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VIA HAND DELIVERY AND ELECTRONIC FILING

The Hon. Robert M. Vinci, J.S.C.
Superior Court of New Jersey
Criminal Division
Bergen County Courthouse
10 Main Street, 3rd Floor
Hackensack, NJ 07601

**Re: State of New Jersey v. Wildermar Dancil
Indictment No. S-1020-19**

Dear Judge Vinci,

Please be advised that this Office represents Defendant Wildermar Dancil in conjunction with co-counsel, James R. Lisa, Esq.. Kindly accept this letter memorandum in lieu of a more formal brief in support of the Defendant’s Order to Show Cause presenting a challenge to the juror array pursuant to R. 1:8-3(b) and seeking relief as to the constitutional deficiencies inherent to the conduct of juror *voire dire* in a socially distanced setting.

POINT I

THE NEW JURY SELECTION PROCEDURE USED BY BERGEN COUNTY IS CON-STITUTIONALLY DEFICIENT BECAUSE IT FAILS TO PRODUCE A RANDOM POOL OF JURORS, AFFORD TRANSPARENCY IN THE SELECTION PROCESS OR ENSURE A POOL THAT REPRESENTS A FAIR CROSS SECTION OF THE COMMUNITY

Bergen County’s new jury selection process is constitutionally deficient because it has evidently failed to produce a fair cross-section of the community or equally distribute the duty of jury service upon the County’s eligible residents. As the Defense understands the situation, notices delivered to

approximately eight hundred (800) persons have only produced a pool of about two hundred (200) potential jurors even though the September 11, 2020 Notice to the Bar indicated that the new procedures should generate jury pools of 70% the pre-COVID-19 numbers. It has also come to the attention of the Defense that Jury Management has already excluded, disqualified, and dismissed many jurors based on work and child care conflicts—issues that have always been addressed by a judge and on the record in the Superior Court. The extremely limited pool available for jury selection in this case, as well as the unprecedented allocation of child care and work conflict issues to the discretion of Jury Management rather than the court, demonstrates that a that Bergen County’s procedures are deficient on their face. Accordingly, the Defendant now makes this challenge to the array pursuant to State v. Long, 204 N.J. Super 469 (App. Div. 1985), and requests that the Court either suspend jury selection and trial proceedings pending correction of the procedural deficiencies or, in the alternative, direct Bergen County Jury Manager Lourdes Figueroa to appear and testify as to the particulars and efficacy of the jury selection process.

A. GOOD CAUSE EXISTS TO CHALLENGE THE JURY ARRAY BECAUSE CONSTITUTIONAL DEFICIENCIES HAVE BEEN DISCOVERED WITHIN THE LAST THIRTY DAYS

A motion attacking the petit jury array constitutes a defense or objection capable of determination without trial and, therefore, should be made within 30 days of the initial plea. Rule 1:8-3(b). However, If the perceived defect in the array was neither discovered nor discoverable within 30 days of entry of the plea, the court may enlarge the time for good cause shown. State v. Long, 204 N.J. Super. 469, 483 (App. Div. 1985).

In the present case, recent information discloses a defect of constitutional magnitude in the County’s new jury selection protocols which encourage jurors to submit eligibility questionnaires

through an electronic portal and investigate remote access capabilities. These new procedures have resulted in the elimination of roughly 75% of the jury pool, leaving a substantially smaller than anticipated array. Because this case will be among the first new jury trials in the State (if not the first) since the outbreak of the COVID-19 pandemic, and because information regarding the significantly diminished jury pool has only just been made available to the Defense, there is good cause to enlarge the time period set forth under Rule 1:8-3(b) and permit this challenge to the array.

B. THE NEW JURY SELECTION PROCESS IS NON-RANDOM BECAUSE RELIANCE ON ELECTRONIC SUBMISSIONS AND REMOTE PROCEDURES EXCLUDES OTHERWISE ELIGIBLE JURORS WHO ARE OLDER IN AGE OR OF LOWER ECONOMIC CLASS

The process of selecting a venire is as sacrosanct as the right to trial by jury. That process not only implicates the criminal defendant’s State Constitutional right to trial by an impartial jury, but also our collective societal interest in due process of law.

It is vital that juries be selected in a manner wholly free from taint and suspicion. Proper jury selection is an integral part of the judicial process to which every criminal defendant has a fundamental right.” State v. Wagner, 180 N.J. Super. 564 (App.Div. 1981). It goes to the heart of a fair and impartial trial and transcends even the accused's personal interest in a just trial. It fulfills society's concern in a rational course of justice precluding arbitrary action and deprivation of life or liberty save by due process of law.

[Long, supra, 204 N.J. Super. at 483 (internal citations retained)]

A criminal defendant is entitled to a jury pool randomly selected from a list of county residents. The jury pool selection process must spread the burden, obligation, duty and privilege of jury service evenly across the eligible population. State v. Long, 204 N.J. Super. 469, 484-485 (N.J. Super. 1985). It must also “produce a fair cross-section of the community” in the jury pool. Ibid.

The jury pool must be selected using a “pure random” process, whereby each person who might

be called upon to serve his or her civic duty has an equal chance of selection. Long, supra, 204 N.J. Super. at 483-84 (discussing the “pure random” jury selection process laid out in N.J.S.A. §§ 2A:71-3, -3.1). But “random” selection “is only half a definition.” Id. at 484. The selection process must also “produce a pool of jurors that truly reflect community standards...” Id. at 485.

In the landmark decision of State v. Long, the Appellate Division invalidated the “benign but flawed” jury selection process used by the Atlantic County Jury Commission as defective under the New Jersey and Federal Constitutions. The process then in use by Atlantic County compiled a master list of potential jurors by running magnetic tapes containing the lists of the county’s licensed drivers and registered voters through “match-merge” program to produce an alphabetical list containing all licensed drivers and registered voters in the county. Id. at 475. The program was flawed, and produced a master list of about 180,000 names for a county with only 130,000 eligible jurors. Ibid.

When jury pools were needed, the County’s data processing clerk would run the master list through another program designed to select names from the list at predetermined intervals. The clerk of the jury commission would then manually “scrub” the short-list of randomly selected jurors to eliminate duplicate entries, entries with incomplete address information, and unintelligible names. Id. at 476. All persons not “scrubbed” by the clerk would be mailed jury questionnaires. Ibid. The clerk would also receive completed questionnaires, and examine them to further eliminate prospective jurors who were ineligible for service. Ibid. Each questionnaire received from an eligible juror would then be filed in alphabetical order and provided to the jury commissioners, who would manually divide the file into a pool of qualified grand jurors and a pool of qualified petit jurors using an “interval” selection process. Id. at 477.

Lists of qualified grand and petit jurors were then recorded magnetic tapes, and reorganized according to the alphabetical order of the fifth letter in the last name, fourth character in the address, and

second number of the driver's license. This randomized list would then be used to issue notices to jurors.

The problems with Atlantic County's jury selection process were several fold. First, the "merge-match" program used to compile a master list from registered voters and licensed drivers produced 50,000 duplicate entries. Second, the intervals used to select jurors from the master list were too large and constant; multiple runs of the list would produce the 50th name, the 51st name, the 52nd name, and so on. As a result, family members were frequently called for jury duty in the same pool:

For example, the November 1983 panel had a total of 110 jurors of which two, Morris and Freida Cohen, live at the same address. This is a frequent occurrence even though in a "random" system the odds of it occurring even once are infinitesimal.

[Long, *supra*, 204 N.J. Super. at 479, fn. 1]

Third, by randomizing the qualified juror lists according to the fifth letter of each jurors' last name, the selection process unintentionally produced jury pools skewed towards particular ethnicities. For example, the court noted that persons with Jewish last names comprised an inordinate portion of one panel, persons with apparently Italian names comprised nearly 30% of another, and that 10% of another panel all had the surname "Williams." *Id.* at 480.

The Appellate Division struck down Atlantic County's jury selection process, finding that it was "decidedly non-random." *Id.* at 485. The appellate panel went on to define a "random" system as one that "provides pools of jurors that comprise a representative cross section of the community selected in a manner that gives each person an equal chance to be selected, and which spreads the burden of service evenly among the eligible populace." *Id.* at 486, fn. 9.

By producing a master list that contained upwards of 50,000 duplicate entries, the existing system made it more likely that a registered voter who had a driver's license would be called for jury duty than a licensed driver who was not registered to vote or a registered voter who did not have a

diver's license. Id. at 486. Additionally, the use of larger than necessary intervals, requiring multiple run-throughs of each list, compromised the system's ability to produce a fair cross-section of the community by producing jury pools largely consisting of similar ethnic groups and, in far too many cases, containing members of the same family. Id. at 479, fn. 1, 480, 486. The cumulative result of these failures was a substantial departure from the requirement of a "random" jury selection process.

Although the court did not find that the Atlantic County Jury Commission discriminated against a cognizable class or caused actual prejudice to any defendant, it explained that neither need be shown to invalidate a jury selection system that is demonstrably non-random. Id. at 486.

In the present case, the remote jury selection process recently implemented by Bergen County is also "non-random," as demonstrated by the elimination of approximately 75% of the pool who did not complete jury questionnaires. In the same way that the fifth-letter alphabetization technique discussed in Long resulted in panels consisting heavily of Jewish or Italian ethnic groups, Bergen County's implementation of electronic notifications, electronic jury questionnaire submissions, and zoom-based *voire dire* has limited an entire socio-economic group's participation in jury service. Those who cannot afford a computer are eliminated from jury service because they cannot submit questionnaires. Others who cannot afford internet service are prevented from appearing at the initial stages of jury selection by zoom. Furthermore, those who lost their jobs during the pandemic and never had a need to learn how to participate in a Zoom conference are at a technological disadvantage

The unemployed and elder portions of the prospective jury pool are similarly impacted by the County's shift to use of electronic procedures. Those eligible jurors who adapted to work-from-home in the wake of the COVID-19 pandemic may be familiar with the Zoom application by now, but many of those individuals—attorneys and judges included—spent hours learning how to operate that program through organized training sessions and real-world trial and error. But unemployment in the United

States has reached its highest levels since the great depression, and unfamiliarity with the Zoom application is clearly a hurdle to a significant number of otherwise-eligible jurors who failed to report for jury service. The Jury pool cannot represent a true “cross-section” of the Bergen County community if these demographic groups are excluded.

Bergen County’s methodology is also “non-random” due to an oversampling of economically-privileged, youthful jurors in the jury pool. Just as the flawed “match-merge” program from Long increased the likelihood of selecting individuals who had both a voter registration and a driver’s license, Bergen County’s focus on remote and electronic procedures substantially increases the likelihood that the jury pool will consist of individuals who are both younger in age and more economically secure. If Bergen County’s present system is set up in such a way that jurors who (a) lack internet access or (b) are not computer literate may be unable to participate, then those jurors who either have internet access or a familiarity with computers are more likely to be empaneled. The jurors most likely to be empaneled are those who have both internet access and a familiarity with computers.

The current jury selection system fails to meet either end of the “randomness” definition presented by the Long court. Because potential jurors who lack the ability to participate in remote or electronic means are eliminated from the pool, the system does not afford every eligible juror on the County’s master list an equal chance to be selected for a jury panel. Moreover, as the process eliminates persons on the lower end of the socio-economic spectrum or and older age groups, it fails to provide an adequate cross-section of the County community. Either of these issues should fail under the analysis set forth in Long, and their cumulative effect produces a “decidedly non-random” jury pool.

C. ADDITIONAL TRANSPARENCY IS NECESSARY DURING THE COVID-19 PANDEMIC BECAUSE PORTIONS OF THE JURY SELECTION PROCESS IS CLOSED TO THE PUBLIC

Transparency in the jury selection process is especially important during these unprecedented

times because public health restrictions imposed to combat the COVID-19 pandemic have all but eliminated constitutionally-mandated public access to *voire dire* proceedings.

Voire dire, as a critical phase of the trial, is required to be conducted as a public proceeding from which the public and media are not to be denied access. R. 1:8-3(g), State v. Cuccio, 350 N.J. Super. 248 (App. Div.), certif. denied, 174 N.J. 43 (2002), see also Waller v. Georgia, 467 U.S. 39 (1984), (noting that a criminal defendant needn't prove prejudice to obtain relief for a violation of his or her 6th Amendment right to a public trial). R. 1:8-3(g) was made effective September 1, 2013 and provides greater emphasis to the existing requirement that public access be provided during *voire dire*. Although there may be situations in which it's appropriate to exclude non-jurors from the courtroom, public access to jury selection proceedings is afforded both by the Defendant's right to a public trial under the 6th Amendment to the United States Constitution and article 1, ¶10 of the New Jersey Constitution, as well as the public's right to attend trials under the 1st Amendment to the United States Constitution and article 1, ¶6 of the New Jersey Constitution. In circumstances where a countervailing public interest warrants closure of jury selection proceedings to the public, the court should consider alternatives to closure or other means to offset the elimination of public access. See Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984).

In the instant case, this Defendant has been denied his right to a public trial under the 6th Amendment to the United States Constitution and article 1, ¶10 of the New Jersey Constitution. Furthermore, the public has been denied the right to attend trials under the 1st Amendment to the United States Constitution and article 1, ¶6 of the New Jersey Constitution. Defendant understands the decision to limit public and media access is made in order to reduce the spread of COVID-19, but submits that the jury selection process must be made more transparent to make up for that change. But the current selection process because it has been less transparent than pre-COVID-19 proceedings in that Jury

Management has undertaken determinations as to the exclusion, dismissal and disqualification of potential jurors, which decisions generally left to the court in proceedings conducted on the record.

Defendant submits that the Court must craft a remedy to address the constitutional rights that have been abridged by present public health restrictions, and accommodate both the Defendant's right to a public trial as well as the public's access to trial proceedings. Decisions that were previously made by a judge and addressed on the record should continue to be handled by the court and addressed on the record in the presence of the Defendant and his Counsel. Furthermore, public access to these proceedings should be provided by live-streaming or other alternatives to in-person public attendance. Absent an appropriately crafted remedy, the Defendant's right to a public trial and the public's right to access trial proceedings have been violated.

D. THE COURT SHOULD ORDER THE JURY MANAGER TO APPEAR AND TESTIFY AS TO THE PROCEDURES REGARDING JURY QUESTIONNAIRES AND EFFICACY OF THE NEW SELECTION PROCESS

Because the jury selection process does not pass muster under the New Jersey Constitution or United States Constitution, the court should sustain Defendant's objection to the petit jury array and suspend jury selection until the constitutional deficiencies have been investigated and corrected.

As occurred in State v. Long, this Court should permit an investigation into the efficacy of jury selection procedures under the new system. Furthermore, the Court should require Bergen County Jury Manager, Lourdes Figueroa, to appear and produce the jury questionnaires now in use under the new system, as well as to testify regarding the procedures and efficacy of the same, as well as the demographic cross-section the new process has produced. Defendant further requests the right to discovery of the juror list, juror questionnaires, and the right to present lay witness and expert testimony regarding the efficacy of new jury selection procedures.

POINT II

VOIRE DIRE IN A SOCIALLY-DISTANCED SETTING IS UNCONSTITUTIONAL AS IT OBSCURES THE JURORS' VIEW OF THE DEFENDANT AND PREVENTS COUNSEL FROM ASSESSING CREDIBILITY OF JURORS DURING VOIRE DIRE EXAMINATIONS

Jury *voire dire* conducted in conformity with social distancing guidelines will not satisfy constitutional requirements for a criminal trial, as the jurors will not be able to clearly observe the Defendant from the back of the room and Defense Counsel will be unable to observe the demeanor of jurors to judge credibility during examinations.

At least one New Jersey court has held that the jury's line-of-site to a criminal defendant, and defense counsel's ability to observe the jury, is an issue of constitutional magnitude. In 2016, the Appellate Division issued a remand on a declaratory judgment finding Court Room 2 in the Warren County Courthouse constitutionally adequate for the conduct of criminal jury trials. In Re: Vicinage 13 of the New Jersey Superior Court, 454 N.J. Super 330 (App. Div. 2018). The case arose on February 6, 2012, when defense counsel objected to conducting a jury trial in the court room due to design issues that included the positioning of the jury box behind counsel table and the presence of load-bearing columns that obstructed the view between counsel table and the jury box as well as the defendant's view of the witness stand. Id. at 335. The trial court sustained the defendant's objection, and detailed the design flaws that rendered the court room unconstitutional for criminal jury trials. Ibid.

The Warren County Freeholders then filed a lawsuit against the Administrative Office of the Courts, which subsequently resulted in a settlement providing for modification of Court Room 2's layout, and Warren County's motion for entry of a declaratory judgment that found the revised layout

constitutionally adequate for conducting jury trials. The Office of the Public Defender opposed the judgment on the basis that the revised layout of Court Room 2 remained inadequate for criminal jury trials and that the layout had not be revised to the full extent called for in the settlement agreement. However, the trial judge determined that the Office of the Public Defender lacked standing to participate in the action. The Public Defender appealed.

On appeal, the Appellate Division determined that the Office of the Public Defender did, in fact, have standing to participate in the action for a declaratory judgment:

In a different context we have said a litigant must "raise the constitutional rights of a third party when the third party's rights are likely to be diluted or adversely affected unless they are raised by a plaintiff holding a confidential relationship with the third party." Stubaus v. Whitman, 339 N.J. Super. 38, 51 (App. Div. 2001) (citing In re Estate of Neuwirth, 155 N.J. Super. 410, 419 (Cty. Ct. 1978)). It is the OPD's voice that speaks to the due process rights of indigent criminal defendants. To exclude it from the process would be contrary to both substantial justice for the agency's clients as well as principles of sound judicial administration. See Salorio, 82 N.J. at 491.

[In Re; Vicinage 13, 454 N.J. Super. at 339]

The Panel remanded the matter to the trial court for further proceedings, and recommended the appointment of a special master to conduct hearings and appoint experts, noting that “[t]he question of whether Courtroom No. 2 passes constitutional muster demands a more comprehensive examination.” Id. at 343.

In the instant case, the court must address the constitutional efficacy of conducting *voire dire* in a manner that poses the same sort of obstacle identified in Court Room 2 of the Warren County Courthouse. Much as a defendant and his counsel could not clearly see the entire jury in Court Room 2 because of a load-bearing column, the Defendant in this case cannot clearly see jurors seated in the rear of the court room in the Bergen County Courthouse. Nor will Counsel be able to clearly view the

demeanor of individual jurors in order to gauge their demeanor and responses to *voire dire* examination, particularly where the jurors are wearing face coverings. Indeed, *hearing* is likely to be problematic in the largest of the criminal courtrooms in the Bergen County Courthouse.

Although the purpose of *voire dire* is to probe the venire rather than to persuade, jury selection remains the eventually-empaneled jurors' first introduction to the defendant and his or her counsel. It is also the *only* opportunity that the defendant and his or her counsel have to feel out each of the jurors and choose to exercise preemptory challenges. If defendant, defense counsel and jurors cannot see each other clearly and cannot understand each other without raised voices, it becomes impossible to adequately judge a juror's demeanor during *voire dire*, and increases the likelihood that less than impartial jurors will slip through the safety net provided by preemptory challenges.

Accordingly, Defendant submits that the jury selection process is constitutionally deficient in a socially-distanced courtroom setting, and that jury trial proceedings should be stayed in this matter until normal jury selection proceedings may resume without social distancing.

In conclusion, by virtue of the foregoing arguments and authorities, the Defense respectfully submits that this court should grant its Order to Show Cause presenting a challenge to the juror array pursuant to R. 1:8-3(b) and seeking relief as to the constitutional deficiencies inherent to the conduct of juror *voire dire* in a socially distanced setting.

Respectfully Submitted,

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/s/ Peter Michael

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/s/ James R. Lisa

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