



PHIL MURPHY  
Governor

State of New Jersey  
OFFICE OF THE PUBLIC DEFENDER  
Appellate Section  
JOSEPH J. RUSSO

JOSEPH E. KRAKORA  
Public Defender

SHEILA OLIVER  
Lt. Governor

Assistant Public Defender/Deputy Public Defender  
31 Clinton Street, 9<sup>th</sup> Floor, P.O. Box 46003  
Newark, New Jersey 07101  
Tel. 973.877.1200 · Fax 973.877.1239

October 7, 2020

JOSEPH J. RUSSO  
ID. NO. 032151987  
Deputy Public Defender  
ALISON PERRONE

JEANNE LOCICERO  
ID. NO. 024052000  
American Civil Liberties  
of New Jersey

ID. NO. 005741997  
First Assistant Deputy Public Defender  
JOHN P. FLYNN  
ID. NO. 303312019  
Assistant Deputy Public Defender

ALEXANDER SHALOM  
ID. NO. 021162004  
American Civil Liberties  
Union of New Jersey

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. AM-000053-20T4  
INDICTMENT NO. 19-08-1020-I

STATE OF NEW JERSEY,	:	<u>CRIMINAL ACTION</u>
Plaintiff-Respondent,	:	On Motion for Leave to Appeal From An Interlocutory Order
v.	:	Entered By the Superior Court of New Jersey, Law Division, Bergen County
WILDEMAR A. DANGCIL,	:	
Defendant-Movant.	:	Sat Below: Hon. Robert M. Vinci, J.S.C.

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**BRIEF ON BEHALF OF AMICI CURIAE  
STATE OF NEW JERSEY OFFICE OF THE PUBLIC DEFENDER AND  
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY**

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Your Honors:

This letter is submitted in lieu of a formal brief pursuant  
to Rule 2:6-2(b). DEFENDANT IS CONFINED

**INTEREST OF AMICI CURIAE**

Office of the Public Defender

The New Jersey Office of the Public Defender (OPD) represents most individuals facing criminal prosecution by the State. Therefore, it is likely that the OPD will represent many criminal defendants seeking to challenge the jury trial system implemented as result of the pandemic. The expected questions include whether juries will include a representative cross-section of the community, reflective of New Jersey' diverse population. Because many OPD clients are racial minorities, and because racial minorities have been disproportionately impacted by the COVID-19 pandemic, the cross-section concerns are particularly acute.

Founded on July 1, 1967, the OPD is the first centralized state-wide public defender system in the United States, created following the landmark decision in Gideon v. Wainwright, 372 U.S. 335 (1963). The OPD was founded to create a system by which no innocent person will be convicted because of an inability to afford an attorney. N.J.S.A. 2A:158A-1. In its criminal-defense function, the OPD not only provides legal counsel at the Superior Court trial level in the State's 21 counties, but also handles appeals, post-conviction relief proceedings, and other significant ancillary legal proceedings.

This case presents issues of great importance to OPD indigent clients because a fair and representative cross-section of our

citizens on juries goes to the heart of the criminal justice system and directly implicates the Sixth Amendment of the United States Constitution and Article 1, ¶ 10 of our State Constitution.

American Civil Liberties Union of New Jersey

The American Civil Liberties Union of New Jersey (ACLU-NJ) is a private, non-profit organization dedicated to the principles of individual liberty embodied in the Constitution. The ACLU-NJ is committed to ensuring the meaningful implementation of the State and Federal Constitution's fair-cross-section requirements.

TABLE OF CONTENTS

	<u>PAGE NOS.</u>
INTEREST OF AMICI CURIAE.....	i
PRELIMINARY STATEMENT.....	1
PROCEDURAL HISTORY.....	3
STATEMENT OF FACTS.....	3
LEGAL ARGUMENT.....	5
POINT I	
THE NEW, HYBRID JURY SELECTION PROCESS UTILIZED IN THIS CASE HAS THE POTENTIAL TO DEPRIVE CRIMINAL DEFENDANTS OF THEIR CONSTITUTIONAL RIGHT TO A JURY POOL COMPRISED OF A FAIR CROSS-SECTION OF THE COMMUNITY. THIS COURT SHOULD, THEREFORE, IMPLEMENT PROCEDURAL SAFEGUARDS TO MINIMIZE THIS RISK, SUCH AS REQUIRING ALL COVID-19 RELATED RECUSALS AND DEFERRALS TO BE DECIDED BY A JUDGE IN THE PRESENCE OF THE PARTIES AND PROVIDING THE DEFENSE DEMOGRAPHIC DATA, INCLUDING RACE AND ETHNICITY, FOR ALL PROSPECTIVE JURORS. ....	5
A. The COVID-19 Pandemic is Likely to Alter the Composition of Jury Pools. ....	6
B. Amici Recommend Two Procedural Safeguards to Address the Risk that the Hybrid Jury Selection Process Will Result in an Underrepresentation of Minorities in the Jury Pool.....	9
1. Requests for COVID-19 Related Excusals and Deferrals Should be Ruled on by a Judge in the Presence of the Parties with a Focus on Limiting the Number of Excusals or Deferrals to Those that are Clearly Warranted.....	10

TABLE OF CONTENTS (CONT'D)

PAGE NOS.

2. The Judiciary Should Collect Data on  
the Demographic Characteristics of  
Prospective Jurors, Including Race and  
Ethnicity, and Provide this Data to  
the Defense in Every Case..... 12

POINT II

THE ATTORNEY GENERAL'S OFFICE MUST NOT BE PERMITTED  
TO REPRESENT THE ADMINISTRATIVE OFFICE OF THE COURTS  
AND BERGEN COUNTY JURY MANAGEMENT WHILE ALSO  
SUPERVISING THE PROSECUTION OF THE MATTER IN ITS  
EXECUTIVE BRANCH FUNCTION.....17

CONCLUSION.....20

**PRELIMINARY STATEMENT**

The rapidly increasing number of pretrial detainees facing indefinite excludable time represents a real crisis for our criminal justice system. The resumption of jury trials is therefore essential. The OPD and ACLU-NJ endorse the Judiciary's efforts to resume trials with largely virtual jury selection and recognizes the need to screen jurors for COVID-19 related grounds for excusal. Given, however, the disproportionate impact the virus has had on people of color, urban residents and others whose socio-economic status has resulted in subpar access to health care, amici propose two procedural safeguards to be implemented in the jury selection process. These safeguards are designed to minimize the risk that a criminal defendant's right to a jury drawn from a fair cross-section of the community will be compromised. First, all COVID-19 related excusals and deferrals should be heard by a judge with the parties present. Second, the Judiciary should collect and provide to the defense demographic data that would allow for an assessment of whether there has been a disparate impact on the representation of a cognizable class in the jury pool.

Indisputably, COVID-19 has had a disproportionately severe impact on racial and ethnic minorities, which has the potential to reduce the demographic diversity of the jury pool. Not only may there be fewer minorities in the jury pool due to their higher likelihood of being ill with COVID-19, but the number of minorities

in the jury pool may also be reduced by the indiscriminate granting of excusals and deferrals based on COVID-19 related excuses. Further exacerbating this concern is the fact that the Judiciary does not maintain data on the race and ethnicity of citizens summoned for jury duty, which will effectively foreclose any meaningful analysis of the racial impact of the hybrid jury selection process.

In light of the ongoing pandemic, the Judiciary must take steps to assure that every defendant receives a fair trial, with a jury pool drawn from a fair cross-section of the community. Courts should be transparent in the granting of COVID-19 excusals or deferrals, and the decisions should be made by a judge in the presence of the parties with the goal of limiting excusals or deferrals to those that are clearly necessary. Additionally, the defense should have access to information about the demographic characteristics of the jury pool, including race and ethnicity, to assess the impact of COVID-19 excusals and deferrals on these cognizable groups. Implementation of these suggestions is necessary to ensure that the hybrid jury selection process will produce an inclusive and representative jury pool. Fair, transparent procedures and relevant data collection will protect the rights of criminal defendants and promote public trust in the criminal justice system.

Further, given the obvious entanglements between the Rules of

Professional Conduct, the Canons of Judicial Conduct, and various statutes, the Attorney General's Office must be disqualified from representing the Administrative Office of the Courts and Bergen County Jury Management in any further proceedings in this case or future cases. This will ensure that New Jersey's long history of an independent and impartial judiciary continues.

**PROCEDURAL HISTORY**

Amici adopt the procedural history as provided in defendant Wildemar Dangcil's October 2, 2020, motion for emergent relief, except to add the following. On September 30, 2020, this Court entered an order granting the defendant's emergent application for permission to file a motion for leave to appeal and inviting the OPD to appear as amicus curiae in this matter. The ACLU-NJ filed a motion to appear as amicus curiae simultaneous with this brief.

**STATEMENT OF FACTS**

Amici adopt the statement of facts provided in defendant's October 2, 2020, motion for emergent relief, except to add the following. In the wake of the public health emergency, New Jersey courts have devised new methods for moving forward with jury trials, one of them being a hybrid jury selection process. This process invites potential jurors to submit eligibility questionnaires electronically and allows them to indicate whether they are requesting deferment or excusal based on child-care or work conflicts. Prospective jurors also fill out a supplemental



questionnaire, which asks questions regarding potential exposure to the virus. According to the certification of Brian McLaughlin, Statewide Manager of Jury Programs, "Vicinage-level jury management staff also ask each prospective juror if they have any reason why they cannot report for service, whether related directly to Covid-19 (e.g., current diagnosis with the virus) or indirectly (e.g., underlying condition causing an elevated risk of exposure)." Requests for COVID-19 related excusals or deferrals are decided by the jury management staff.

Lourdes Figueroa, Jury Manager for Bergen County, certified that the hybrid jury selection process in this case resulted in 800 Bergen County residents receiving summonses for jury duty. Of those 800 prospective jurors, 533 responded to the summons by completing the qualifications questionnaire. 178 people did not meet the eligibility criteria to serve; 90 were excused on statutory grounds; and an additional 58 were deferred. The hybrid jury selection process resulted in an overall juror yield of 22.38 percent. No data is available about the race or ethnicity of the prospective jurors.

LEGAL ARGUMENT

POINT I

THE NEW, HYBRID JURY SELECTION PROCESS UTILIZED IN THIS CASE HAS THE POTENTIAL TO DEPRIVE CRIMINAL DEFENDANTS OF THEIR CONSTITUTIONAL RIGHT TO A JURY POOL COMPRISED OF A FAIR CROSS-SECTION OF THE COMMUNITY. THIS COURT SHOULD, THEREFORE, IMPLEMENT PROCEDURAL SAFEGUARDS TO MINIMIZE THIS RISK, SUCH AS REQUIRING ALL COVID-19 RELATED RECUSALS AND DEFERRALS TO BE DECIDED BY A JUDGE IN THE PRESENCE OF THE PARTIES AND PROVIDING THE DEFENSE DEMOGRAPHIC DATA, INCLUDING RACE AND ETHNICITY, FOR ALL PROSPECTIVE JURORS.

The state and federal constitutions guarantee criminal defendants a panoply of rights, including the right to an impartial jury selected from a jury pool that reflects the demographic composition of the geographic community served by the court. The COVID-19 public health emergency has, however, resulted in a jury selection process that has been untested in terms of its impact on racial and ethnic minorities, notwithstanding that significant concerns exist due to the disparate impact COVID-19 has had on these groups. The trial court in this case -- the first in the county and second in the state to utilize the hybrid jury selection process -- failed to acknowledge the likelihood that the jury pool would not be representative of the composition of the community and denied the defense request for discovery on this issue. Amici urge this Court to dismiss the jury that has been selected and remand the matter to the trial court for the selection of a new jury consistent with the procedures proposed below.

**A. The COVID-19 Pandemic is Likely to Alter the Composition of Jury Pools.**

As of October 5, 2020, COVID-19 has infected over 7.4 million people in the United States and killed 209,721. Johns Hopkins University & Medicine, Coronavirus Resource Center: Maps & Trends.<sup>1</sup> In New Jersey alone, cases exceed 14,349 and deaths exceed 1,787. New Jersey Department of Health, New Jersey COVID-19 Dashboard.<sup>2</sup> Notably, COVID-19 has had a particularly devastating impact on people of color, with clear racial disparities in both infection and mortality rates. Nationally, areas with concentrations of people of color have had the highest tolls of infections, hospitalizations, and deaths. Black and Latino people are more than twice as likely than their white counterparts to contract COVID-19, and more than four times as likely to require hospitalization. Centers for Diseases Control and Prevention, COVID-19 Hospitalization and Death by Race/Ethnicity.<sup>3</sup>

Consistent with the national data, statistics compiled by the New Jersey Department of Health show that COVID-19 has had a

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<sup>1</sup> Available at <https://coronavirus.jhu.edu/data/mortality> (last visited Oct. 5, 2020).

<sup>2</sup> Available at [https://www.nj.gov/health/cd/topics/covid2019\\_dashboard.shtml](https://www.nj.gov/health/cd/topics/covid2019_dashboard.shtml) (last visited Oct. 5, 2020).

<sup>3</sup> Available at <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> (last visited Oct. 5, 2020).

disproportionate impact on minorities within our state. As of October 2, 2020, Black people account for 33.69% of COVID-19 cases even though they make up only 15.1% of New Jersey's population, and Hispanic people account for 37.74% of cases even though they make up only 20.9% of the population. "Daily Confirmed Cases Summary" on New Jersey COVID-19 Dashboard.<sup>4</sup> 2,848 Black people and 3,189 Hispanic people have died from COVID-19, representing 17.98% and 20.13% of fatalities in New Jersey, respectively. "Mortalities Summary" on New Jersey COVID-19 Dashboard.<sup>5</sup> As Governor Murphy stated, "COVID-19 did not create the inequalities in our society. But, it laid them bare." Lili H. Stainton, 'We Can't Unsee' Racial Inequities in NJ Made Clear by COVID-19. What's the Plan to Address Them?, N.J. Spotlight (June 19, 2020).<sup>6</sup> Indeed, the disparity in mortality rates has been widely recognized as stemming from factors that include inferior access to health care, increasing the likelihood of high-risk underlying conditions and

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<sup>4</sup> Available at [https://www.nj.gov/health/cd/topics/covid2019\\_dashboard.shtml](https://www.nj.gov/health/cd/topics/covid2019_dashboard.shtml) (last visited Oct. 5, 2020); see also United States Census Bureau, QuickFacts: New Jersey, <https://www.census.gov/quickfacts/fact/table/NJ,US/PST045219> (last visited Oct. 5, 2020).

<sup>5</sup> Available at [https://www.nj.gov/health/cd/topics/covid2019\\_dashboard.shtml](https://www.nj.gov/health/cd/topics/covid2019_dashboard.shtml) (last visited Oct. 5, 2020).

<sup>6</sup> Available at <https://www.njspotlight.com/2020/06/we-cant-unsee-racial-inequities-in-nj-made-clear-by-covid-19-whats-the-plan-to-address-them/> (last visited Oct. 5, 2020).

higher numbers working in “essential” jobs, increasing exposure to the virus.<sup>7</sup>

The disproportionate impact of COVID-19 on minority communities is likely to exacerbate the lack of minority representation in jury pools. For example, recent polls indicate that in the wake of the pandemic, young Black and Hispanic women and older white women were among the most hesitant to appear in court in response to a summons while younger white politically conservative males were more likely to appear in court.<sup>8</sup> Similarly, a survey of 650 potential jurors in Houston and Dallas found that Black people were “30 percent more likely to qualify for a COVID-19 jury duty exemption, such as being in a high-risk

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<sup>7</sup> See, e.g., Centers for Diseases Control and Prevention, Health Equity Considerations and Racial and Ethnic Minority Group. Available at <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity> (last visited Oct. 5, 2020); William F. Marshall, III M.D., The Mayo Clinic, Coronavirus infection by race: What’s behind the health disparities?, <https://www.ncsc.org/newsroom/at-the-center/2020/national-poll-public-warming-to-idea-of-remote-court-appearances> (last visited Oct. 5, 2020).

<sup>8</sup> The National Center for State Courts commissioned a survey of 1,000 potential jurors conducted in mid-June 2020. Available at <https://www.ncsc.org/newsroom/at-the-center/2020/national-poll-public-warming-to-idea-of-remote-court-appearances> (last visited Oct. 5, 2020). The survey company reported that African Americans are “the least likely to report to the courthouse for jury duty because of health or safety reasons.” More than 80% of younger, more conservative, non-college educated white men said they would report for jury service if summoned; while only 45% - 60% of African American women, younger Hispanic women and older white women said they would report.

category or working at a hospital, than white people,” and were also more likely to face an economic hardship if required to serve as a juror during the pandemic. Mark Curriden, Harris County Juries Projected to Be Whiter, More Conservative as Pandemic Persists, Houston Chronicle (July 2, 2020).<sup>9</sup> Given that the virus is harming people of color in disproportionate numbers, and that white people and Republicans are least concerned about spreading and contracting the virus, jury pools during the pandemic are likely to not represent the community. Pew Res. Ctr., Republicans, Democrats Move Even Further Apart In Coronavirus Concerns (2020) (“The gaps between white adults’ concerns about getting or spreading the coronavirus and Hispanic and black adults’ concerns also have grown since April, as the concerns of white adults have declined while those of black and Hispanic adults have not”).<sup>10</sup>

**B. Amici Recommend Two Procedural Safeguards to Address the Risk that the Hybrid Jury Selection Process Will Result in an Underrepresentation of Minorities in the Jury Pool.**

The functioning of the hybrid jury selection process in this case raises the likelihood of a jury pool that does not reflect the demographics of the community. Cognizant of this concern, defense counsel in this case objected to aspects of the process,

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<sup>9</sup> Available at <https://www.houstonchronicle.com/business/article/harris-county-jury-whitemale-conservative-covid-15380341.php> (last visited Oct. 5, 2020).

<sup>10</sup> Available at <https://perma.cc/9JQW-YKTR> (last visited Oct. 5, 2020)

including that decisions on COVID-19 deferrals and excusals were made by Judiciary staff outside of the presence of the parties. Moreover, the defense was not provided with any demographic data about those prospective jurors who received a deferral or excusal on the basis of COVID-19 or for any other reason. Without that information, it is impossible to measure any disparate impact on minorities. Amici recommend two practical and achievable procedural safeguards to increase jury representativeness: (1) COVID-19 deferrals and excusals should be heard by a judge in the presence of the parties, and (2) the Judiciary should collect and share demographic data on prospective jurors to facilitate an analysis of minority representation in the jury pool.

**1. Requests for COVID-19 Related Excusals and Deferrals Should be Ruled on by a Judge in the Presence of the Parties with a Focus on Limiting the Number of Excusals or Deferrals to Those that are Clearly Warranted.**

The disproportionate impact of COVID-19 on racial and ethnic minorities must be considered by courts in determining requests for deferrals or excusals. As discussed above, many citizens who are fearful or susceptible will seek COVID-19 excusals, resulting in juries that are less representative of the community, as people of color are likely deterred in greater numbers from jury service. Melanie D. Wilson, The Pandemic Juror, 77 Wash. & Lee L. Rev. Online 102, 122 (2020) (recognizing that a fundamental shift in the makeup of juries because of COVID-19 is "problematic for a

fair system of justice"); see also Brandon Marc Draper, And Justice for None: How COVID-19 Is Crippling the Criminal Jury Right, 62 B.C.L. Rev. E.Supp. I.-1 (2021) (recognizing that the prevalence of white jurors during the pandemic could give rise to a fair cross-section challenge). "Because of the strong correlation between socioeconomic status and minority status, excusal rates contribute significantly to underrepresentation of minorities in the jury pool." Judge William Caprathe (ret.), et al, Assessing and Achieving Jury Pool Representativeness (noting that financial hardship, lack of transportation and lack of child care have a disproportionate impact on minorities).<sup>11</sup>

Therefore, to safeguard a defendant's right to a jury pool that contains a fair cross-section of the community, all requests for excusals and deferrals, including those related to COVID-19, should be decided by the judge in the presence of the parties. Every request should be evaluated on an individualized basis, with no across-the-board grant of requests related to COVID-19. While some COVID-19 related requests will undoubtedly result in excusal or deferral, an individualized assessment of the validity of each request will presumably reduce the number of individuals, many of whom may be minorities, who are eliminated from the jury pool.

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<sup>11</sup> Available at [http://www.ncsc-jurystudies.org/\\_\\_data/assets/pdf\\_file/0028/8389/jj\\_sp16\\_v55n02\\_caprathegorloquvamdiamond.pdf](http://www.ncsc-jurystudies.org/__data/assets/pdf_file/0028/8389/jj_sp16_v55n02_caprathegorloquvamdiamond.pdf) (last visited Oct. 5 2020)



**2. The Judiciary Should Collect Data on the Demographic Characteristics of Prospective Jurors, Including Race and Ethnicity, and Provide this Data to the Defense in Every Case.**

A second procedural mechanism to address underrepresentation of certain cognizable groups in the jury pool is for the Judiciary to provide demographic data for all prospective jurors. Challenges to the composition of the jury pool are largely reliant on data, making it impossible to evaluate the impact of the pandemic and the hybrid jury selection process on the racial and ethnic composition of the jury pool unless data is collected and shared. Under the circumstances of the pandemic, the Judiciary should, therefore, provide this information to the defense in every case.

To establish a prima facie violation of the Sixth Amendment's fair cross-section requirement, a defendant must show:

(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Berghuis v. Smith, 559 U.S. 314, 327 (2010) (citing Duran v. Missouri, 439 U.S. 357, 364 (1979)); accord State v. Ramseur, 106 N.J. 123, 215-216 (1987) (reciting this three-part test).<sup>12</sup> The

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<sup>12</sup> The United States Supreme Court has found that the fair cross-section requirement is grounded in the Sixth Amendment's guarantee of jury trial rather than the Fourteenth Amendment's Equal Protection

State may rebut a prima facie case "by a showing that a significant state interest is manifestly and primarily advanced by those aspects of the jury selection process that result in disproportionate exclusion of the distinctive group." Ramseur, 106 N.J. at 217 (citing Duren, 439 U.S. at 367-78). As such, fair-cross section challenges are heavily reliant upon data that the defense typically does have access to.

Because the data needed to demonstrate a prima facie claim is within the control of the Judiciary, courts have often been willing to provide data to the parties in relation to a fair cross-section claim. In State v. Ciba-Geigy Corp., 240 N.J. Super. 511, 513 (App. Div. 1990), the defendants requested data as to the race of individuals who had served on grand juries "as an intermediate step in gathering facts necessary to prove their entitlement to an evidentiary hearing to challenge the selection process of state grand juries." Supported by a preliminary report using the names

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Clause. See Duren v. Missouri, 439 U.S. 357, 371-72 (1979) (Rehnquist, J., dissenting). Our Supreme Court has delineated two similar, but distinct, tests regarding challenges to the composition of a jury venire for fair cross-section and equal-protection claims. State v. Coyle, 119 N.J. 194, 213-14 (1990); Ramseur, 106 N.J. at 215-217. The most significant difference is that under the equal-protection test, a defendant must show a discriminatory purpose, whereas under the fair cross-section test, a "defendant need not show purposeful discrimination but must show merely that the underrepresentation was due to systematic exclusion." Ramseur, 106 N.J. at 216. At issue here is the fair cross-section requirement, as there is no indication of a discriminatory purpose.

of grand jurors and census information, the defendants contended that African Americans and Hispanics were being systematically excluded from grand juries. Id. at 514, n.2 (describing the “geographic inference method”). The trial court granted the defendants’ request and permitted a questionnaire on court letterhead to be mailed to everyone who had served on specific grand juries. Id. at 515-16. This court affirmed, reasoning that “it would be virtually impossible for defendants who are endeavoring to ascertain if a successful attack on the grand jury selection process can be advanced if the facts necessary to prove a defect in the selection process are withheld.” Id. at 524. The court noted that defendants should show that “they have in good faith exhausted available data,” ibid., but explicitly “reject[ed] the [S]tate’s contention that defendants are entitled to the discovery they seek only if they meet the good cause standard prescribed by our courts for discovery of grand jury materials beyond that authorized by R. 3:13-3(a)(3).” Id. at 517.

Recognizing the need to provide data to guarantee a defendant’s Sixth Amendment rights, other state courts have required the Judiciary to provide data to defendants asserting fair cross-sections claims. See State v. Plain, 898 N.W.2d 801, 828-29 (Iowa 2017) (holding that “the constitutional fair cross-section purpose alone is sufficient to require access to the information necessary to prove a prima facie case” and requiring

the jury manager to provide historical data on the racial composition of juries in county); Afzali v. State, 326 P.3d 1, 3-4 (Nev. 2014) (holding that the defendant was "entitled to information relating to the racial composition of the grand jury so that he may assess whether he has a viable constitutional challenge" and directing the trial court to furnish demographic information or, if necessary, contact grand jurors to obtain it); State v. Mack, 65 So.3d 897, 900-01 (Ala. 2010) (directing the production of voter registration lists from which race and gender of members of jury venires could be ascertained); State ex rel. Garrett v. Saitz, 594 S.W.2d 606, 608 (Mo. 1980) (reasoning that the "cross-section requirement would be without meaning if a defendant were denied all means of discovery in an effort to assert that right").

Adopting similar reasoning, the United States Supreme Court has held that under the Jury Selection and Service Act of 1968, 28 U.S.C. 1861-1867, litigants have an unqualified right to inspect jury lists used in the selection of grand and petit juries. Test v. United States, 420 U.S. 28, 30 (1975) ("Indeed, without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge."). Accordingly, federal courts collect demographic data of jurors through questionnaires and provide such information to defendants when requested. See, e.g., United States v. Rodriguez, 924 F.

Supp. 2d 1108, 1114-1116 (C.D. Cal. 2013); United States v. Shine, 571 F. Supp. 2d 589, 592-93 (D. Vt. 2008); United States v. Green, 389 F. Supp. 2d 29, 43-45 (D. Mass. 2005). During this pandemic, several federal courts have granted discovery requests regarding demographic information of jurors. United States v. Holmes, 2020 U.S. Dist. LEXIS 164683, at \*9-\*11 (N.D. Cal. Sept. 9, 2020) (granting request for data on race, gender, ethnicity, year of birth, and county of residence of prospective grand jurors); United States v. Shader, 2020 U.S. Dist. LEXIS 131802, at \*5-\*6 (E.D.N.Y. July 17, 2020) (same); United States v. Williams, 2020 U.S. Dist. LEXIS 142030, at \*7 (E.D. La. Aug. 10, 2020) (granting discovery request regarding "whether the composition of the grand jury reflects the adverse impacts demonstrated by public health statistics, that is, whether the disproportionate impact the pandemic is having -- in disproportionately infecting and killing African Americans -- was reflected in the grand jury quorum").

Data is a critical component of any fair cross-section claim. With the disparate impact of the pandemic on certain cognizable groups and with the implementation of a new, hybrid jury selection process, more information is needed about the racial and ethnic make-up of the jury pool. The Judiciary should, as many other States have done, provide data on the demographics of all potential jurors.

POINT II

**THE ATTORNEY GENERAL'S OFFICE MUST NOT BE PERMITTED TO REPRESENT THE ADMINISTRATIVE OFFICE OF THE COURTS AND BERGEN COUNTY JURY MANAGEMENT WHILE ALSO SUPERVISING THE PROSECUTION OF THE MATTER IN ITS EXECUTIVE BRANCH FUNCTION.**

The Attorney General ("A.G."), as a member of the executive branch, has broad authority over the conduct of all law enforcement officials in the State and is, essentially, the lawyer for the executive branch. See, e.g., N.J.S.A. 52:17B-2, N.J.S.A. 52:17B-98, and N.J.S.A. 40A:14-181. In the capacity as the State's lawyer, the A.G. must defend a State employee for most actions committed in the scope of their employment. See Wright v. State, 169 N.J. 422, 444 (2001). In representing those employees,

[t]he Attorney-General may assign an assistant Attorney-General, a deputy Attorney-General or an assistant deputy Attorney-General to serve in any legal capacity in or for any officer, department, board, body, commission or instrumentality of the State Government . . . but such member of the Division of Law shall remain under the supervision and control of the Attorney-General while so serving . . .

N.J.S.A. 52:17A-12 (emphasis added). Thus, representing the State in various proceedings, it is clear that those attorneys remain "under the supervision and control of the Attorney-General." Id.

Given this backdrop, those attorneys cannot both supervise the prosecuting agency and concomitantly represent the Judiciary as was done in this matter. The First Canon in the New Jersey Code

of Judicial Conduct states that "an independent and impartial Judiciary is indispensable to justice" and requires the courts to "uphold" and "promote the independence, integrity and impartiality of the judiciary." This First Canon, the independence of the Judiciary, cannot be effectuated if the A.G. is supervising and controlling the litigation. In effect, the representation by the A.G. in this matter usurps the Judiciary's independence relegating that separate branch of government subordinate to the A.G.

In addition to this statutory conflict, where the A.G. is tasked with representing the Judiciary in a case such as the one at bar, it may also violate the Rules of Professional Conduct. For example, R.P.C. 1.2(A) provides, generally, that "[a] lawyer shall abide by a client's decisions concerning the scope and objectives of representation . . . ." If the Judiciary is the client, and the attorney is under the supervision and control of the A.G., how is compliance with R.P.C. 1.2(A) effectuated when the lawyer is tasked with following two masters?

Further, given that the A.G. supervises the Bergen County Prosecutor's Office, per N.J.S.A. 52:17B-98, and is also now representing the Judiciary, there is an apparent conflict of interest under R.P.C. 1.7. Pursuant to R.P.C. 1.7(a), a lawyer shall not represent a client where:

1. the representation of one client will be directly adverse to another client; or

2. there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

Additionally, R.P.C. 1.8(k) further circumscribes the conflict of interest rules in relation to public entities:

A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client.

Unlike other conflicts, this is a non-waivable conflict. R.P.C.

1.8(1). Additionally, the Second Canon in the New Jersey Code of Judicial Conduct, 2.1, provides that judges shall avoid even the appearance of impropriety. There can be no clearer conflict than the A.G.'s supervision of a prosecution while simultaneously representing those bodies tasked with formulating a jury selection process respectful of all of the litigant's constitutional rights. Put simply, it could appear that the fox is guarding the henhouse.

The Legislature, likely in recognition of these difficulties and conflicts when litigation ensnares the various branches of our government provided a solution; to wit, the appointment of "outside counsel" or "special counsel." The Legislative solution is found in N.J.S.A. 52:17A-13, which instructs that

[n]o special counsel shall be employed for the State or for or by any officer, department, board, body,



commission or instrumentality of the State Government except by authority of the Attorney-General, and then only with the approval of the Governor, and provided that appropriations have been made therefor, unless the matter be of such an emergency and shall be so declared by the Governor.

Despite what appears to be limiting language in the first clause, such counsel are routinely retained by the State for various types of litigation. See <https://www.nj.gov/oag/law/outside-counsel.htm>.

Given the obvious entanglements between the Rules of Professional Conduct, the Canons of Judicial Conduct, and the various statutes, the Attorney General's Office must be disqualified from representing the Administrative Office of the Courts and Bergen County Jury Management. Instead, this Court must order the A.G.'s Office to appoint Special Counsel for both the Administrative Office of the Courts and Bergen County Jury Management from either the general litigation list or the complex litigation list of approved special counsel. The independence of the Judiciary and the public confidence that flows from that independence demand no less.

#### **CONCLUSION**

For the foregoing reasons, amici curiae urge this Court to adopt the procedural safeguards proposed herein and order the appointment of Special Counsel for the Administrative Office of the Courts and Bergen County Jury Management.

Respectfully submitted,

JOSEPH E. KRAKORA  
Public Defender  
Attorney for Amicus Curiae

AMERICAN CIVIL LIBERTIES  
UNION OF NEW JERSEY  
Attorney for Amicus Curiae

BY: s/ Joseph J. Russo  
JOSEPH J. RUSSO  
Deputy Public Defender  
Attorney Id. No. 032151987

By: s/ Jeanne Locicero  
JEANNE LOCICERO  
Attorney Id. No. 024052000

BY: s/Alison Perrone  
ALISON PERRONE  
First Assistant  
Deputy Public Defender  
Attorney Id. No. 005741997  
First Assistant Deputy Public Defender

By: /s Alexander Shalom  
ALEXANDER SHALOM  
Attorney Id. No. 021162004

BY: s/John P. Flynn  
JOHN P. FLYNN  
Assistant Deputy Public Defender  
Attorney Id. No. 303312019