

# RECORD IMPOUNDED

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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0105-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HERMAN QUINTANA,  
a/k/a HERMAN JR.,  
HERMAN QUINTANA, JR.,  
and HERMAN HERRERA,

Defendant-Appellant.

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Argued April 18, 2023 – Decided April 26, 2023

Before Judges Sumners, Geiger and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Warren County, Indictment No. 17-02-0088.

Morgan A. Birck, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Morgan A. Birck, of counsel and on the briefs).

Kelly Shelton, Assistant Prosecutor, argued the cause for respondent (James L. Pfeiffer, Warren County

Prosecutor, attorney; Naya A. Tsang, Assistant  
Prosecutor, of counsel and on the brief).

## PER CURIAM

An indictment charged defendant Herman Quintana with three counts each of second-degree sexual assault and second-degree endangering the welfare of a child. The case proceeded to trial. The first trial ended in a mistrial. On the second day of jury selection in the retrial, counsel agreed the jury was satisfactory and to seat thirteen jurors rather than fourteen. At that point, the State had two peremptory challenges remaining. The jury was not yet sworn.

Two days later, the State requested to reopen jury selection. During a conference conducted by the court, defense counsel consented to reopening jury selection. Shortly thereafter, defense counsel emailed the trial prosecutor changing his position. Twelve days later, the State again requested to reopen jury selection, for reasons it did not disclose to defense counsel or the court. Defense counsel consented to a closed hearing without defendant or counsel being present so that the State could disclose its reason for reopening jury selection to the court.

At the closed hearing, the State reported it had learned that juror six had received an expungement. The prosecutor represented that she did not know what offense had been expunged and did not disclose how the State learned of

the expungement. The record does not disclose the race or national origin of juror six or the race or national origin of the seated jurors and the remaining venire members. The State acknowledged it was not seeking to remove juror six for cause. Instead, it sought to reopen jury selection to remove juror six by using a peremptory challenge. The court denied the State's request to reopen selection, finding nothing precluded juror six from serving and both parties had passed on using remaining peremptory challenges. The court nevertheless reopened jury selection on its own motion and in "the interest of justice" to add a fourteenth juror.<sup>1</sup> The State promptly exercised a peremptory challenge and excused juror six. A jury of fourteen was sworn in and testimony began the next day.

The jury found defendant guilty of all six counts. He was sentenced to an aggregate eight-year term, subject to the parole ineligibility imposed by the No Early Release Act, N.J.S.A. 2C:43-7.2, and parole supervision for life.

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<sup>1</sup> The trial was not particularly lengthy. Following four days of jury selection, the trial lasted an additional five days.

Defendant argues the improper reopening of jury selection and the dismissal of jury six on an impermissible basis denied him a fair trial by a jury of his peers.<sup>2</sup> We reverse and remand for a new trial.

Defendant had "the right to trial by a jury drawn from a representative cross-section of the community." State v. Gilmore, 103 N.J. 508, 524 (1986). "Bringing together a diverse group of jurors with different life experiences and insights not only preserves 'the right to trial by a jury drawn from a representative cross-section of the community' but also helps achieve impartiality." State v. Andujar, 247 N.J. 275, 296-97 (2021) (quoting Gilmore, 103 N.J. at 524-25). "That principle is meant to promote impartiality, by having jurors with 'diverse beliefs and values' interact, and to enhance public respect for the court process." Id. at 300 (quoting Gilmore, 103 N.J. at 525). The jury selection "process must also be respectful of jurors who do not expect that by appearing for jury duty, they will be subject to a criminal history check." Id. at 305. This is particularly important when a prospective juror has received an expungement, since expungement creates an expectation that records of their

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<sup>2</sup> Defendant also argues the trial court erred by admitting other bad acts evidence; failing to properly instruct the jurors on the permissible and prohibited uses of certain evidence; and failing to explain finding conflicting sentencing factors requiring resentencing. Because we need not reach these issues, we do not address them in this opinion.

arrest, criminal charges, or conviction shall be "removed from the files of the law enforcement and criminal justice agencies which, at the time of the hearing of the petition, possess the records" and transferred to a person who must "ensure that such records or information . . . are not released for any reason and are not utilized or referred to for any purpose." N.J.S.A. 2C:52-15(a).

The right to serve on a jury is lost upon conviction of an indictable offense. N.J.S.A. 2B:20-1(e). A convicted felon's jury eligibility is restored only by pardon, Hozer v. Dep't of Treasury, 95 N.J. Super. 196, 202 (App. Div. 1967), or gubernatorial restoration of rights, N.J.S.A. 2A:167-5. For these reasons, a prospective juror is required to disclose whether they have been convicted of an indictable offense unless the conviction has been expunged. See N.J.S.A. 2C:52-27 ("Unless otherwise provided by law, if an order of expungement is granted, the arrest, conviction and any proceedings related thereto shall be deemed not to have occurred, and the [person] may answer any questions related to their occurrence accordingly . . . .").

Expungement "permit[s] defendants to regain various civil privileges like serving on a jury and voting. In re D.J.B., 216 N.J. 433, 441 (2014) (citing In re T.P.D., 314 N.J. Super. 643, 648 (Law. Div. 1997)). Consequently, an expunged conviction is not a basis to remove a juror for cause. Because counsel

had indicated the jury was satisfactory, the opportunity to assert a peremptory challenge had ended. Jury selection should not have been reopened.

Conducting the closed hearing regarding juror six without defendant or defense counsel present was also error. Our court rules require the defendant must be present for every scheduled pretrial event unless excused by the court for good cause shown, R. 3:16(a), and "at every stage of the trial, including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, unless otherwise provided by Rule," R. 3:16(b). Thus, jury selection may not take place without defendant's presence. State v. Smith, 346 N.J. Super. 233, 236 (App. Div. 2002); accord State v. Lomax, 311 N.J. Super. 48 (App. Div. 1998).

Although a defendant may waive his right to be present at trial, there must be "an express written or oral waiver placed on the record," or for other reasons not pertinent here. R. 3:16(b). The fact that defense counsel agreed to the closed hearing in his absence does not alter that requirement.

An essential element of the constitutional right to confront witnesses is the right of the defendant to be present in the courtroom at every stage of the trial. State v. Whaley, 168 N.J. 94, 99 (2001). The defendant's right to be present at trial is "a condition of the Due Process Clause of the Fourteenth

Amendment to the extent that a defendant's absence would hinder a fair and just hearing. Id. at 99-100 (citing State v. Hudson, 119 N.J. 165, 171 (1990)). The defendant's presence "provides protections on both an individual and institutional level." Hudson, 119 N.J. at 172.

Conducting a hearing involving the potential excusal of a juror without defendant being present or expressly consenting to his absence is a foundational violation of defendant's rights. Defendant has a constitutional right to be present at trial, including jury voir dire and side-bar conferences. State v. W.A., 184 N.J. 45, 53, 59 (2005).

The fact that the closed hearing involved a juror's expunged conviction or expunged criminal records does not justify defendant's absence. See State v. Byrd, 198 N.J. 319, 353-57 (2009) (holding defendant's right to be present extends to an in camera hearing to determine whether defendant engaged in witness intimidation leading to the refusal of a witness to testify); State v. Ogburne, 235 N.J. Super. 113, 117-19 (App. Div. 1989) (holding that right to be present extends to an in camera Rape Shield hearing and excluding defendant from the hearing denied a fundamental right despite the presence of defense counsel). In our view, conducting the closed hearing without defendant being

present "represented a complete breakdown of the adversarial process." Byrd, 198 N.J. at 355.

Also troubling is the absence of any explanation how the State learned of juror six's expungement. Aside from this non-disclosure, we view any such inquiry and the use of the information learned to be more egregious than a criminal history check of a juror without court approval, which the Court prohibited in Andujar, 247 N.J. at 308-10. Indeed, disclosing expunged records is a disorderly persons offense. See N.J.S.A. 2C:52-30. Put simply, the State should not engage in any such inquiry, and even if it did not, it should not have used the knowledge of the expungement as a ground to remove the juror for cause or by peremptory challenge.

Jury selection is a critical phase of a trial. See State v. Brunson, 101 N.J. 132, 138 (1985) (stating jury selection is "an integral part of the process to which every criminal defendant is entitled" (quoting State v. Singletary, 80 N.J. 55, 62 (1979))); see also United States v. Ford, 824 F.2d 1430, 1435 (5th Cir. 1987) (en banc) (stating jury selection is "an essential instrument to the delivery of a defendant's constitutionally secured right to a jury trial"). A defendant has a right to participate, through counsel, in the selection of a fair and impartial jury



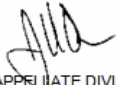
of his peers. To ensure that occurs, both counsel and defendant must be present during jury selection absent a valid, express waiver.

We review the abridgement of defendant's right to be present at trial for harmless error. See State v. Dellisanti, 203 N.J. 444, 456-59 (2010) (applying a fact-sensitive test to determine if defendant was prejudiced by his absence from part of his trial). Given the limited record in this matter,<sup>3</sup> we cannot say that conducting the closed hearing regarding juror six was harmless error. See State v. Castagna, 187 N.J. 293, 312 (2006) ("before a . . . constitutional error can be held harmless," the court must find "that it was harmless beyond a reasonable doubt." (quoting Chapman v. California, 386 U.S. 18, 24 (1967))). Accordingly, we reverse defendant's convictions and remand for a new trial.

Considering our decision, we do not reach the other issues raised by defendant.

Reversed and remanded for retrial.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION

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<sup>3</sup> We reiterate that the State has not disclosed when or how it learned of juror six's expungement or whether a conviction or criminal records relating to an arrest that did not result in a conviction were expunged. Nor does the record on appeal reveal the race or other characteristics of juror six.