

STATE OF NEW JERSEY,

v.

WILDEMAR A. DANGCIL,

Defendant-Petitioner.

SUPREME COURT OF NEW JERSEY

DOCKET NO.: 085665

Criminal Action

On Direct Certification from
Superior Court, Bergen County,
Docket No. 19-08-1020-I

BRIEF OF *AMICUS CURIAE*
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INTEREST OF AMICUS CURIAE

Amicus New Jersey State Bar Association ("NJSBA") is a voluntary association of over 18,000 members of New Jersey's legal profession whose practices, whether private or public, involve every area of the law, including criminal matters. The NJSBA was founded in 1899 in order to "maintain the honor and dignity of the profession of the law; to cultivate social relations among its members; to suggest and urge reforms in the law; and to aid in the administration of justice." It serves as the voice of the State's private bar with other organizations, governmental entities and the public on the wide range of issues relating to the law, the legal profession, and the legal system. The NJSBA seeks, among other goals, to promote access to the justice system, fairness in its administration, and the independence and integrity of the judicial branch of government. As part of its work, the NJSBA has appeared as *amicus curiae* in numerous cases before this Court and the Appellate Division, sometimes at the invitation of the Court, with respect to issues that affect the legal profession or the system of justice. See, e.g., *State v. Andrews*, 243 N.J. 447 (2020); *S.C. v. N.J. Dep't of Children & Families*, 242 N.J. 201 (2020); *Nieves v. Office of Pub. Defender*, 241 N.J. 567 (2020); *Balducci v. Cige*, 240 N.J. 574 (2020); *Meisels v. Fox Rothschild LLP*, 240 N.J. 286 (2020); *N.J. Dep't of Children & Families v. L.O.*, 460 N.J. Super. 1 (App. Div. 2019); *Estate of Van Riper v. Dir., Div. of Taxation*, 456 N.J. Super. 314 (App. Div. 2018),

aff'd, 241 N.J. 115 (2020); *Moreland v. Parks*, 456 N.J. Super. 71 (App. Div. 2018).

Of particular relevance to this case, the NJSBA has undertaken numerous efforts to address myriad issues of law and judicial administration that have arisen in light of the COVID-19 pandemic. For example, the NJSBA is represented on the Judiciary Stakeholder Coordinating Committee, which is chaired by the Acting Director of the Administrative Office of the Courts, Judge Glenn A. Grant, and develops and oversees plans for court operations during and after the COVID-19 pandemic. Furthermore, in recognition of the long-lasting effects that COVID-19 will have on the practice of law, the NJSBA established a Pandemic Task Force, which includes several committees, including, most pertinent to this matter, a Committee on the Resumption of Jury Trials. The Committee is constituted of retired judges as well as experienced trial attorneys in a number of different civil and criminal practice areas, and it has issued three reports, on July 2, 2020; September 2, 2020; and November 11, 2020. Those reports have been provided to the Chief Justice and the Administrative Office of the Courts for their consideration in developing a plan for the resumption of jury trials that will not only be safe for jurors, attorneys, litigants, judges, court staff, and other participants, but that also retain the fundamental fairness and justice embodied in the right to a trial by a jury of one's peers.

PRELIMINARY STATEMENT

The NJSBA supports the New Jersey Judiciary's formidable and laudable efforts to implement effective, safe, and fair procedures for the resumption of jury trials in the face of the ongoing challenges posed by the COVID-19 pandemic. Critical to that endeavor is a jury selection process that allows parties, and their attorneys, to select an impartial jury from a representative pool of prospective jurors. Of course, trials can be won or lost in the jury selection process -- particularly criminal trials, in which the defendant need sway only a single juror to avoid a guilty verdict.

Many steps taken by the Judiciary to adapt the traditional jury selection process to the virtual environment required by the pandemic have been appropriate, constructive, and even admirable. Indeed, in its May 11, 2021 Order, which announced the June 15 resumption of in-person criminal jury trials ("May 11 Order"), this Court recognized the need to "replicate to the extent practicable pre-COVID-19 jury processes." May 11 Order at 2. That Order thus provides that "the judge will invite jurors to raise any specific questions about their ability to report in person (if proceeding to an in-person trial) during sidebar, in the presence of the attorneys and parties," *id.* at 3, and that "[a]ll case-specific questioning of jurors will be conducted during the virtual *voir dire* process in the presence of the judge, attorneys, and parties." *Id.* at 4.

But that process was not used in the trial of Defendant Dangcil. Instead of hearing juror requests to have their service excused or deferred (other than those provided by statute, which are ruled upon by Assignment Judges or their designees) on the record and in the presence of counsel, the Bergen County Jury Management Office alone adjudicated these requests, without any articulated standards. And it did so outside the presence of the court, the parties, and their attorneys, and without creating a record of who was excused or deferred and why requests for such relief were or were not granted.

This *ex parte*, unrecorded process, in which the Jury Management Office exercised unfettered discretion to grant or deny jurors' requests to be excused from or defer the time of service, raises two significant constitutional issues. *First*, it deprives criminal defendants of their right to be present, and have counsel present, during the entire jury selection process. Indeed, in this case, Defendant and defense counsel were unable to evaluate for themselves the sincerity and reasonableness of any juror's request and to object to or advocate for a juror's excusal from service. The process used in this trial is thus contrary to this State's "open court" jury selection process, embodied in the Court Rules, under which *voir dire* is conducted on the record and in the presence of counsel and the defendant. Because this Court has consistently held that both criminal defendants and their counsel must be able to participate in jury selection, the process used in this case denied Defendant this right.

Second, the Jury Management Office's conduct was further constitutionally problematic because of its lack of recordkeeping regarding the dismissal of jurors, which prevents an inquiry into whether the jury pool was selected in a representative and non-discriminatory manner. Thus, the Jury Management Office did not explain why it granted excusals or deferrals in some cases and denied them in others. Additionally, the Jury Management Office failed to collect demographic data on jurors' race, ethnicity, or gender, which could have revealed whether the jurors who were excused consisted disproportionately of certain classes, and thus unfairly skewed the available jury pool towards an unrepresentative sample of the public. The absence of that transparency undercuts the public confidence that is critical to a fair and just system of jury trials. Indeed, the Jury Management Office's opaque exercise of authority further raises constitutional concerns regarding whether the jury pool was in fact drawn from a fair cross-section of the community and whether dismissal of jurors was based on impermissible factors such as race and gender.

For these reasons, as more fully explained below, *Amicus* NJSBA therefore respectfully asks this Court to require, in all cases, an open and transparent jury selection process, which permits the full participation of defendants and their counsel, including at the stage when jurors seek to be excused for personal reasons.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This case involves challenges to the jury selection process employed during the COVID-19 pandemic for Defendant's criminal trial. Prior to the pandemic, a juror could request one deferment of jury service, without cause, due to scheduling conflicts on the date for which the juror was summoned. See *Frequently Asked Questions About Juror Service in New Jersey* 7, *****.njcourts.gov/jurors/assets/juryfaq.pdf. The juror would be required to request a specific later date for service. *Ibid.* According to the Administrative Office of the Courts, however, for Defendant's trial, "the self-deferral option [was] temporarily disabled so that jurors seeking to be rescheduled [had to] communicate with jury management to process that request[.]" Certification of Brian McLaughlin ¶ 7, Da90.¹

This marked a change in judicial practice: prior to the pandemic, "requests for rescheduling of service" were not addressed by the Jury Management Office. *Id.* ¶ 15, Da91. Instead, unless jurors elected to avail themselves of their single self-deferrals, scheduling issues were addressed by the trial judge during *voir dire*, as part of the phase of selection in which jurors were excused for cause. See New Jersey Courts, *Bench Manual on Jury Selection* § 4.11 (Dec. 4, 2014) (explaining that inquiry of jurors to be excused for cause includes consideration of "hardship problems (child care issues, absence from work without pay,

¹ "Da" is Defendant's Appellate Division Appendix.

etc.)");² see also Administrative Directive 04-07 (May 16, 2007), [*****njcourts.gov/attorneys/assets/directives/dir_04_07.pdf](http://www.njcourts.gov/attorneys/assets/directives/dir_04_07.pdf) (model *voir dire* questions include, "[i]s there anything about the length or scheduling of the trial that would interfere with your ability to serve?").

In this case, the Jury Management Office summoned 800 people for the jury pool. See Certification of Lourdes Figueroa ¶ 5, Da27. Of those, 70 summonses were returned as "undeliverable," *id.* ¶ 12; 197 did not respond to the summons, *id.* ¶ 13; 178 were deemed unqualified for service, *id.* ¶ 8; and 90 were excused on statutory grounds, *id.* ¶ 9. That left 265 jurors who were otherwise qualified to serve. But the Jury Management Office then unilaterally, without any involvement of counsel, and without creating a record of its decision-making process, granted 58 jurors a requested deferral of service "due to calendaring conflicts." *Id.* ¶ 11. In other words, 22% of the qualified jurors were dismissed from service based solely on the decision of the Jury Management Office, without any input from counsel. And because the Jury Management Office "does not request or collect juror demographic data, including as to race, ethnicity, or gender," McLaughlin Cert. ¶ 9, there is no way to determine whether the persons granted deferment for scheduling conflicts disproportionately affected the composition of the final jury pool.

² Available at <https://www.njcourts.gov/pressrel/2014/Bench%20Manual%20on%20Jury%20Selection%20-%20promulgated%20Dec%204%202014.pdf>.

Defendant sought an Order to Show Cause challenging the jury array on a variety of grounds, including that the Jury Management Office dismissed jurors based on scheduling conflicts off the record and outside the presence of counsel and the trial judge. Da23. The trial court, however, rejected Defendant's challenge. Da1. Defendant then filed an emergent application with the Appellate Division seeking leave to appeal. After entering a temporary stay of the trial and receiving briefing from the parties and several *amici*, including the NJSBA, the Appellate Division issued an order granting leave to appeal, but summarily affirming the trial court's order and remanding for trial. *State v. Dangcil*, Docket No. AM-53-20T4 (App. Div. Oct. 12, 2020). With regard to the issues raised here, the court noted only that "there is no indication that disabling the self-deferral option reduced the jury pool." *Id.* at 9. But the court otherwise declined to address arguments made by the NJSBA and other *amici*, reasoning that it "lack[ed] the authority to alter orders issued by the Supreme Court" regarding alterations to the jury selection process. *Id.* at 11.

Defendant filed an emergent application for leave to appeal to this Court. On October 16, 2020, the Court issued an Order that denied the application, but "recognize[d] the importance of the issue raised by defense counsel" and indicated that defendant could file a post-trial motion for direct certification on the jury selection issues. *State v. Dangcil*, No. S-19-20 (Oct. 16, 2020). The Court further granted the NJSBA, and other *amici* who appeared

in the Appellate Division, leave to appear as *amici* in any post-trial application to the Court. On December 8, 2020, the Court denied Defendant's post-trial (but pre-sentencing) motion for direct certification, "without prejudice to defendant filing the motion for direct certification after entry of the judgment of conviction." *State v. Dangcil*, No. S-36-20 (Dec. 8, 2020).

Following sentencing, Defendant appealed his conviction to the Appellate Division and also filed a motion with this Court for direct certification regarding the jury selection issues. On May 7, 2021, this Court granted Defendant's motion for direct certification, "limited to defendant's challenge to the hybrid virtual/in-person jury selection procedure," and entered a peremptory briefing schedule applicable to both the parties and *amici*.

ARGUMENT

I. THE JURY MANAGEMENT OFFICE'S *EX PARTE*, UNRECORDED, AND UNFETTERED AUTHORITY TO DISMISS JURORS WHO CLAIMED SCHEDULING CONFLICTS INTERFERED WITH DEFENDANT'S CONSTITUTIONAL RIGHT TO PARTICIPATE IN JURY SELECTION WITH COUNSEL.

A. The Jury Selection and *Voir Dire* Process is a Critical, and Constitutionally Protected, Stage of a Criminal Jury Trial.

The right to trial by jury in criminal cases is protected by both the Federal and State Constitutions. *U.S. Const.* Amend. VI; *N.J. Const.* art. I, §§ 9-10. As the United States Supreme Court has recently reaffirmed, the drafters of the Federal Constitution "considered the right to trial by jury 'the heart and lungs, the mainspring and the center wheel' of our liberties," in that "the

right to a jury trial [seeks] to preserve the people's authority over [the government's] judicial functions." *United States v. Haymond*, 139 S. Ct. 2369, 2375 (2019) (plurality opinion). Thus, in the words of this Court, "[j]ury selection is an integral part of the process to which every criminal defendant is entitled." *State v. W.A.*, 184 N.J. 45, 55 (2005) (quoting *State v. Singletary*, 80 N.J. 55, 62 (1979)); accord *State v. Brunson*, 101 N.J. 132 (1985) (same).

As such, any criminal defense lawyer (and indeed, any trial attorney) knows that, in the words of Clarence Darrow, "[s]electing a jury is of the utmost importance." Clarence Darrow, *Attorney for the Defense*, Esquire, May 1936, at 36, available at [*****moses.law.umn.edu/darrow/documents/Esquire How to pick jury 1936 ocr.pdf](http://*****moses.law.umn.edu/darrow/documents/Esquire_How_to_pick_jury_1936_ocr.pdf). That is because jury selection, and an attorney's participation in it, has a profound effect on the outcome of a trial. See 6 Wayne R. LaFare, et al., *Criminal Procedure* § 22.3(a) (4th ed., Dec. 2019 update) ("[V]oir dire . . . is commonly perceived by attorneys to be critical to success at trial."). As Darrow wrote, "lawyers always do their utmost to get [people] on the jury who are apt to decide in favor of their clients." Darrow, *Attorney for the Defense*, supra, at 37. The converse is, of course, true as well: lawyers "may request that potential jurors be excused for cause" if they are, in the lawyer's view, likely to rule against their clients. *State v. McCombs*, 81 N.J. 373, 379 (1979) (Pashman, J., concurring).

The process, including *voir dire*, is obviously complex and multi-faceted, encompassing not only the jurors' written or verbal responses, but also their "expressions, gestures, and body movements." Ellen Kreitzberg, *Jury Selection: The Law, Art & Science of Selecting a Jury* § 14:15 (Nov. 2020). For this reason, "[a]n attorney can and should play a significant role in the selection of jurors." LaFave, *Criminal Procedure, supra*, § 22.3(a). As any experienced attorney knows, there are "substantial advantages to be gained by counsel from careful planning and execution of jury selection and *voir dire* in a criminal case." Anne M. Payne & Christine Cohoe, *Jury Selection and Voir Dire in Criminal Cases*, 76 Am. Jur. Trials 127, § 1 (2000) ("If counsel is sensitive to the importance of *voir dire* during criminal trials, the jury is likely to be more perceptive, to the obvious benefit of the accused, than if counsel had not taken care in selecting the jury.").

The law thus provides several protections designed to guarantee a criminal defendant's right "to trial by an impartial jury without discrimination on the basis of religious principles, race, color, ancestry, national origin, or sex." *State v. Gilmore*, 103 N.J. 508, 524 (1986). First, as a constitutional matter, jurors must be "drawn from pools that represent a 'fair cross-section' of the community[.]" *State v. Ramseur*, 106 N.J. 123, 215 (1987) (quoting *Duren v. Missouri*, 439 U.S. 357, 368 n.26 (1979)). In particular, jurors may not be excluded from a jury pool on the basis of race, see *Strauder v. West Virginia*, 100 U.S. 303, 308

(1879), or gender, see *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975). Second, once summoned for service, jurors may be exempted from service only if not statutorily qualified, see N.J.S.A. 2B:20-1, or for particular statutory reasons, such as extreme hardship, see N.J.S.A. 2B:20-10. Third, jurors within the jury pool are randomly selected to be seated on the jury and subjected to *voir dire*, *State v. Tinnes*, 379 N.J. Super. 179, 184 (App. Div. 2005) (citing N.J.S.A. 2B:23-2); absent "compelling reasons," *voir dire* must be publicly accessible and, with the exception of sidebar conferences, in open court. See R. 1:8-3(g). Once selected and questioned, jurors can be removed only by challenge for cause, on the basis that the juror is not "qualified, impartial and without interest in the result of the action," N.J.S.A. 2B:23-10, or through the exercise of a peremptory challenge, N.J.S.A. 2B:23-13. And, of course, those peremptory challenges are subject to constitutional limits, and cannot be used to unconstitutionally discriminate against jurors on the basis of race, see *Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986); *Gilmore*, 103 N.J. at 517; gender, see *J.E.B. v. Alabama*, 511 U.S. 127, 143 (1994); or religious belief, see *State v. Fuller*, 182 N.J. 174, 201 (2004).

B. The Jury Management Office's Excusal of Jurors Outside the Presence of Defendant and His Counsel Violated Defendant's Constitutional Rights in the Jury Selection Process

Criminal defendants, both themselves and through their counsel, have a constitutional right to be a part of the jury selection process. This involvement, in order to be meaningful,

must encompass every stage of the jury selection process, beginning with the adjudication of jury excuses, to *voir dire* regarding the case, to for cause and peremptory challenges. Thus, although trial courts may fashion appropriate methods for the defendant's participation to accommodate security concerns, *W.A.*, 184 N.J. at 59-61, this Court has made clear that, pursuant to Rule 3:16(b), the defendant's right to be present "includes jury selection." *Id.* at 53-54 (citing *State v. Smith*, 346 N.J. Super. 233, 236-37 (App. Div. 2002); *State v. Dishon*, 297 N.J. Super. 254 (App. Div. 1997); *State v. Lomax*, 311 N.J. Super. 48 (App. Div. 1998)).

And the constitutional right to counsel also attaches throughout the jury selection process, including during *voir dire*. See *McCombs*, 81 N.J. at 377 ("[I]n allowing the jury selection phase of the trial to proceed while defendant was unrepresented, the trial court committed reversible error."). The Appellate Division has thus held that "conducting sidebar questioning of a juror [during *voir dire*] -- while the defense attorney remains at counsel table, unable to hear and unable to gauge the juror's reactions -- constitutes a denial of defendant's right to the effective assistance of counsel." *Lomax*, 311 N.J. Super. at 57; accord *W.A.*, 184 N.J. at 56 (favorably citing *Lomax*). As Justice Pashman wrote over 40 years ago:

[An attorney's] skillful assertion of his client's rights is essential to empaneling an impartial jury. Thus, experienced counsel can provide invaluable aid during jury selection. The total deprivation of that assistance cannot be sanctioned.

[*McCombs*, 81 N.J. at 379 (Pashman, J., concurring).]

Against this backdrop, the Jury Management Office's unilateral exercise of authority to excuse jurors, without input from counsel or the defendant, interferes with defendants' right to participate in the jury selection process, themselves or through counsel. Indeed, in an ordinary trial, the concerns of an eligible juror who has not been deferred or exempted from service on statutory grounds are discussed in open court, with counsel and the defendant present. See, e.g., *Tinnes*, 379 N.J. Super. at 187-190 (describing several on-the-record discussions regarding juror excuses for hardship based on trial scheduling); Administrative Directive 04-07, *supra*. But the Jury Management Office, in this case, left the attorneys, the Defendant and, for that matter, the trial judge,³ entirely out of the process by dismissing jurors from the pool based upon putative scheduling conflicts, without creating a record of its decision-making process. See *Figueroa* Cert. ¶ 11, Da27. Counsel -- and Defendant -- were as a result denied any opportunity not only to participate in this aspect of *voir dire* but also, critically, to evaluate the jurors' demeanor and to assess the sincerity of their claims for excuse from service, as they would have been able to do in a trial conducted prior to the COVID-19 pandemic. See *McLaughlin* Cert. ¶ 15, Da91

³ See *Tinnes*, 379 N.J. Super. at 184 (noting that "[t]he trial judge plays a critical 'gatekeeping' role" in the jury selection process (quoting *State v. Tyler*, 176 N.J. 171, 181 (2003))).

(explaining that prior to the pandemic, "requests for rescheduling of service" were not addressed by the Jury Management Office).

The process used here is thus inconsistent with the Court's recent May 11 Order, which expressed the intent to "replicate to the extent practicable pre-COVID-19 jury processes." May 11 Order at 2. The Administrative Office of the Courts' May 17, 2021 Notice to the Bar regarding the resumption of jury trials similarly provides that absent statutory grounds for dismissal under N.J.S.A. 2B:20-1 or N.J.S.A. 2B:20-10, "a juror who does not supply documentation required for a pre-reporting excuse and instead requests an excuse during *voir dire* (questioning of the panel) would be addressed at sidebar in the presence of the judge, attorneys, and parties."⁴ The Court has, then, implicitly recognized that counsel's presence when jurors seek non-statutory excusals is one "of the essential attributes of the right to a" jury trial that must be retained, even "in the midst of an unprecedented public health emergency." *State v. Vega-Larregui*, --- N.J. ---, No. A-33-20 (Apr. 28, 2020) (slip op. at 32). This appeal gives the Court the opportunity to make explicit that conclusion, grounded as it is in both the Rules of Court, see R. 1:8-3(g) (requiring that juror *voir dire* be held either in open court, "on the record at sidebar, or in writing"), and the Constitution. See *State v. McCombs*, 171 N.J. Super. 161, 164 (App.

⁴ Notice to the Bar, *COVID-19 - Criminal and Civil Jury Trials - Public Information and Guidance Pursuant to the Supreme Court's May 11, 2021 Order* 2-3, [*****njcourts.gov/notices/2021/n210519a.pdf?c=BqS](https://www.njcourts.gov/notices/2021/n210519a.pdf?c=BqS).

Div. 1978) (holding, where "jury selection took place while defendant was not represented by counsel," that "defendant was deprived of his right to the effective assistance of counsel at a critical stage of the trial, as guaranteed by the Sixth Amendment of the Federal Constitution and of the New Jersey Constitution, *N.J. Const.* (1947), Art. I, par. 10"), *aff'd*, 81 N.J. 373 (1979); *Lomax*, 311 N.J. Super. at 50 (holding, where trial court conducted *voir dire* at sidebar and without counsel present, that "the defendant was deprived of his right to the effective assistance of counsel at a critical stage of the trial, as guaranteed by the Sixth Amendment of the United States Constitution and by [A]rticle I, [P]aragraph 10 of the New Jersey Constitution").

Nor can this violation be remediated by providing the opportunity for defense counsel to contest the dismissal of any jurors by the Jury Management Office on a cold record. Leaving aside that such an opportunity would be without the essential opportunity to observe potential jurors and thus to assess their demeanor, their truthfulness, their personality traits, and the like -- all of which are the very essence of jury selection -- the Jury Management Office did not create a record of its dismissals that could be used by counsel, as well as by the Court, for such a *post hoc* challenge. *Cf. United States v. Paradise*, 98 F.3d 1266, 1280 (11th Cir. 1996) (reviewing record of jury questionnaires in rejecting defendants' federal statutory challenge to excusal of jurors for hardship).

But lest there be any misunderstanding, the position of *amicus* the NJSBA is that such a *post hoc* right to challenge the action of the Jury Management Office in excusing jurors would be insufficient. As noted, exclusion of defendants and their counsel from the stage of *voir dire* during which prospective jurors seek to be excused from jury duty also interferes with attorneys' ability to fully participate in the entire jury selection process, including the exercise of both for cause and peremptory challenges. That is because *voir dire* in open court affords the parties "the opportunity to assess the venireperson's demeanor" and ultimately "provid[es] court and counsel alike with sufficient information with which to challenge potential jurors intelligently -- whether for cause or peremptorily" (or, if an attorney views the juror as favorable to his client's position, to advocate against the trial judge's dismissal of the juror). *State v. Biegenwald*, 126 N.J. 1, 39 (1991). And the ability to participate in this process is profoundly affected by what occurs at the "excuse" stage: consideration of a juror's request for excuse based on hardship will certainly affect trial attorneys' use of peremptory challenges in shaping a jury that is acceptable to their clients. See *Tinnes*, 379 N.J. Super. at 191-92, 205 (finding that trial judge's failure to question jurors about scheduling prior to use of peremptory challenges was a "highly critical" error that failed to "insure, to the greatest extent that the applicable statutes and rules permit, the production of a fair and impartial jury"); see also *People v. Reese*, 670 P.2d 11, 13 (Colo. Ct. App. 1983)

(describing prosecutor's use of peremptory challenge after juror claimed financial hardship during *voir dire*).

In sum, and for all of these reasons, the jury selection process used in this case, understandable though it may be during the pandemic, infringed upon the rights of Defendant and his counsel to participate in the jury selection process in a way that could and should have been avoided. Defendant's conviction should therefore be set aside.

C. The Jury Management Office's Unilateral Process for Excusing Jurors Raises Constitutional Concerns Regarding the Composition of the Jury Pool and Discrimination in Removal of Jurors.

Beyond the significant legal, including constitutional, deficiencies in the jury selection process for Defendant's trial, the Jury Management Office's practices in this case raise additional constitutional concerns arising out of the creation of the jury pool and the exclusion of persons from prospective jury service. Thus, while it is clear that people cannot be excluded from a jury pool based on race, gender, or another "constitutionally cognizable group," *Ramseur*, 106 N.J. at 215, the Jury Management Office did not even collect records of summoned jurors' "demographic data, including as to race, ethnicity, or gender," prior to excusing them from service. *McLaughlin Cert.* ¶ 9, Da90. It is thus not possible to even tell if there was "systematic exclusion" of jurors of a particular protected class from the pool. *Ramseur*, 106 N.J. at 216 (citing *Duren*, 439 U.S. at 364).

Indeed, the Jury Management Office's active involvement in excusing jurors for scheduling conflicts raises the risk of the "court allow[ing] jurors to be excluded because of group bias" and thus becoming "[a] willing participant in a scheme that could only undermine the very foundation of our system of justice -- our citizens' confidence in it." *Georgia v. McCollum*, 505 U.S. 42, 49-50 (1992) (quoting *State v. Alvarado*, 221 N.J. Super. 324, 328 (Law Div. 1987)). Rather than applying clear, objective, and known criteria and setting forth its reasoning for the record in a way that would permit the parties and the public to understand why any given juror was excluded from service, the Jury Management Office in no way explained how it exercised its authority to excuse jurors at their request, due (for example) to scheduling conflicts. This lack of a public explanation as to how the jury pool was culled thus fails to provide "the legitimacy of the judicial process in the eyes of the public" that is served by citizens' "participat[ion] in the administration of justice by serving on grand and petit juries." *Gilmore*, 103 N.J. at 525; see generally *McCollum*, 505 U.S. at 49 (prohibiting criminal defendant from discriminatory use of peremptory strikes because "[o]ne of the goals of our jury system is to impress upon . . . the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." (internal quotation marks omitted)); *Taylor*, 419 U.S. at 529 (explaining one purpose of the "fair-cross-section requirement as promoting "[c]ommunity participation in the administration of the criminal

law," which "is also critical to public confidence in the fairness of the criminal justice system").

As noted, in an ordinary case, although jurors with scheduling conflicts are permitted to invoke a one-time deferral of service to a new date, the Judiciary staff does not have any role in evaluating that choice. See *McLaughlin Cert.* ¶ 15, Da91. But in this case, the Jury Management Office had discretion -- apparently unguided by any stated objective principles -- to consider, evaluate, and accept or reject a juror's request for deferral of service. Although this Court upheld the selection of virtual grand juries (as opposed to trial juries) that were "drawn in the same manner as in-person grand juries," *Vega-Larregui*, No. A-33-20 (slip op. at 40), that was not the case here, where the process was altered in constitutionally significant ways. In the absence of a policy governing those deferral requests; a record of which deferral requests were accepted and rejected, and why; and the input of counsel and the defendant in that process, there can be no assurance that deferral requests were considered equally and consistently, without inappropriately differential treatment, based upon race, ethnicity, gender, or some other improper reason. *Cf. United States v. Pruett*, 681 F.3d 232, 247 (5th Cir. 2012) (explaining that prejudicial error "is found if [a] juror was discharged without factual support or for a legally irrelevant reason" (internal quotation marks omitted)).

In fact, any such differential treatment may well have a disparate impact on certain groups in the particular circumstances

of the COVID-19 pandemic. See N.J. State Bar Ass'n, *Report on Resumption of Jury Trials, Part 2* 9 (Sept. 2, 2020)⁵ ("NJSBA Sept 2 Report") (describing NJSBA's "concerns about a representative jury" during pandemic because "COVID-19 has had disparate effects among various population groups"). Thus, for example, if the Jury Management Office permitted deferrals for parents of children who required help at home with remote schooling,⁶ such requests were likely to disproportionately -- and unconstitutionally -- exclude women from the jury pool. See, e.g., Amanda Taub, *Pandemic Will 'Take Our Women 10 Years Back' in the Workplace*, N.Y. Times, Sept. 26, 2020, <https://nyti.ms/3nkAxkN> (reporting that women have disproportionately taken on extra responsibility for child care during the pandemic); see also *Taylor*, 419 U.S. at 535 n.17 (rejecting "the suggestion that all women should be exempt from jury service based solely on their sex and the presumed role in

⁵ Available at <https://bit.ly/3ulvkv7>.

⁶ Jury selection for Defendant's trial began on September 21, 2020. At the start of the academic school year in September, only 68 of the state's traditional public schools, charter schools, and renaissance schools -- which total over 600 -- opened with full in-person schooling. Anthony G. Attrino, et al., *N.J. schools reopening: These districts are planning all-virtual classes*, N.J. Advance Media, Sept. 4, 2020, [*****.nj.com/education/2020/09/nj-schools-reopening-these-districts-are-planning-all-virtual-classes-sept-4-2020-updates.html](https://www.nj.com/education/2020/09/nj-schools-reopening-these-districts-are-planning-all-virtual-classes-sept-4-2020-updates.html). A number of schools that reopened with some in-person instruction soon reverted to all-remote instruction due to coronavirus exposures. Allison Pries, *Here's the growing list of schools going remote because of COVID-19 cases*, N.J. Advance Media, Sept. 18, 2020, <https://www.nj.com/education/2020/09/heres-the-growing-list-of-schools-going-remote-because-of-covid-19-cases-sept-18-2020.html>.

the home"). Similarly, if the Jury Management Office let "essential workers" defer their service at higher rates than other summoned jurors with work-related conflicts, then those deferrals were likely granted disproportionately to those who were poor, Black, and Latinx, which would also be constitutionally problematic. See, e.g., Hannah Van Drie & Richard V. Reeves, *Many essential workers are in "low-prestige" jobs*, The Brookings Inst., May 28, 2020, [*****.brookings.edu/blog/up-front/2020/05/28/many-essential-workers-are-in-low-prestige-jobs-time-to-change-our-attitudes-and-policies/](https://www.brookings.edu/blog/up-front/2020/05/28/many-essential-workers-are-in-low-prestige-jobs-time-to-change-our-attitudes-and-policies/) (reporting that essential workers "are typically lower paid" and "are disproportionately Black or Hispanic"); see also *Norris v. Alabama*, 294 U.S. 587 (1935) (holding that exclusion of persons from jury rolls on the basis of race is unconstitutional); *Thiel v. S. Pac. Co.*, 328 U.S. 217, 223-25 (1946) (rejecting jury selection process that excluded all "daily wage earners" from the jury pool as "discriminat[ion] against persons of low economic and social status").

Beyond the exclusion of Defendant and counsel, then, the Jury Management Office's failure to collect or retain any records regarding jurors whose service was deferred for scheduling conflicts -- including not only the reason for the deferral, but also the demographic data of those potential jurors -- makes it fundamentally impossible to understand the full scope of the discretion exercised in granting scheduling deferrals or to review the exercise of that discretion, as would otherwise be possible, and critical to a fully functioning system of justice, including

the right to a meaningful appeal. See *State v. Williams*, 171 N.J. 151, 167 (2002) (finding no error in dismissal of juror for financial hardship based on “[e]xamination of the record developed here”); *Singleton*, 80 N.J. at 62 (holding that trial judge did not err in excluding juror only after “carefully consider[ing] the record of the proceedings below”); see also *Paradies*, 98 F.3d at 1279 (finding no violation in dismissal of jurors only after “carefully review[ing] all of the questionnaires challenged by the defendants”).

Finally, to the extent that the State and the Jury Management Office argued, and the trial court and Appellate Division concluded, that any claims regarding the exclusion of certain groups of jurors are “purely speculative,” see *Dangcil*, No. AM-53-20 (slip op. at 7), that is only because the Jury Management Office did not provide the necessary information that would show whether jurors were excused based on discriminatory or other inappropriate grounds. See N.J.S.A. 2B:20-9(b) (“Records shall be kept of all requests for excuses and deferrals, and of the granting of excuses and deferrals.”); see also *People v. Basuta*, 114 Cal. Rptr. 2d 285, 305 (Ct. App. 2001) (requiring courts, upon request, to keep records of hardship exclusions in order “to give transparency to the process and provide data potentially relevant to a review of the cross-sectional nature of the pool”). In fact, the NJSBA raised this very issue in its Recommendations for Resumption of Jury Trials, shared with the Court on July 2, 2020, highlighting the need for “protection of the right to a trial with

a representative, fair, and impartial jury” and urging the Judiciary to provide counsel and the parties with juror questionnaires of those excluded so that they could be analyzed to ensure a fair and balanced jury. N.J. State Bar Ass’n, *Report of the Committee on the Resumption of Jury Trials* 3, 5 (July 2, 2020).⁷ In later reports, the NJSBA noted that the Judiciary’s plan foreclosed lawyers from accessing the critical information necessary to raise constitutional issues in defense of their clients, and urged the Court to allow attorneys to be present and participate in the evaluation of deferral requests. See NJSBA Sept. 2 Report, *supra*, at 4, 9; N.J. State Bar Ass’n, *A Path to Virtual Civil Trials* 4 (Nov. 11, 2020).⁸

In this case, however, the Jury Management Office declined to take essential steps required in order to gather the information that would address these concerns, and avoid constitutional problems. That the very body which had the exclusive ability to collect demographic information, yet declined to do so, now argues that Defendant’s inability to access that information renders his argument speculative only highlights why it was critical for that information to be provided to the parties. Indeed, in order to fully protect litigants, the Jury Management Office should be charged with collecting and supplying to counsel and the court such demographic information as would allow them to analyze whether the jury selection process was able to provide assurance that an

⁷ Available at <https://bit.ly/3hX7svr>.

⁸ Available at <https://bit.ly/3yG5ipT>.

array that was, in fact, inclusive and representative. This is particularly true given that this Court has recognized the need to “ensur[e] representative and inclusive juries at every stage of the selection process.” N.J. Sup. Ct., *Plan for Resuming Jury Trials* 26 (Aug. 14, 2020), *****njcourts.gov/notices/2020/n200722a.pdf.

As Defendant noted in his brief to this Court, he sought discovery and an evidentiary hearing in the trial court regarding the Jury Management Office’s process for excluding jurors, but that request was denied. See Def.’s Br. at 5-6, 15, 17. And, as set forth above, counsel’s (and Defendant’s) exclusion from this process, and inability to obtain the relevant information for his claims, is at the heart of the constitutional violation raised in this case. See *Lomax*, 311 N.J. Super. at 52 (“[T]he *voir dire* examination of prospective jurors is a critical stage during which a criminal defendant is entitled to representation by counsel.”); see also *W.A.*, 184 N.J. at 53 (a defendant’s “right of presence includes jury selection”). Under these circumstances, it would simply be unfair to characterize Defendant’s argument as speculative, when the asserted speculation comes about only because the Jury Management Office declined to collect the very information necessary for an analysis of whether or not the court process worked, as the NJBSA urged.

The Judiciary has, of course, stated its commitment to “ensuring inclusive jury panels” during the pandemic. See Notice to the Bar, *COVID-19 -- Criminal and Civil Jury Trials to Resume*

Incrementally 3, July 22, 2020,
*****njcourts.gov/notices/2020/n200722a.pdf. But that goal can only be achieved through a transparent process that recognizes the constitutional rights of criminal defendants, and their attorneys, to fully participate in the jury selection process and to effect the necessary transparency so that speculation is not necessary. See NJSBA Sept. 2 Report, *supra*, at 4 (describing how the Judiciary's unilateral excusal or deferral of jurors on non-statutory grounds means that "lawyers will not know whether the jury selection process in a given case is disproportionately eliminating jurors in a way that is potentially unconstitutional"); *id.* at 9 ("To provide transparency and allow for any issues to be addressed, data concerning who was administratively excused prior to the proposed virtual *voir dire* process should be made available to the parties."). As is described above, the Jury Management Office's unilateral dismissal of jurors in this case fails to satisfy those constitutional mandates or allow for that transparency.

In sum, the Jury Management Office should not be permitted to adjudicate jury deferral requests in its sole, unfettered, unguided, and unrecorded discretion, without counsel or the defendant present. That process, utilized in this trial, stifled Defendant's right to fully participate, both personally and through counsel, in the jury selection process. It also failed to sufficiently protect against the risk of unconstitutionally discriminatory jury selection. This Court should therefore hold

that the jury selection process can be lawful, and constitutionally sufficient, only if juror scheduling conflicts are adjudicated on the record, with counsel present.

CONCLUSION

The NJSBA understands the importance of resuming jury trials, and the difficulties of doing so in light of the health concerns resulting from the COVID-19 pandemic. But no pandemic, or other emergency, can completely override the constitutional protections, such as the right to counsel, that are designed to ensure that a jury is constituted through a process that is thorough, fair and equitable, and that gives assurance to the defendant and the public that trials are adjudicated by juries drawn from pools that are sufficiently representative of the community. *Cf. Vega-Larregui*, No. A-33-20 (slip op. at 44) (recognizing that “temporary remedies . . . to keep the criminal justice system moving” during the pandemic must be “consistent with constitutional rights”). For the reasons described above, the selection process used for Defendant’s trial, which allowed the Jury Management Office to exercise unilateral discretion to excuse jurors for scheduling conflicts, failed to accomplish, and even undermined, these goals. And it did so for no good reason: as the Court’s most recent Order makes clear, this aspect of jury selection can take place in the presence of the defendant and his counsel, even if remotely. Because that did not occur here, *amicus* NJSBA respectfully submits that the conviction at issue should be vacated and the Court should hold, in no uncertain terms, that even in a hybrid jury selection

process, requests for excuses or deferrals, as part of the *voir dire* process, must occur on the record and in the presence of counsel.

Respectfully submitted,

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