McMahan*, respectively), with Order, *supra* note 17 (prohibiting use of jurors' criminal history records in voir dire without discussing whether statutes regulating criminal history records allow use of these records in voir dire).

183. See Commonwealth's Motion to Reconsider, *supra* note 40, at 1-3 (citing VA. CODE ANN. § 19.2-389(A)(3) (Michie 1950)). The Commonwealth later amended its argument, choosing instead to rely on § 19.2-389(A)(1). Petition for Appeal, *supra* note 37, at 16. Apparently, the Commonwealth changed its argument because it more accurately applies to the Commonwealth Attorney's use of criminal history data as a "criminal justice agency." Compare VA. CODE ANN. § 19.2-389(A)(1) (Michie 1950) (applying directly to use of criminal history data by "criminal justice agency . . . for purposes of the administration of criminal justice"), with VA. CODE ANN. § 19.2-389(A)(3) (Michie 1950) (applying to use of criminal history data by "individuals or agencies pursuant to a specific agreement with a criminal justice agency to provide services required for the administration of criminal justice"). For this reason, this Note's statutory analysis will focus on §19.2-389(A)(1).

184. See VA. CODE ANN. § 19.2-389 (Michie 1950) (regulating dissemination of criminal history data).

185. *Id.* § 19.2-389(A)(1).

186. See *supra* notes 161-62 and accompanying text (discussing Alaska legislature's definitions of key terms of ALASKA STAT. § 12.62.030(a) (repealed 1994)).

187. See VA. CODE ANN. § 9-169(3) (Michie 1950) (defining criminal justice agency as "a court or any other governmental agency or subunit thereof which as its principal function performs the administration of criminal justice").

justice agencies as agencies whose "principal function" is the "administration of criminal justice."¹⁸⁸ The Virginia statute's definition of "the administration of criminal justice" closely resembles the language of Alaska's definition of "law enforcement."¹⁸⁹ Virginia defines the administration of criminal justice as the "performance of *any* activity directly involving the . . . prosecution . . . of accused persons or criminal offenders."¹⁹⁰ Therefore, because the principal function of the Commonwealth's Attorney is to prosecute crimes,¹⁹¹ the Commonwealth's Attorney is a criminal justice agency.¹⁹² Conducting voir dire appears to fit under the broad definition of "administration of criminal justice" because a jury trial necessitates the use of voir dire to prosecute crimes.¹⁹³

Therefore, like the *Tagala* court's interpretation of Alaska Statute § 12.62.030(a),¹⁹⁴ the Commonwealth's interpretation of Virginia Code § 19.2-389(A)(1) is a fair one.¹⁹⁵ The Commonwealth's Attorney should be able to use criminal history data of jurors during voir dire because this use furthers the administration of criminal justice by a criminal justice agency. However, Chief Judge Chamblin did not reach this conclusion because he did not employ the type of analysis used by the Commonwealth's Attorney, the Supreme Court of Iowa, the Alaska Court of Appeals, and the Missouri Court of Appeals.¹⁹⁶ Eschewing an analysis of the controlling statutes, Chief Judge Chamblin found other reasons for prohibiting the Commonwealth's Attorney from using jurors' criminal records in voir dire.¹⁹⁷

188. *Id.*

189. Compare *supra* note 162 and accompanying text (examining Alaska's definition of "law enforcement"), with *infra* note 190 and accompanying text (examining Virginia's definition of "administration of criminal justice").

190. VA. CODE ANN. § 9-169(1) (Michie 1950) (emphasis added).

191. See *id.* § 15.2-1627(B) (Michie 1950) (stating duties of Commonwealth's Attorney or assistant Commonwealth's Attorney include "duty of prosecuting all warrants, indictments or informations charging a felony").

192. See *supra* notes 188-90 and accompanying text (discussing Virginia's statutory definition of "criminal justice agency," which includes agencies whose principal function is prosecution of crimes).

193. See *supra* note 190 and accompanying text (discussing definition of "administration of criminal justice" provided by § 9-169); VA. SUP. CT. R. 3A:14 (requiring court and allowing parties to question jurors as to various qualifications and biases after jurors are sworn in voir dire).

194. See *supra* note 135 and accompanying text (discussing court's interpretation of § 12.62.030(a) in *Tagala*).

195. See *supra* note 51 and accompanying text (discussing Commonwealth's claim that § 19.2-389 authorized use of jurors' criminal history records in voir dire by prosecutors).

196. Compare *supra* notes 104-11, 133-34, 149-50 and accompanying text (discussing statutory analysis used by courts in *Bessenecker*, *Tagala*, and *McMahan*, respectively), with Order, *supra* note 17 (prohibiting use of jurors' criminal history records in voir dire without discussing whether statutes regulating criminal history records allow use of these records in voir dire).

197. See Order, *supra* note 17, at 3-5 (discussing privacy of jurors and unfairness to

V. Chief Judge Chamblin's Reasons for Prohibiting the Use of Jurors' Criminal Records in Voir Dire

Rather than decide that the Commonwealth lacked the authority to use jurors' criminal records in voir dire, Chief Judge Chamblin focused on reasons of juror privacy and fairness to the defendant to support his order.¹⁹⁸ This Part examines these justifications in greater detail, beginning with an examination of the issue of privacy in the context of jury service. This Part concludes by evaluating whether allowing prosecutors to use criminal records in voir dire is unfair to the defendant, and if so, how that unfairness should be remedied.

A. Protecting the Privacy Rights of Jurors

1. Development of the Right to Informational Privacy¹⁹⁹

The Supreme Court has stated that the Constitution does not protect a general right to privacy.²⁰⁰ However, the Court has recognized more discreet privacy interests that the Constitution does protect.²⁰¹ In *Whalen v. Roe*,²⁰² the Supreme Court divided the privacy interests which the Constitution protects into two categories: (1) an interest in avoiding disclosure of private information and (2) an interest in the ability to make certain important personal decisions independently.²⁰³ Four months after its decision in *Whalen*, the

defendant as reasons for prohibiting use of jurors' criminal history data); *infra* Part V (discussing Chief Judge Chamblin's reasons for his prohibitive order).

198. See *supra* note 47 and accompanying text (identifying juror privacy and fairness to defendant as two main reasons supporting Chief Judge Chamblin's order).

199. This Note's analysis proceeds on the assumption that the right to privacy that Chief Judge Chamblin's order references is based on a right to privacy which the United States Constitution guarantees. The analysis will proceed in this fashion because the Virginia laws recognizing a right to privacy do not apply to the context of a juror's criminal history records. See VA. CODE ANN. § 8.01-40 (Michie 1950) (protecting person from unauthorized use of name or identity); *id.* § 32.1-127.1:03(A) (protecting patient's right to privacy in personal medical records).

200. See *Katz v. United States*, 389 U.S. 347, 350-51 (1967) (stating that "the protection of a person's *general* right to privacy – his right to be let alone by other people – is, like the protection of his property and of his very life, left largely to the law of the individual States"); *cf.* *Whalen v. Roe*, 429 U.S. 589, 607-09 (1977) (Stewart, J., concurring) (emphasizing support of majority opinion as long as it does not contradict principle stated in *Katz* that no general constitutional right to privacy exists).

201. See *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (listing following privacy interests that Constitution protects: contraception, *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)).

202. 429 U.S. 589 (1977).

203. See *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) (upholding New York practice of keeping records of names and addresses of all persons obtaining Schedule II drugs from physicians by prescription). In *Whalen*, the Supreme Court considered whether the New York State

Court in *Nixon v. Administrator of General Services*²⁰⁴ further developed *Whalen's* right to informational privacy²⁰⁵ by crafting a two-part test to determine violations of that right.²⁰⁶ First, a person must show a legitimate expectation of privacy in the information or material at issue.²⁰⁷ If the person successfully makes this showing, the right to privacy recognized in *Whalen* attaches.²⁰⁸ The Court then balances the scope and nature of the intrusion against the public's interest in disclosure to determine whether the public's interest warrants disclosure despite the intrusion on that person's privacy interest.²⁰⁹ Although some courts view the development of this right to

Department of Health could maintain a centralized computer record of the names and addresses of all persons obtaining Schedule II drugs by prescription. *Id.* at 591. The law required physicians prescribing Schedule II drugs to fill out the prescription on an official form in triplicate with copies going to the physician, to the pharmacist, and to the New York State Department of Health. *Id.* at 593. The statutory scheme provided numerous safeguards to prevent the unauthorized public disclosure of the information collected. *Id.* at 593-95. Both patients receiving the medication at issue and doctors prescribing the medication challenged the scheme as violating their right to privacy. *Id.* at 595. The Court held that neither the mere possibility of public disclosure, nor the required disclosure to state employees was sufficient to constitute an invasion of a right to privacy protected by the 14th Amendment. *Id.* at 603-04.

204. 433 U.S. 425 (1977).

205. See Weinstein, *supra* note 18, at 5 (referring to privacy interest in avoiding disclosure of personal matters recognized in *Whalen* as "right to informational privacy").

206. See *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 457-58 (1977) (outlining test to determine whether disputed action violates privacy interest in avoiding disclosure of personal matters). In *Nixon*, former President Nixon (Nixon) challenged the Presidential Recordings and Materials Preservation Act (Act), by which Congress intended to nullify an agreement that Nixon and the Administrator of General Services (Administrator) made which gave Nixon legal title of the documents and tape recordings that Nixon amassed during his presidency. *Id.* at 429-32. The Act instructed the Administrator to take possession of Nixon's presidential materials and to promulgate regulations governing public access to those materials. *Id.* at 434-35. The Act also required regulations detailing a plan for processing the materials in order to sort out and return to Nixon those materials that were "personal and private in nature" and had no historical value. *Id.* at 435-36. The Court had to decide whether the Act violated Nixon's right to privacy. *Id.* at 455. The Court answered this question in the negative by looking to the privacy interest in avoiding disclosure of personal matters recognized in *Whalen* and employing a two-part test. *Id.* at 457-58. The Court concluded that although Nixon had a legitimate expectation of privacy with respect to a small fraction of the materials, the interests in public access to the information and the limited and necessary nature of the intrusion outweighed Nixon's privacy interest. *Id.* at 465.

207. See *id.* at 458 (adopting language from *Katz v. United States*, 389 U.S. 347, 351-53 (1967)).

208. See Glover, *supra* note 18, at 711 (describing Nixon's "legitimate expectation of privacy" standard as means for determining if *Whalen's* privacy interest in avoiding disclosure of personal matters attaches).

209. See *Nixon*, 433 U.S. at 458 (describing balancing test court should employ once litigation shows legitimate expectation of privacy); see also Weinstein, *supra* note 18, at 4 (discussing *Nixon* balancing test); Glover, *supra* note 18, at 711 (same).

privacy in *Whalen* and *Nixon* as merely a product of dictum and refuse to recognize it as controlling, the Supreme Court and a majority of United States Courts of Appeals have recognized *Whalen's* right to informational privacy.²¹⁰

2. *The Right to Informational Privacy in the Context of Jury Service*
 a. *Adapting the Nixon Balancing Test to the Unique Demands of Jury Service*

The Supreme Court has had little opportunity to give lower courts any guidance as to how to apply the *Whalen* right to informational privacy and the *Nixon* test in the context of jury service. The Court has discussed this matter only once,²¹¹ noting in dictum in *Press-Enterprise Co. v. Superior Court*²¹² that voir dire, in certain circumstances, may implicate a potential juror's privacy interest to a degree sufficient to warrant the closing of voir dire to the public.²¹³ However, Justice Blackmun wrote a separate concurrence in *Press-Enterprise* to emphasize that the Court's decision did not rest on, nor was it even required to examine, any right to privacy for prospective jurors.²¹⁴ Expressing concern that accepting the application of the right to informational privacy in the context of jury service could bring about unintended and complicated results,²¹⁵ Justice Blackmun raised, as an example, the question

210. See Weinstein, *supra* note 18, at 5 (noting that despite United States Court of Appeals for Sixth Circuit's refusal to follow rule of *Whalen* and *Nixon* regarding right to informational privacy, Supreme Court and majority of United States Courts of Appeals recognize the right as "well-entrenched").

211. See *id.* at 7 (stating that United States Supreme Court has applied right of privacy to context of jury service just once, in *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501 (1984)).

212. 464 U.S. 501 (1984).

213. See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 511 (1984) (stating jury selection process may give rise to compelling privacy interest for prospective juror when voir dire questioning touches on deeply personal matters). In *Press-Enterprise*, the Court confronted the question of whether the guarantee of open public criminal trials included voir dire proceedings. *Id.* at 503. The trial judge had denied a motion from *Press-Enterprise* to open voir dire proceedings to the public and press, closing all but three days of a six-week voir dire. *Id.* Once voir dire was complete, *Press-Enterprise* moved for the release of the voir dire transcripts, which the court also denied in order to protect the defendant's right to an impartial jury and the jurors' right to privacy. *Id.* at 504. The Supreme Court found that courts historically have treated criminal trials, including voir dire, as presumptively open. *Id.* at 505-09. In order to overcome that presumption, a court must show an overriding interest in closure in order to preserve "higher values" and that the closure is narrowly tailored to that interest. *Id.* at 510. The Court decided that the trial court's findings were not sufficient to warrant closure, and even if they were, the trial court's failures to consider alternatives to such a broad closure made the closure unconstitutional. *Id.* at 510-11.

214. See *id.* at 513-14 (Blackmun, J., concurring) (emphasizing that Court did not decide whether prospective jurors have right to privacy).

215. See *id.* at 515 (Blackmun, J., concurring) (stating that recognizing jurors' right to privacy could unnecessarily complicate voir dire proceeding).

of whether a juror could claim a right to privacy in refusing to answer a question posed during voir dire.²¹⁶

Eleven years later, Justice Blackmun's hypothetical problem became a judicial reality. In *Brandborg v. Lucas*,²¹⁷ a federal magistrate judge encountered a petition for a writ of habeas corpus arising out of a conviction for contempt of court.²¹⁸ A state court judge had held Diane Brandborg in contempt for repeatedly refusing to answer 11 of the 110 questions on a jury questionnaire.²¹⁹ In explaining her refusal, Brandborg claimed that the questions were of a "very private nature" and irrelevant to her ability to serve as an impartial juror.²²⁰

In deciding to set aside her conviction, the court recognized that Brandborg claimed the right to informational privacy recognized in *Whalen*.²²¹ The court then applied the *Nixon* test, adapting it to the unique requirements of a juror's claim to privacy in the context of a criminal trial.²²² The court began by noting that although a person can forfeit her expectation of privacy by

216. See *id.* (Blackmun, J., concurring) (stating that Court should not assume existence of jurors' privacy interest without considering its implications).

217. 891 F. Supp. 352 (E.D. Tex. 1995).

218. See *Brandborg v. Lucas*, 891 F. Supp. 352, 353 (E.D. Tex. 1995) (noting contempt of court conviction and resulting sentence as basis for petition for writ of habeas corpus). In *Brandborg*, the court had to answer the question Justice Blackmun foresaw in his concurrence in *Press-Enterprise*: Can a juror refuse to answer voir dire questions based on her asserted right to privacy? *Id.* at 355. After being summoned for jury duty in a capital murder case, Diane Brandborg refused to answer 11 of the 110 questions in the jury questionnaire. *Id.* at 353. Brandborg explained that she would not answer the questions because they were of a "very private nature" and were irrelevant as to whether she could be a fair and impartial juror. *Id.* After Brandborg's continued refusal to answer the questions, the trial court judge held her in contempt of court and sentenced her to 3 days in jail and a \$200 fine. *Id.* at 355. Brandborg filed a petition for writ of habeas corpus in federal district court after the Texas Court of Criminal Appeals denied her appeal. *Id.* After finding that merely serving as a juror did not forfeit a person's right to informational privacy as articulated in *Whalen*, *id.* at 357-59, the federal magistrate judge found that the trial judge's failure to determine the relevance of the disputed questions, coupled with the court's failure to balance the various interests involved, was sufficient justification to entitle Brandborg to refuse to answer the questions. *Id.* at 361. Accordingly, the magistrate judge set aside Brandborg's conviction on the grounds that it violated her right to privacy. *Id.*

219. *Id.* at 353-55. The questions Brandborg refused to answer sought information regarding her previous year's combined family income, religious preference, political party affiliation, political leaning, television watching habits, magazines and newspapers subscribed to or regularly read, type of vehicle, club and association membership, volunteer work, routine reading material, whether under a physician's care or taking medication, and NRA or gun club membership. *Id.* at 354.

220. *Id.* at 353.

221. See *id.* at 359 (noting that Brandborg was claiming interest in avoiding disclosure of personal matters and citing *Whalen*).

222. See *id.* at 355-61 (finding jury duty did not remove expectation of privacy and conducting balancing test of competing interests).

taking action that opens matters to public scrutiny,²²³ fulfilling one's duty as a juror is not a voluntary waiver of one's expectation of privacy.²²⁴ Citing the trial court's duty to control the voir dire process in order to protect the various interests involved,²²⁵ the court proposed a two-step approach for deciding whether a juror can refuse to answer a voir dire question because of a privacy interest in the information sought.²²⁶ First, prior to voir dire, the court should examine the relevancy of the voir dire questions because prospective jurors should have to answer only relevant questions.²²⁷ Courts should make prospective jurors aware of their right to informational privacy, either in the jury questionnaire or at voir dire.²²⁸ Second, if the juror raises a claim of privacy in response to a relevant question, the court must consider four competing interests: (1) the juror's right to informational privacy, (2) the defendant's right to a fair trial by an impartial jury, (3) the prosecution's right to an impartial jury, and (4) the public's right of access to jury information.²²⁹ If the court concludes that the balance of interests requires the juror to disclose the information, the court should conduct an in camera hearing to determine the least intrusive means for obtaining the information.²³⁰

*b. Applying the Nixon Balancing Test to Jurors'
Criminal History Records*

*(1) Jurors Do Not Have a Legitimate Expectation of
Privacy in Criminal History Records*

An analysis of whether a juror's right to informational privacy attaches to the juror's criminal history records begins by determining whether the juror

223. *Id.* at 357 (quoting *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 459 (1977)).

224. *Id.* Although jury service is a part of a presumptively open process, *see Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505-10 (1984) (describing public nature of jury trials and jury selection throughout history), jury duty does not act as a per se waiver of one's expectation of privacy because one does not willingly serve as a juror: "[P]rospective jurors do not seek out the public forum; they are summoned; often unwillingly, to fulfill a public duty in the justice system' . . . [and] the potential juror must attend the proceedings or face the possibility of criminal or civil sanctions." *Brandborg v. Lucas*, 891 F. Supp. 352, 357 (E.D. Tex. 1995) (quoting *Glover*, *supra* note 18, at 712) (alteration in original).

225. *Id.* at 359-60 (citing *Press-Enterprise*, 464 U.S. at 512).

226. *Id.* at 360.

227. *See id.* (outlining first of two-step process and citing *United States v. Robinson*, 475 F.2d 376, 381 (D.C. Cir. 1973)).

228. *Id.*

229. *See id.* at 361 (referring to opinion's earlier discussion of juror, defendant, prosecution, and public's interests).

230. *See id.* (recommending use of in camera hearing to allow parties to obtain needed information from juror without unnecessary disclosure of juror's private matters). In camera is defined as "in chambers; in private." BLACK'S LAW DICTIONARY 760 (6th ed. 1990).

has a legitimate expectation of privacy in that information.²³¹ Although Chief Judge Chamblin alluded to this expectation of privacy,²³² he failed to examine the issue adequately. The Commonwealth, however, argued that the information contained in a person's criminal record is not private at all.²³³

In Virginia, a person's criminal history record contains identifying information along with notations and descriptions of arrests, the filing of formal charges, the dispositions of those charges, and any detentions.²³⁴ This information is already available through various public documents.²³⁵ The Supreme Court has stated that when information is available from public records, any privacy interest that a person may claim in that information "fades."²³⁶

Additionally, a person's criminal history is theoretically available through jury questionnaires or voir dire questioning.²³⁷ A juror must divulge the information that a criminal history record contains upon inquiry by the prosecutor because voir dire questions seeking this information are relevant to determining the juror's qualification and biases.²³⁸ If the juror must disclose the information in this manner, the juror cannot reasonably claim a violation of privacy when the prosecutor acquires that information by accessing the juror's criminal history records.

Not only is the information that a person's criminal records contains public in nature, but that information can be far less personal than some information that jury questionnaires or voir dire forces jurors to divulge. Voir dire questions often inquire about matters that are quite personal in nature.²³⁹

231. See *supra* notes 206-07 and accompanying text (discussing legitimate expectation of privacy inquiry as that which determines whether *Whalen's* right to informational privacy attaches under *Nixon* test).

232. See Order, *supra* note 17, at 4 (stating prosecutor's use of juror's criminal and driving histories violates juror's "reasonable expectation that this information would not be shared with the person over whom the juror sits in judgment").

233. See Commonwealth's Motion to Reconsider, *supra* note 40, at 5 (arguing that information which prosecutors gain through criminal history checks is already matter of public record); Petition for Appeal, *supra* note 37, at 27-31 (same).

234. See VA. CODE ANN. § 9-169(4) (Michie 1950) (defining criminal history record information).

235. See Commonwealth's Motion to Reconsider, *supra* note 40, at 5 (arguing that information available from criminal history check through VCIN is already matter of public record); Petition for Appeal, *supra* note 37, at 28 (same).

236. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975).

237. See *State v. Bessenecker*, 404 N.W.2d 134, 137 (Iowa 1987) (en banc) (noting that criminal history data is available to parties through jury questionnaire and voir dire questioning).

238. See *Brandborg v. Lucas*, 891 F. Supp. 352, 358 (E.D. Tex. 1995) (summarizing case law on limiting voir dire questions as allowing specific question if it is "relevant to determining the bias or prejudice of a prospective juror"); *supra* Parts III.A-B (discussing utility of criminal history data in discovering biased and disqualified jurors).

239. See Commonwealth's Motion to Reconsider, *supra* note 40, at 6 (listing juror's family

Perhaps nothing illustrates this point more clearly than the jury questionnaire used in the most-watched trial of the 20th century – the murder trial of O.J. Simpson. The jury questionnaire in the *Simpson* trial posed 302 questions to the prospective jurors covering a wide variety of topics.²⁴⁰ The jurors had to provide detailed information regarding organizational memberships and affiliations;²⁴¹ reading habits, television viewing habits, and other leisure interests;²⁴² charitable donations and volunteer work;²⁴³ religious beliefs and practices;²⁴⁴ political views and affiliations;²⁴⁵ spouses's place of birth, ethnicity, employment, and education;²⁴⁶ experiences with domestic violence,²⁴⁷ and employment history for the past ten years.²⁴⁸ Two of the more intrusive questions regarding racial issues asked jurors about the racial and ethnic make-up of the neighborhood where they grew up²⁴⁹ and whether they ever had dated a person of another race.²⁵⁰ Jurors had to reveal whether they ever had consulted an expert other than a medical doctor²⁵¹ or ever had given blood or urine samples for testing.²⁵² Jurors also had to disclose if they currently were taking medication, as well as what the medication was, the reasons for taking it, and how often they took it.²⁵³ Jurors even had to answer whether they owned a knife designed for a purpose other than cooking.²⁵⁴

history of drug and alcohol abuse and juror's personal beliefs among possible subjects of inquiry during voir dire).

240. See Juror Questionnaire, *People v. Simpson*, No. BA097211, 1994 WL 564388, at *1 (Cal. Super. Ct. Oct. 3, 1994) (dividing questionnaire into 28 topics). Please note that the last question on the questionnaire is numbered 294, but an error occurs in the numbering after question 254. *Id.* at *22. The questionnaire actually contains 302 numbered questions, many with multiple subparts. In this Note, references to individual question numbers will reflect what the question should be numbered in order to avoid confusion that may arise from two different questions sharing the same number.

241. *Id.* at *15 questions 160-61; *17 questions 189-90; *20 questions 221, 223; *22 question 264; *23 question 267.

242. *Id.* at *20-*22 questions 244-62; *23 questions 268-69, 277-80.

243. *Id.* at *16 question 174; *23 questions 265-66.

244. *Id.* at *18 question 201.

245. *Id.* at *18-*19 questions 202-205.

246. *Id.* at *5 questions 49-55.

247. *Id.* at *15-*16 questions 162-67.

248. *Id.* at *3 question 25.

249. *Id.* at *17 question 191.

250. *Id.* question 186.

251. *Id.* at *19 question 206.

252. *Id.* questions 210-211.

253. *Id.* at *2 question 8.

254. *Id.* at *24 question 289.

These questions were far more intrusive than the eleven questions that Dianna Brandborg objected to in *Brandborg*,²⁵⁵ and yet the *Simpson* jurors had to answer them truthfully under penalty of perjury.²⁵⁶ The intrusive nature of these questions becomes even more apparent when considered in the context of the *Simpson* trial, which became a fixture in the national media from the day of the murders until after the jury reached its verdict. If jurors can be required to reveal the type of information sought in the *Simpson* questionnaire, they hardly can argue that criminal history data is too private to be disclosed.

Additionally, at least one court has decided that no legitimate expectation of privacy exists in criminal history records.²⁵⁷ In *Eagle v. Morgan*,²⁵⁸ the United States Court of Appeals for the Eighth Circuit ruled that the unwanted disclosure of a person's criminal record did not violate any constitutionally protected right to informational privacy.²⁵⁹ The court observed that the development of *Whalen's* right to informational privacy has led courts to limit its application to "extremely personal" information.²⁶⁰ At the same time, courts have refused to recognize a privacy interest in matters such as criminal activity, arrests, and false rumors that a person has committed a crime.²⁶¹ Criminal

255. Compare *supra* text accompanying notes 241-54 (listing particularly intrusive questions in jury questionnaire used in *Simpson* murder trial), with *Brandborg v. Lucas*, 891 F. Supp. 352, 354 (E.D. Tex. 1995) (listing questions Ms. Brandborg objected to answering).

256. See Juror Questionnaire, *supra* note 240, at *25 (requiring juror to sign name attesting to truth of answers under penalty of perjury).

257. See *infra* note 262 and accompanying text (discussing view of United States Court of Appeals for the Eighth Circuit that no legitimate expectation of privacy exists in criminal history records).

258. 88 F.3d 620 (8th Cir. 1996).

259. See *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996) (deciding person's prior guilty plea is, by its very nature, within public domain, thereby negating any claim to legitimate expectation of privacy). In *Eagle*, a group of police officers accessed federal and state criminal records databases in order to discover whether *Eagle* had a prior felony conviction. *Id.* at 622. Upon finding a guilty plea to theft of property, one of the officers revealed the conviction at a city council meeting in order to discredit the results of *Eagle's* survey comparing local police salary with other jurisdictions. *Id.* at 623. *Eagle* claimed that the search of the criminal records databases was illegal and the unwanted disclosure of his criminal record violated his constitutional right to privacy. *Id.* The Court decided that the events recorded on one's criminal record are by their very nature within the public domain. *Id.* at 625. Therefore, the Court refused to recognize any legitimate expectation of privacy in one's criminal record. *Id.*

260. See *id.* (listing types of information to which courts have applied right of privacy as follows: information about spouse gained through marriage, *Sheets v. Salt Lake County*, 45 F.3d 1383, 1388 (10th Cir. 1995); financial information, *Fraternal Order of Police, Lodge 5 v. City of Philadelphia*, 812 F.2d 105, 115 (3d Cir. 1987); medical records, *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980); and person's naked body, *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963)).

261. See *id.* (listing types of information to which courts have refused to apply right of privacy as follows: criminal activity, *Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir. 1995);

history data resembles those types of information that courts have not protected more closely than the extremely personal information that the courts have protected. Accordingly, the court decided that no legitimate expectation of privacy exists in the information contained in criminal history records.²⁶²

The court's conclusion in *Eagle* appears to contradict the Supreme Court's statement in *United States Department of Justice v. Reporters Committee for Freedom of the Press*²⁶³ that a substantial privacy interest exists in criminal history records.²⁶⁴ However, *Reporters Committee* is distinguishable from *Eagle*. The Supreme Court's discussion of criminal history records in *Reporters Committee* occurred in the context of a statutory right to privacy protected by Congress in the Freedom of Information Act.²⁶⁵ In contrast, the right to privacy that the court considered in *Eagle* is constitutional in nature.²⁶⁶ As the Supreme Court has stated, analysis of a statutorily protected right to privacy is distinct from an analysis of a constitutionally protected right to

arrests, *Holman v. Central Arkansas Broad. Co.*, 610 F.2d 542, 544 (8th Cir. 1979); false rumors of criminal activity, *Baker v. Howard*, 419 F.2d 376, 377 (9th Cir. 1969)).

262. *Id.* at 628.

263. 489 U.S. 749 (1989).

264. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) (stating that "privacy interest in a rap sheet is substantial"). In *Reporters Committee*, the Court had to decide whether the disclosure of a person's criminal history records was an "unwarranted invasion of personal privacy" within the meaning of the Freedom of Information Act (FOIA). *Id.* at 751. Several reporters made FOIA requests to the Department of Justice (DOJ) for the production of the criminal history records of four people. *Id.* at 757. The Court determined that a substantial privacy interest exists in the criminal history records that the federal government compiles and collects based on the following factors: (1) the common-law and dictionary understandings of privacy, (2) the basic difference between a federally compiled collection of criminal history data and the same information scattered among various public documents stored in different locales, (3) federal statutory provisions severely limiting access to criminal history records, (4) similar state policies, (5) prior cases recognizing privacy interest in nondisclosure of information that was public at one time, and (6) prior cases recognizing privacy interest in keeping private information away from public view. *Id.* at 767, 769. The Court then examined the central purpose of the FOIA, characterizing it as protecting the people's right to know "what their government is up to" by exposing government action and policies to public scrutiny. *Id.* at 772-74. Distinguishing a private citizen's rap sheet from a record of governmental actions, the Court held that a third party's FOIA request for the criminal records of a private citizen can reasonably be expected, as a categorical matter, to invade that citizen's privacy. *Id.* at 780. The Court also held that the invasion of privacy is unwarranted when the FOIA request is merely for records the government happens to be storing, as opposed to documents about official action. *Id.*

265. *See id.* at 751 (stating question before Court as whether disclosure of rap sheets to third party could reasonably be considered unwarranted invasion of privacy within meaning of FOIA).

266. *See Eagle v Moran*, 88 F.3d 620, 623 (8th Cir. 1996) (noting *Eagle's* claim that unjustified search and unwanted public disclosure of his criminal record violated his constitutional right to privacy).

privacy.²⁶⁷ Thus, the conclusion of the court in *Eagle* that no legitimate expectation of privacy exists in criminal history records²⁶⁸ is valid notwithstanding the Supreme Court's statement in *Reporters Committee*.

The Supreme Court's view in *Reporters Committee* is also distinguishable from the facts surrounding Chief Judge Chamblin's order. First, Chief Judge Chamblin's order concerned itself with a juror's constitutional right to privacy, unlike *Reporters Committee*.²⁶⁹ Second, the issue confronting the Supreme Court in *Reporters Committee* was the availability of a person's criminal history records to the public at large.²⁷⁰ The use of jurors' criminal history records by prosecutors in voir dire, on the other hand, does not implicate this concern. Chief Judge Chamblin did not issue his order to prevent the dissemination of jurors' criminal history records to the public at large.²⁷¹ Rather, Chief Judge Chamblin sought to prevent prosecutors from using the records for the discreet purpose of conducting voir dire.²⁷² Therefore, an application of the Supreme Court's reasoning in *Reporters Committee* to the narrow use of criminal history records by prosecutors is inappropriate.²⁷³

Any one of the reasons discussed above should be sufficient to find no legitimate expectation of privacy in criminal history records. Together, these

267. See *Reporters Committee*, 489 U.S. at 762 n.13 (noting that question of statutory meaning of privacy under FOIA is "not the same" as determining whether Constitution protects specific privacy interest).

268. See *supra* note 262 and accompanying text (discussing conclusion of court in *Eagle* that no legitimate expectation of privacy exists in criminal history records).

269. See *supra* note 199 (discussing why this Note assumes right to privacy that Chief Judge Chamblin relied on is constitutional in nature); *supra* note 267 and accompanying text (discussing Supreme Court's recognition of distinction between statutorily protected right to privacy and constitutionally protected right to privacy).

270. See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754-55 (1989) (noting § 552(a)(3) of FOIA makes documents requested under FOIA available to "any person").

271. See *Order*, *supra* note 17, at 3, 4 (discussing concern that prosecutor's use of juror's criminal history records in voir dire violates juror's expectation of privacy that parties over whom juror sits in judgment will not have access to juror's criminal history information).

272. See *id.* (discussing problems surrounding prosecutors' use of jurors' criminal history records in voir dire).

273. The fact that prosecutors are members of law enforcement agencies is also noteworthy. See *supra* notes 155-57, 161-63, 167-69, 187-91 and accompanying text (discussing whether Iowa, Alaska, Missouri, and Virginia laws, respectively, consider prosecutors to be members of law enforcement agencies). The Supreme Court in *Reporters Committee* cited federal and state policies regulating access to criminal history records as basis for recognizing privacy interest in these records. *Reporters Committee*, 489 U.S. at 764-67. Both the federal and the state policies allow law enforcement agencies to access criminal history records. See *id.* at 765 (noting FBI's policy allowing dissemination of rap sheets to law enforcement agencies); see, e.g., *supra* notes 155-57, 161-63, 167-69, 187-91 and accompanying text (discussing provisions of Iowa, Alaska, Missouri, and Virginia law allowing law enforcement agencies access to criminal history records).

reasons confirm the soundness of the *Eagle* decision that a legitimate expectation of privacy does not extend to criminal records. The information is public in fact and in nature,²⁷⁴ it must be divulged by the juror during voir dire,²⁷⁵ and it is far less personal than other information that jurors may have to reveal during voir dire.²⁷⁶ By comparison, the information that criminal history records contain is far less private than that contained in income tax returns, information courts have upheld as a valid tool for federal prosecutors to use in exercising peremptory challenges of jurors.²⁷⁷ Thus, a juror cannot claim a legitimate expectation of privacy in criminal history records. Chief Judge Chamblin was remiss in recognizing this claim as a basis for his order.

(2) *The State's Interests and the Public's Interests Outweigh Any Possible Privacy Interest in Jurors' Criminal History Records*

Once a court has found a legitimate expectation of privacy, *Nixon* requires a balancing test weighing the scope and nature of the intrusion against the public's interest in disclosure.²⁷⁸ Thus, even if Chief Judge Chamblin correctly assumed the existence of a legitimate expectation of privacy in a juror's criminal history records, that privacy interest would not be sufficient to warrant a prohibition on the prosecutorial use of those records in voir dire. As was the case in *Brandborg*, the uniqueness of jury service in a criminal trial requires a modification of the *Nixon* balancing test, taking into account any additional interests that prohibiting prosecutors from using jurors' criminal history data in voir dire may implicate.

As discussed above, the State has an interest in accessing a juror's criminal history records for use in voir dire in order to protect its right to a qualified and impartial jury.²⁷⁹ Prohibiting the State from using the valuable tool of criminal history records during voir dire clearly inhibits this

274. See *supra* notes 234-38 and accompanying text (discussing public nature of criminal history information).

275. See *supra* notes 236-37 and accompanying text (discussing how jurors must divulge criminal history information during voir dire process).

276. See *supra* notes 240-56 and accompanying text (discussing jury questionnaire from *Simpson* case).

277. See *United States v. Costello*, 255 F.2d 876, 883 (2d Cir. 1958) (upholding prosecutor's use of information taken from jurors' federal income tax returns as aid in exercising peremptory challenges). The information taken from the jurors' tax returns included the taxpayer's occupation, amount of and source of income, number of dependants, amount of taxes paid or refund received, and any unusual deductions. *Id.* at 882.

278. See *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 458 (1977) (describing balancing test courts should employ once party shows legitimate expectation of privacy); *supra* notes 204-11 and accompanying text (same).

279. See *supra* Parts III.A-B (discussing State's interest in discovering disqualified jurors and jurors potentially biased against State).

right.²⁸⁰ Depending on the situation, use of jurors' criminal history records may implicate the defendant's right to an impartial jury as well.²⁸¹ The Supreme Court has recognized that the public has an interest in ensuring that both the defendant and the State have the opportunity to present their respective cases before a qualified and impartial jury.²⁸² In *Press-Enterprise*, the Court stated that the value of having an open voir dire proceeding is in promoting both a fair trial and the appearance of fairness.²⁸³ Maintaining that appearance of fairness is essential to securing the public's confidence in the judicial system.²⁸⁴ The Court's concern with the appearance of fairness applies with equal force to the use of jurors' criminal history records by prosecutors. Prohibiting prosecutors from using jurors' criminal history records severely inhibits their ability to discover disqualified and potentially biased jurors.²⁸⁵ A rule that hinders either party from securing an impartial jury gives the criminal trial an appearance of unfairness and thus adversely affects the public's confidence in the criminal justice system.²⁸⁶

Any privacy interest a juror could claim in his criminal history records is simply not sufficient to outweigh the interests of the State, the defendant, and the public. The scope of the intrusion into a juror's private matters is minimal. The information that criminal history records contain is all public information available from various documents which the court clerk keeps on file.²⁸⁷ Thus, the juror has only a minimal interest in keeping this information private.²⁸⁸ The nature of the intrusion is also minimal. Prosecutors use criminal history data solely for the purpose of conducting voir dire to secure a qualified and impartial jury.²⁸⁹ Prosecutors do not disseminate a juror's

280. See *supra* Parts III.A-B (discussing value of criminal history records in discovering disqualified jurors and jurors potentially biased against State).

281. See *infra* Part V.B.1 (discussing situations when use of jurors' criminal records supports defendant's right to impartial jury).

282. See *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 508 (1984) (noting public's interest in ensuring that both parties receive trial by fair and impartial jury).

283. See *id.* (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569-71 (1980)).

284. *Id.*

285. See *supra* Parts III.A-B (discussing utility of jurors' criminal history records in helping prosecutors secure impartial and qualified jury).

286. Cf. Commonwealth's Motion to Reconsider, *supra* note 40, at 14 (arguing that Chief Judge Chamblin's order "risks jeopardizing public confidence in jury verdicts because the public will question whether a jury acquitted a defendant because it was biased against the Commonwealth and not because it engaged in an impartial consideration of the law and the evidence").

287. See *supra* Part V.A.2.b.1 (discussing public nature of information that criminal history records contain).

288. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-95 (1976) (stating that "interests in privacy fade when the information involved already appears on the public record").

289. See Commonwealth's Motion to Reconsider, *supra* note 40, at 2 (arguing that Com-

criminal history to the public at large, as the police officer did in *Eagle*.²⁹⁰ In light of the minimal scope and nature of any claimed intrusion, the interests of the State and some defendants in a qualified and impartial jury and the public's interest in maintaining an appearance of fairness outweigh the questionable claim of privacy in criminal history records. Therefore, Chief Judge Chamblin improperly relied on protecting juror privacy as a reason for prohibiting the use of jurors' criminal history records in voir dire.

B. Protecting the Defendant from Unfairness

In addition to protecting juror privacy, Chief Judge Chamblin based his order on a desire to protect the defendant from unfairness.²⁹¹ According to Chief Judge Chamblin, the Commonwealth's attorney gains an unfair advantage over the defendant in voir dire by having access to the information contained in jurors' criminal history records.²⁹² Because of his concerns for protecting juror privacy, Chief Judge Chamblin would not remedy this unfairness by making the jurors' criminal history records available to the defendant.²⁹³ Having rejected juror privacy as a legitimate reason for prohibiting the Commonwealth's attorney from using these criminal history records in voir dire,²⁹⁴ the relevant question becomes whether such use of jurors' criminal history records is unfair to the defendant, and if so, whether a less-restrictive remedy exists that would protect the government's right to an impartial jury.²⁹⁵

1. Allowing the Prosecutor to Use Jurors' Criminal History Records in Voir Dire May Be Unfair to the Defendant

According to Chief Judge Chamblin, a criminal defendant's right to a fair trial includes the right to have access to information in possession of the

monwealth's Attorney has statutory authority to use criminal history data in voir dire to discover possible biases of jurors and to prevent disqualified people from serving as jurors); Petition for Appeal, *supra* note 37, at 19 (arguing that use of criminal history data facilitates detection of biased or disqualified jurors).

290. See *Eagle v. Morgan*, 88 F.3d 620, 623 (8th Cir. 1996) (reporting that defendants publicly read contents of plaintiff's criminal history at city council meeting); *supra* note 259 (discussing *Eagle*).

291. See Order, *supra* note 17, at 4-5 (discussing unfairness that defendant suffers due to unequal access to juror information).

292. *Id.* at 5.

293. See *id.* at 4 (stating that giving defendant access to jurors' criminal history information cannot solve problem of unequal access because doing so violates jurors' reasonable expectation of privacy).

294. See *supra* Part V.A (discussing development of right to informational privacy and its misapplication in context of Chief Judge Chamblin's order).

295. See *supra* notes 63-68 and accompanying text (discussing government's right to impartial jury).

prosecutor that the defendant cannot otherwise obtain by law.²⁹⁶ Due process does not require absolute equality.²⁹⁷ Yet, a handful of jurisdictions have ruled that fairness requires prosecutors to provide the defendant with the criminal history records of jurors gathered for voir dire.²⁹⁸ Some courts have based their decisions, in part, on the need to place the defendant on "equal footing" with the government.²⁹⁹ However, a handful of courts have rejected claims that the principles of fairness and equality require disclosure of jurors' criminal records to defendants.³⁰⁰ In fact, the majority of jurisdictions that have considered the

296. Order, *supra* note 17, at 5.

297. See *Hamer v. United States*, 259 F.2d 274, 281 (9th Cir. 1958) (describing logical extension of defendant's claim that lack of "perfect equality" denied him fair trial as "ridiculous" and not worthy of serious consideration); also *Petition for Appeal, supra* note 37, at 32-33 (arguing due process does not require "an even playing field").

298. See *Tagala v. State*, 812 P.2d 604, 612-13 (Alaska Ct. App. 1991) (citing "sense of fundamental fairness" as reason for broadly interpreting discovery rules to require prosecutors to disclose to defendant criminal records of jurors that prosecutor intends to use in voir dire); *People v. Murtishaw*, 631 P.2d 446, 465 (Cal. 1981) (en banc) (granting trial court discretionary authority to require disclosure to defendant of prosecutor's information about jurors because inequality reflects on fairness of trial); *Losavio v. Mayber*, 496 P.2d 1032, 1035 (Colo. 1972) (en banc) (finding "fundamental fairness and justice" require equal treatment of both defendant and prosecution with regard to access to jurors' criminal histories); *State v. Bessenecker*, 404 N.W.2d 134, 138-39 (Iowa 1987) (en banc) (agreeing with other jurisdictions that fairness requires jurors' criminal records made available to prosecutor also must be made available to defendant, unless good cause can be shown otherwise); *Commonwealth v. Smith*, 215 N.E.2d 897, 901 (Mass. 1966) (finding public's interest in assuring fair trial for defendant sufficient grounds for requiring disclosure to defendant of information about prospective jurors gathered by police officers and given to district attorney, even though defendant did not claim that trial court's denial of disclosure deprived him of fair trial); *People v. Aldridge*, 209 N.W.2d 796, 801 (Mich. Ct. App. 1973) (concluding that "fundamental fairness" requires prosecutor to disclose to defendant investigatory reports of prospective jurors); cf. *United States v. Hamer*, 259 F.2d 274, 281 (9th Cir. 1958) (rejecting per se rule requiring disclosure to defendant of prosecution's "jury book" containing information as to jurors' voting records in previous jury service, but giving trial judge responsibility of ensuring that neither prosecution nor defendant has "unfair advantage" as result of use of jury information).

299. See *Tagala v. State*, 812 P.2d 604, 612 (Alaska Ct. App. 1991) (stating that fundamental fairness required placing defendant "upon an equal footing" with prosecution by requiring disclosure of jurors' criminal records in prosecutor's possession); *People v. Murtishaw*, 631 P.2d 446, 465 (Cal. 1981) (en banc) (stating that "inequality reflects on the fairness of the criminal process"); *Losavio v. Mayber*, 496 P.2d 1032, 1034-35 (Colo. 1972) (en banc) (stating that district attorney and public defender have same ethical and legal responsibilities to public, and thus must be "treated as equals" with respect to access to jurors' criminal histories); *People v. Aldridge*, 209 N.W.2d 796, 801 (Mich. Ct. App. 1973) (stating that fundamental fairness requires placing defendant "on equal footing" with prosecution by requiring disclosure of prosecutor's investigatory report of jurors).

300. See *McBride v. State*, 477 A.2d 174, 188 (Del. 1984) (rejecting defendant's claim that trial court's refusal to compel disclosure of jurors' criminal records gave prosecution unfair advantage in voir dire, thus violating defendant's due process and equal protection rights under 14th Amendment); *State v. Kandies*, 467 S.E.2d 67, 77 (N.C. 1996) (rejecting defen-

matter have rejected the idea of requiring disclosure of jurors' criminal records to defendants without examining notions of fairness or equality.³⁰¹ Even so, the concern for fairness to the defendant merits a closer analysis.

The Supreme Court has stated that due process requires fundamental fairness.³⁰² The Court also has recognized the uncertainty in discovering the requirements of fundamental fairness in a given situation.³⁰³ However, the Court has provided the following simple framework to guide the inquiry: (1) consider relevant precedents, then (2) assess the interests that are at stake.³⁰⁴ Although it is true that some jurisdictions have determined that

defendant's claim that trial court's refusal to require disclosure of jurors' criminal records to defendant violated defendant's right to due process and right to fair and impartial jury); *cf.* *State v. Hernandez*, 393 N.W.2d 28, 29-30 (Minn. Ct. App. 1986) (rejecting defendant's claim that fundamental fairness requires disclosure of jurors' criminal records to defendant, but noting that prosecutor has ethical obligation to disclose knowledge that juror has not been truthful about criminal record).

301. *See* *Best v. United States*, 184 F.2d 131, 141 (1st Cir. 1950) (rejecting defendant's claim that he should have had access to prosecutor's report of F.B.I. investigation of jurors); *Christoffel v. United States*, 171 F.2d 1004, 1006 (D.C. Cir. 1948) (ruling government is not required to furnish to defendant notes made from F.B.I. investigation of jurors for use in selecting jury), *rev'd on other grounds*, 338 U.S. 84, 90 (1949); *Kelley v. State*, 602 So. 2d 473, 477-78 (Ala. Crim. App. 1992) (ruling defendant not entitled to disclosure of jurors' criminal records because information does not fall within scope of *Brady* material and background information is available to defendant through voir dire questioning); *State v. Monathan*, 294 So. 2d 401, 402 (Fla. Dist. Ct. App. 1974) (upholding trial court's decision to deny defendant's motion for discovery of jurors' criminal records); *Thompson v. State*, 411 S.E.2d 886, 888-89 (Ga. Ct. App. 1991) (ruling prosecutor is under no obligation to disclose criminal histories of jurors to defendant because information is not exculpatory and there is no right to discovery in criminal cases); *State v. Jackson*, 450 So. 2d 621, 628 (La. 1984) (ruling defendant was not entitled to disclosure of jurors' criminal records because information was not pertinent to purpose of defendant's voir dire, which is to remove jurors who "will not approach the verdict in a detached and objective manner"); *People v. McIntosh*, 252 N.W.2d 779, 782 (Mich. 1977) (stating defendant has no constitutional or statutory right to inspect prosecutor's "jury dossier" compiled from public records); *State v. White*, 909 S.W.2d 391, 394 (Mo. Ct. App. 1995) (deciding that, in absence of statutory mandate for disclosure, prosecutor is not obligated to disclose jurors' arrest records to defendant); *Commonwealth v. Foster*, 280 A.2d 602, 605 (Pa. Super. Ct. 1971) (stating report of investigation of jurors paid for by district attorney's office and used in voir dire is not subject to discovery in criminal case); *Linebarger v. State*, 469 S.W.2d 165, 167 (Tex. Crim. App. 1971) (ruling State has no obligation to furnish defendant with information regarding jurors' criminal record). *But see* UNIF. R. CRIM. P. § 421(a), 10 U.L.A. 50 (Supp. 1987) (requiring prosecutors to disclose "reports on prospective jurors" upon defendant's written request).

302. *See* *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 24-25 (1981) ("Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation . . .").

303. *See id.* (describing inquiry into requirements of fundamental fairness as "uncertain enterprise").

304. *See id.* at 25 (describing process of discovering what fundamental fairness requires in given set of circumstances).

allowing prosecutors to use jurors' criminal history records in voir dire without making the same information available to the defendant is unfair,³⁰⁵ the majority of jurisdictions have reached the opposite conclusion.³⁰⁶ Thus, the weight of precedent supports a conclusion that the defendant does not suffer unfairness by the prosecutor's use of jurors' criminal records.

The next step requires a consideration of the various interests at stake in the use of jurors' criminal records in voir dire.³⁰⁷ For prosecutors, jurors' criminal records are a valuable tool in uncovering jurors who may harbor prejudices against the government as a result of prior experiences with the criminal justice system.³⁰⁸ As one state supreme court has noted, defendants do not have the same interest in using jurors' criminal records during voir dire.³⁰⁹ Although a juror's prior arrest or conviction may cause the juror to be biased against the State,³¹⁰ the defendant may actually benefit from the negative view the juror has of the police, prosecutors, or the government.³¹¹ Because prosecutors do have a valid interest in discovering the criminal history of jurors, while defendants generally do not,³¹² defendants generally do not suffer unfairness when courts allow prosecutors to use jurors' criminal history records in voir dire.³¹³

However, certain cases exist in which the defendant's interest in having access to jurors' criminal records will mirror that of the prosecutor's – removing jurors who may harbor potential biases. For instance, the potential for

305. See *supra* notes 298-99 (listing cases requiring prosecutor to disclose jurors' criminal records to defendant on grounds of fairness).

306. See *supra* notes 300-01 (listing cases refusing to require disclosure of jurors' criminal records).

307. See *supra* note 304 and accompanying text (describing two-step process of determining requirements of fundamental fairness).

308. See *supra* Part III.A (discussing prosecutor's interest in securing impartial jurors by using criminal history data); see also *State v. Jackson*, 450 So. 2d 621, 628 (La. 1984) (recognizing valid use of jurors' criminal records by prosecutor as tool to challenge jurors with biases against State).

309. See *Jackson*, 450 So. 2d at 628 (stating that jurors' criminal records are not pertinent to defendant's purpose in voir dire, which is to challenge those jurors who will not be objective in rendering verdict, not to pick jurors who are favorable to defendant).

310. See *supra* Part III.A (discussing how prior criminal history increases potential for bias against State by juror).

311. See *Jackson*, 450 So. 2d at 628 (discussing defendant's desire to use jurors' criminal history records as aid in selecting jurors who were familiar with "police coercive tactics").

312. See *id.* (distinguishing prosecutor's valid purpose in using jurors' criminal history records – to remove biased or disqualified jurors – from defendant's invalid purpose for using these records – to select jurors favorable to defendant); see also *State v. Bessenecker*, 404 N.W.2d 134, 138 (Iowa 1987) (en banc) (noting that defendant may not have same motive as prosecutor in using jurors' criminal history records in voir dire).

313. See *supra* notes 300-01 (listing cases that have rejected claim that defendant suffers unfairness by prosecutor's use of jurors' criminal history records in voir dire).

prejudice is obvious when a white juror convicted of a hate crime sits on the jury for a black defendant.³¹⁴ Another clear example of likely prejudice involves a male juror convicted of domestic violence sitting on the jury of a female defendant accused of murdering her abusive husband. In circumstances like these, the defendant's purpose in having access to jurors' criminal history records will be the same as that of a prosecutor – to remove jurors with a potential for bias.³¹⁵ Thus, the defendant will have a valid interest in using jurors' criminal history records equal to that of the prosecutor.³¹⁶ In these special circumstances, it would be unfair to allow only the prosecutor to use jurors' criminal history records as a tool in securing an impartial jury.

2. *The Proper Remedy for Unfairness*

Many courts either have required disclosure of jurors' criminal records to the defendant in all cases or have given trial courts the discretion to determine whether disclosure should be required.³¹⁷ Requiring disclosure in all cases gives jurors' criminal records to defendants who do not have a valid interest in those records.³¹⁸ Instituting a general ban on the use of jurors' criminal history records, as Chief Judge Chamblin did,³¹⁹ creates problems as well. Prohibiting any use of jurors' criminal history records in voir dire undermines both the government and some defendants' right to an impartial jury.³²⁰

This Note proposes a solution that will remedy the unfairness that some defendants suffer without interfering with the government's right to an impartial and qualified jury.³²¹ Recognizing that most defendants do not share the

314. See Commonwealth's Motion to Reconsider, *supra* note 40, at 2 n.2 (stating that "injustice would be manifest" if white juror convicted of hate crime sat on jury of black defendant).

315. See *supra* Part III.A (discussing purpose of removing potentially biased jurors as prosecutor's reason for using jurors' criminal history records).

316. See *State v. Jackson*, 450 So. 2d 621, 628 (La. 1984) (noting validity of interest in jurors' criminal history records to remove biased jurors).

317. See *supra* notes 298-99 (listing cases requiring disclosure to defendant, in one form or other, of jurors' criminal records).

318. See *supra* notes 309-13 and accompanying text (discussing why most defendants do not have valid interest in use of jurors' criminal history records).

319. See *supra* notes 45-47 and accompanying text (discussing Chief Judge Chamblin's order prohibiting use of jury lists to conduct criminal background checks on potential jurors).

320. See *supra* Part III.A (discussing adverse effect of prohibiting use of jurors' criminal histories on government's right to impartial jury); *supra* notes 314-16 and accompanying text (discussing when use of jurors' criminal history records relates to protecting defendant's right to impartial jury).

321. See *supra* Part V.B.1 (discussing why only some defendants suffer unfairness from prosecutor's exclusive use of jurors' criminal history records in voir dire); *supra* Part III (discussing government's right to impartial and qualified jury as implicated by use of jurors' criminal history records in voir dire).

same valid interests as prosecutors in using jurors' criminal records,³²² courts should require disclosure of these records to the defendant only upon a showing that, as a result of special circumstances, the defendant has a valid interest in jurors' criminal history records.³²³ Because defendants generally do not have a valid interest in this information,³²⁴ the defendant should bear the burden of showing why fairness requires disclosure in the defendant's situation.³²⁵ In order to make this showing, the defendant must do two things. First, the defendant must specifically describe for the court the types of criminal history incidents which concern him. For example, a woman defendant accused of murdering her abusive husband would have an interest in any arrests or convictions members of the jury may have had for any kind of domestic violence. Second, the defendant then must make clear to the court how these types of criminal history incidents could result in a juror being prejudiced against the defendant. Unlike the court's rule in *Bessenecker*,³²⁶ the defendant need not show the unlikely availability of this information by other means. If the defendant is successful in making this showing, the court then will order disclosure to the defendant of only that criminal history information about which the defendant has demonstrated a need. This proposal best ensures fairness by providing access to jurors' criminal records to all parties that have a valid interest in using those records without needlessly giving information about jurors to those defendants who do not have the same valid interest in the information.

VI. Conclusion

Although the text of the Sixth Amendment's right to an impartial jury applies only to the accused, the government also enjoys that same right.³²⁷ The voir dire process plays a critical role in securing an impartial jury for both the defendant and the government.³²⁸ Experiences such as an arrest or a crim-

322. See *supra* notes 308-11 and accompanying text (discussing differences between interests of prosecutors in using jurors' criminal history records and interests of most defendants).

323. See *supra* notes 314-16 and accompanying text (discussing special circumstances that give defendant valid interest in using jurors' criminal history records in voir dire).

324. See *supra* notes 309-11 and accompanying text (discussing why, as general rule, defendants do not have valid interest in jurors' criminal history records).

325. But see *State v. Bessenecker*, 404 N.W.2d 134, 139 (Iowa 1987) (en banc) (requiring disclosure of jurors' criminal history records to defendant unless prosecutor can show good cause to contrary).

326. See *id.* (requiring prosecutors to show that means other than accessing criminal history records is unlikely to reveal juror's criminal history information).

327. See *supra* notes 62-67 and accompanying text (discussing how right to impartial jury applies to government as well as defendant).

328. See *supra* notes 57-58 and accompanying text (discussing importance of voir dire in protecting right to impartial jury).

inal conviction have the potential for creating in jurors a bias against the government.³²⁹ Criminal convictions also can disqualify a person from jury service.³³⁰ Because criminal history records provide a comprehensive picture of a person's exposure to the criminal justice system, these records provide prosecutors with information helpful to determining a juror's potential bias and possible disqualification.³³¹ Thus, prosecutors regard the ability to access jurors' criminal history records as an invaluable tool for ensuring an impartial and qualified jury.

Courts that confront the question of whether prosecutors can use jurors' criminal history records in voir dire should look first for guidance from the statutory scheme regulating criminal history records, following the example of the courts in *Bessenecker*, *Tagala*, and *McMahan*.³³² If the statutory scheme is similar to those discussed above in Part IV.D, courts should allow prosecutors to continue using jurors' criminal history records in voir dire, notwithstanding a concern for the privacy rights of jurors. Jurors' right to informational privacy does not attach to criminal history records because they do not have a legitimate expectation of privacy in these records.³³³ Even if the right to informational privacy does attach to criminal history records, the interests of the government, the defendant, and the public in using these records outweigh the privacy interest of jurors.³³⁴

Once courts decide that prosecutors can use jurors' criminal history records in voir dire, they must decide whether the defendant has a right to disclosure of these records. Defendants generally do not share the same valid interest that prosecutors have in using jurors' criminal records in voir dire.³³⁵

329. See *supra* notes 68-74 and accompanying text (examining how arrests and criminal convictions increase potential for bias in juror against government); *supra* Part I (describing hypothetical scenario of how voir dire process may fail to detect and remove jurors biased against government).

330. See *supra* note 81 (listing federal and state statutory provisions making some forms of criminal convictions disqualification from jury service).

331. See *supra* Part III (discussing utility of jurors' criminal history records in discovering potential bias and possible disqualification).

332. See *supra* Parts IV.A-C (discussing approach of courts in *Bessenecker*, *Tagala*, and *McMahan*).

333. See *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 458 (1977) (discussing legitimate expectation of privacy in information as first part of analysis to determine whether disclosure of information violates person's right to informational privacy); *supra* Part V.A.2.b.(1) (discussing why jurors do not have legitimate expectation of privacy in criminal history records).

334. See *Nixon*, 433 U.S. at 458 (requiring courts to balance scope and nature of intrusion into person's privacy against interests in disclosing disputed information); *supra* Part V.A.2.b.2 (discussing interests of government, defendant, and public in use of jurors' criminal history records in voir dire and why these interests outweigh jurors' privacy interest).

335. See *supra* Part V.B.1 (discussing what distinguishes prosecutors' interest in using

However, some defendants do have that valid interest – removing biased jurors – as a result of the special circumstances surrounding their cases.³³⁶ In these cases, allowing only the prosecutor to use jurors' criminal history records as a tool of voir dire is unfair to the defendant. To remedy unfairness, courts should require disclosure of jurors' criminal history records to the defendant only when the defendant can show that special circumstances have created a valid interest in using these records.

The approach proposed in this Note is the best solution to the problem Chief Judge Chamblin faced in Virginia. By first looking to the statutory scheme regulating criminal history records, courts will ensure that the legislature decides whether to grant or to deny prosecutors the authority to use jurors' criminal history records in voir dire. Once courts determine that the legislature has given prosecutors this authority, utilization of this approach will best protect the government's right to an impartial jury while safeguarding the defendant from any possible unfairness.

jurors' criminal history records in voir dire from interest defendants generally have in using these records).

336. See *supra* Part V.B.1 (discussing how special circumstances give defendant valid interest in using jurors' criminal history records in voir dire).

ARTICLES
