

STATE OF NEW JERSEY,

Plaintiff/Respondent,

v.

OMAR VEGA-LARREGUI,

Defendant/Appellant

SUPREME COURT OF NEW JERSEY

DOCKET NO.: 085288

MOTION TO DISMISS INDICTMENT AND ON
DIRECT CERTIFICATION PURSUANT TO
RULE 2:12-1 FROM THE SUPERIOR COURT
OF NEW JERSEY, CRIMINAL LAW
DIVISION, MERCER COUNTY

Indictment No.: MER-20-07-0221-I

Below Dkt. No.: MER-19-002952

**BRIEF OF AMICUS CURIAE THE ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS OF NEW JERSEY**

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PRELIMINARY STATEMENT¹

In times of challenge, Americans do not jettison constitutional principles; we cling more closely to them. That has been the source of our nation's strength for 244 years, through times of war and times of peace, times of calm and times of crisis, issues of magnitude and the more mundane.

By judicial order, and without the legislative action that has directed all other aspects of the traditional in-person Grand Jury system in our state, the constitutionally guaranteed right to indictment by Grand Jury has been suspended and replaced with a virtual process that both prosecutors and defense lawyers alike have publicly characterized as unconstitutional. Prosecutors have been forced to carry out their obligation to enforce the laws of our state utilizing a process that they state is "a Constitutional mistake that can be avoided by holding socially distanced, in-person Grand Juries in larger venues." See *Virtual Grand Juries Are a Constitutional Mistake Which Threaten the Rights of All New Jerseyans*, County Prosecutors Assoc. of New Jersey (July 9, 2020), available at <https://www.almcms.com/contrib/content/uploads/documents/399/46336/CPANJ-Final.doc> (date last accessed Jan. 27, 2021 (Aa69)). The objections of the defense bar have been similarly ignored, and a once optional program has been forced upon

¹ "Aa" refers to *Amicus Curiae* Association of criminal Defense Lawyers of New Jersey's appendix.

defendants. History does not provide a recent example of an issue that has unified the criminal defense bar and prosecutors in this way. Yet, to date, the judiciary has acted unilaterally to upend the Grand Jury system without regard to the rights of defendants and the legitimate, publicly expressed concerns of prosecutors.

The COVID-19 pandemic is no doubt a once-in-a-lifetime crisis. It has impacted nearly all aspects of life in our state and, indeed, the world. However, no public health crisis should result in the suspension and abrogation of fundamental constitutional rights. Our system is built to withstand such a challenge, and has historically done so. We have weathered storms without compromising civil rights before, and we can do so this time once again. While the public health crisis that we now face from COVID-19 is like no other, now is not the time to abandon the basic values and standards that, until this virus struck, have historically made New Jersey a shining example of what it means to provide liberty and justice for all. No generic judicial rule-making authority should allow one co-equal branch of government to undue a substantive right enshrined in our state's constitution and set into motion through comprehensive legislative action.

By suspending in-person Grand Juries and allowing only a virtual imposter in New Jersey, fundamental rights have been taken away from the most vulnerable and helpless people in our society. These words are pointed, but necessary and true given the context

in which this matter comes before the Court. Worse yet, if a fundamental right found directly within the text of our state's constitution can be rendered meaningless with the stroke of a pen due to a crisis, what is the limit on such authority? The attack from within on our Grand Jury system is a harbinger for the additional deterioration of constitutional rights in our state if this grave injustice stands.

The New Jersey State Constitution guarantees that "[n]o person shall be held to answer for a criminal offense, unless on the presentment or indictment of a Grand Jury[.]" N.J. Const., art. I, ¶ 8. Building upon that fundamental right, the Legislature has prescribed a statutory framework for virtually every conceivable facet of our Grand Jury system. That right has been rendered meaningless, and the scores of vulnerable, presumed innocent criminal defendants that rely upon the Grand Jury process as the initial checking force on the awesome power of the State to take away their liberty has been lost for the sake of expediency.

History will not judge this period kindly if this mistake is not immediately corrected. The Supreme Court now has the opportunity to do just that, and the Association of Criminal Defense Lawyers of New Jersey ("ACDL-NJ") is grateful for the opportunity to appear in this matter as a friend of the Court.

STATEMENT OF INTEREST FOR
THE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS - NEW JERSEY

The ACDL-NJ is a non-profit corporation organized under the laws of New Jersey to, among other purposes, "protect and insure by rule of law, those individual rights guaranteed by the New Jersey and United States Constitutions; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance, to promote justice and the common good." *ACDL-NJ By-Laws*, Article II(a). A proper resolution of the issues raised in this case is of great concern to the approximately 500 members of the ACDL-NJ who are committed to the appropriate development of the law with respect to issues that affect individual rights.

The issues now before the Court regarding the constitutionality of the virtual Grand Jury process are of tremendous public importance, and of particular importance to the ACDL-NJ, as this Court's decision will affect many future criminal defendants and their counsel. The pending motion implicates a fundamental constitutional right of every presumed innocent, criminally accused person in New Jersey.

RELEVANT FACTUAL AND PROCEDURAL HISTORY²

A. Defendant Omar Vega-Larregui is Indicted by a Virtual Grand Jury

On August 22, 2019, Mr. Vega-Larregui was arrested. On August 24, 2019, Mr. Vega-Larregui was released from custody on his own recognizance. (Aa5).

On July 9, 2020, Mr. Vega-Larregui was indicted by a virtual Grand Jury, alleging that there was probable cause he committed the following criminal offenses: (1) third degree possession of a controlled dangerous substance in violation of N.J.S.A. 2C:35-10(a)(1); (2) second degree possession of a controlled dangerous substance with intent to distribute in violation of N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(2); (3) second degree possession of a controlled dangerous substance with intent to distribute on or near a public facility in violation of N.J.S.A. 2C:35-7.1(a), N.J.S.A. 2C:35-5(a)(1), and N.J.S.A. 2C:35-5(b)(2); and (4) fourth degree obstructing the administration of law or other governmental function in violation of N.J.S.A. 2C:29-1(a). The State did not obtain Mr. Vega-Larregui's consent prior to presenting his case to a virtual Grand Jury during the Mercer County virtual Grand Jury pilot program. Although he was not detained, the State inexplicably pursued a mechanism that was presented at first as a

² The ACDL-NJ also incorporates by reference here the factual background placed before the Court by Mr. Vega-Larregui's counsel.

means by which to ensure due process for incarcerated defendants unable to get their cases moving because of the pandemic.

On November 11, 2020, Mr. Vega-Larregui filed a motion to dismiss the indictment, challenging, among other things, the constitutionality of the virtual Grand Jury proceedings, as authorized by this Court's order dated May 14, 2020, and modified by subsequent orders. On December 21, 2020, the trial court entered an Order granting the ACDL-NJ leave to appear as *amicus curiae* in the underlying matter. (Aa9).

On January 4, 2021, the ACDL-NJ filed its brief in accordance with the trial court's briefing schedule. On January 13, 2021, before any responsive briefing by the State or argument at the trial court level, this Court directly certified Mr. Vega-Larregui's motion to dismiss pursuant to R. 2:12-1 of the Rules Governing the Courts of the State of New Jersey, which allows the Supreme Court, to *sua sponte* ". . . certify any action or class of actions for appeal." Pursuant to this Court's January 13, 2021 Order, review is limited to Mr. Vega-Larregui's constitutional challenges to the indictment returned by a **virtual** Grand Jury. (Aa2).

B. The Supreme Court Suspends Grand Jury Selection and Cancels Grand Jury Sessions in Response to COVID-19

On March 17, 2020, in response to the COVID-19 pandemic, the Supreme Court issued an initial Order suspending Grand Jury

selection and canceling all Grand Jury sessions. (Aa11). On April 24, 2020, the Supreme Court issued its Second Omnibus Order continuing the statewide suspension of Grand Jury selection and sessions through May 31, 2020. (Aa12).

C. The Virtual Grand Jury Pilot Program Originally Required a Defendant's Consent

On May 14, 2020, the Supreme Court issued yet another Order authorizing the Acting Administrative Director of the Courts ("Director") and Assignment Judges in New Jersey's various counties to take steps to implement virtual Grand Jury proceedings (the "Virtual Grand Jury Program"). (Aa28). The May 14, 2020 Order stated that "[c]ases shall be presented to a Grand Jury operating remotely **only with the consent of the defendant to proceed in a remote format.**" (Aa32 (emphasis added)). It also ordered, "[c]onsent shall be memorialized in a form promulgated by the Director." (*Id.*). Quickly, the consent requirement for participation in the Virtual Grand Jury Program disappeared without explanation. One can only surmise that no defendants, even those locked away in COVID-19 infested county jails, consented to the proposed alternative to the genuine form of in-person Grand Jury presentation.

D. The Virtual Grand Jury Program, as Modified on June 4, 2020

On June 4, 2020, after criminal defendants refused to consent to virtual Grand Jury proceedings, the Court issued yet another

Order. (Aa34). The Court modified its May 14, 2020 Order and eliminated the requirement that a criminal defendant's written consent be obtained prior to presenting a case to a virtual Grand Jury. (Aa35).

The Director publicly stated that the Virtual Grand Jury Program would focus on a small number of cases that involved "less serious offenses" only, specifically third- and fourth-degree charges. See Glenn A. Grant, J.A.D., *Virtual Grand Juries?* New Jersey Law Journal (June 16, 2020), available at www.law.com/njlawjournal/2020/06/16/virtual-grand-juries/ (last accessed Jan. 27, 2021) (Aa74). The Director also stated that the purpose of the Virtual Grand Jury Program was to address the "1,611 defendants now held in custody [and] awaiting Grand Jury action." *Id.* By distinguishing between degrees of crimes, the detention status of the defendant, as well as originally requiring consent from the defendant, it is undeniable that the Director and the AOC acknowledged a clear difference between virtual and in-person Grand Jury proceedings. Otherwise, there would be no need to draw such distinctions. In a legal system that is supposed to provide equal protection under law for all, these early efforts to single out certain categories of crimes for participation in the flawed virtual Grand Jury process, while excluding other categories of crimes, are a microcosm for some of the constitutional deficiencies inherent in New Jersey's virtual Grand Jury program.

E. Public Criticism of Virtual Grand Jury Proceedings by Prosecutors

On or around July 9, 2020, the County Prosecutors Association of New Jersey ("CPANJ") issued a public statement aptly entitled, "Virtual Grand Juries Are a Constitutional Mistake Which Threaten The Rights of All New Jerseyans," ("CPANJ Public Statement"). (Aa69). In the CPANJ Public Statement, the chief law enforcement officers of each of New Jersey's 21 counties collectively expressed grave constitutional concerns regarding the proposed use of virtual Grand Juries without reservation.

Recently, after the Supreme Court certified direct appeal of the constitutional challenge to the virtual Grand Jury process, a media representative speaking for the AOC attempted to publicly suggest that "there is clearly support [for virtual Grand Juries] if that many prosecutor's offices are participating to that extent in a volunteer program." Charles Toutant, *Jersey Lawyers Participate in Virtual Grand Jury Trials—But Don't Assume They're Fans*, *New Jersey Law Journal* (Jan. 21, 2021), <https://www.law.com/njlawjournal/2021/01/21/jersey-lawyers-participate-in-virtual-grand-jury-trials-but-dont-assume-theyre-fans/> (last access Jan. 27, 2021) (Aa77). Immediately, CPANJ refuted that narrative, and the current CPANJ President, Hudson County Prosecutor Esther Suarez, publicly stated, "[o]ur position has been and remains that there are constitutional issues related

to virtual grand juries that may be compromised and need to be addressed by the courts." *Id.*

The President of CPANJ at the time of the CPANJ Public Statement was Angelo J. Onofri, the Mercer County Prosecutor. Mr. Onofri's office is responsible for securing the virtual indictment of Mr. Vega-Larregui at issue here. Furthermore, Mr. Onofri reportedly issued at least one more public statement on his own at or around this same time, just days removed from Mr. Vega-Larregui's virtual indictment, where he reportedly told a journalist covering the virtual Grand Jury Pilot Program, "[w]e've had several examples here where the grand juror has either dropped off completely or they couldn't hear a witness's testimony, and that's very concerning to us because the Grand Jury panel isn't getting the entire flavor for the case[.]" See Joe Hernandez, *Zoom grand juries continue in N.J. despite backlash from prosecutors, defense attorneys*, WHY Y (July 15, 2020), <https://whyy.org/articles/zoom-grand-juries-continue-in-n-j-despite-backlash-from-prosecutors-defense-attorneys/> (last accessed Jan. 27, 2021) (hereinafter cited to as the "July 15, 2020 WHY Y Article") (Aa80).

The Mercer County Prosecutor's Office is certainly not to blame for the unconstitutional Virtual Grand Jury Program in New Jersey; it was left with no choice but to utilize it. However, early calls for its abolition by the chief executive of the Mercer

County Prosecutor's Office and his colleagues from the remaining New Jersey counties, all frontline stakeholders, speaks volumes about the slipshod manner in which the program was deployed and implemented. Mr. Vega-Larregui was entitled to better than that.

F. Subsequent Orders Concerning Virtual Grand Juries

On July 24, 2020, the Court issued its Seventh Omnibus Order. (Aa36). The Court ordered that "[j]urors will be summoned for new Grand Jury selections starting on or after September 21, 2020, with those selections to be conducted in virtual format consistent with the Court's June 9, 2020 Order." (Aa37).

On September 17, 2020, the Court issued its Eighth Omnibus Order. (Aa45). It states that "[j]urors have been summoned for new Grand Jury selections starting on September 29, 2020 (in Passaic County) and expanding statewide by the end of October 2020." (Aa46).

On October 8, 2020, the Court issued its Ninth Omnibus Order. (Aa53). It stated that all counties have been summoned for new Grand Jury selections, which would be done virtually. (Aa55). In what was billed at the time as a recognition of the inherent controversy surrounding virtual Grand Juries and the numerous issues in pilot program counties, the Order authorized Assignment Judges and County Prosecutors to convene in-person Grand Jury panels in court facilities consistent with social distancing and other health precautions. (Aa55). It also permitted county

prosecutors to submit a proposal to conduct Grand Jury sessions in a non-Judiciary location. (Aa55).

However, on November 16, 2020, in response to the rising cases of COVID-19 in New Jersey as part of the virus' so-called "second wave" in the state, the Court issued another Order once again suspending all in-person Grand Jury sessions. (Aa63). It also stated that existing virtual Grand Jury panels may continue to convene in a virtual format. (*Id.*).

Since the November 16, 2020 Order, county prosecutors have had no choice but to present cases to virtual Grand Juries if they want to present a case. It is now within the exclusive discretion of prosecutors to determine which cases are to be presented and which cases will be held for hopeful future presentation to an in-person Grand Jury. That disparity in cases selected for virtual presentment, coupled with the inherent problems noted with the process itself by all sides, warrant an immediate and unequivocal determination from this Court that virtual Grand Jury presentment may not occur in the absence of the consent by the defendant, and that dismissal of the indictment against Mr. Vega-Larregui is warranted.

LEGAL ARGUMENT

The current manifestation of the Virtual Grand Jury Program, as modified on June 4, 2020 to allow virtual presentment even in the absence of consent from the defendant, deprives criminal

defendants of their constitutionally guaranteed rights. Consequently, for the reasons specified below, the virtual indictment returned against Mr. Vega-Larregui – who did not consent to being subjected to the highly flawed Zoom platform – must be dismissed. Furthermore, the ACDL-NJ is calling for an immediate, statewide moratorium on the use of virtual Grand Juries until such time as the Virtual Grand Jury Program is modified to require a criminal defendant's consent prior to presentment to a virtual Grand Jury. No emergency, including the COVID-19 pandemic, justifies the suspension of fundamental rights.

POINT I

ABSENT THE REQUIREMENT OF CONSENT, THE VIRTUAL GRAND JURY PROGRAM IS CONSTITUTIONALLY DEFICIENT AND VIOLATES A DEFENDANT'S CONSTITUTIONAL RIGHT TO A FUNDAMENTALLY FAIR GRAND JURY PROCEEDINGS

One of the most basic precepts of our criminal justice system is an individual's right to an indictment by Grand Jury. In New Jersey, the right to indictment by Grand Jury is not simply an aspirational objective or some sort of prosecutorial best practice, it is a specifically enumerated fundamental right enshrined in our state's constitution. See N.J. Const. art. I, ¶8.

Due process requires that the constitutionally guaranteed Grand Jury process be fundamentally fair. See *State v. Shaw*, 241 N.J. 223, 239 (2020) (stating, in the context of Grand Juries, that fundamental fairness is an integral part of due process); See

also *State v. Miller*, 216 N.J. 40, 71 (2013) ("The doctrine of fundamental fairness is an integral part of due process, and is often extrapolated from or implied in other constitutional guarantees." (internal quotation marks and citations omitted)).

This doctrine of fundamental fairness "serves to protect citizens generally against unjust and arbitrary governmental action, and specifically against governmental procedures that tend to operate arbitrarily." *Doe v. Poritz*, 142 N.J. 1, 109 (1995) (internal quotation marks and citations omitted). In short, as reflected in the CPANJ Public Statement decrying the use of virtual Grand Juries, the Grand Jury process is more than just a rubber stamp for prosecutorial action in New Jersey, and must comport with basic notions of fairness in order to pass constitutional muster. See CPANJ Public Statement ("[A] Grand Jury represents a crucial Constitutional protection for a defendant and an important check on prosecutorial discretion, assuring a person is not unfairly charged unless a majority of the jurors determine there is probable cause to believe that a crime was committed.") (Aa69).

An indictment thrusts an individual into the criminal justice system. While legally the indictment may only represent a finding of probable cause to proceed, leaving the question of guilt or innocence to the trial, the irreparable harm to one's life as a result of a criminal indictment cannot be overstated. In many instances, a mere indictment results in reputational and economic

ruin and the loss of liberty, even well before conviction. In many ways, that is antithetical to the presumption of innocence. Therefore, it is vital that every measure is taken to ensure that Grand Jury proceedings are fundamentally fair and result in just, warranted outcomes conducted within the appropriate legal framework.

Virtual Grand Juries, by their very nature, represent an inherently unfair process, devoid of the protections intended to preserve the integrity of Grand Juries. On this point, prosecutors and the criminal defense bar are in total agreement. See CPANJ Public Statement ("Proceeding in this fashion would be a mistake that will compromise the Constitutional and social justice rights of defendants, victims and jurors.") (Aa70).

The virtualization of the Grand Jury process by judicial fiat, against the objections of prosecutors, and without the consent of the defendant, is fundamentally unfair and deprives the accused of their basic constitutional right to an indictment by a Grand Jury for several reasons. Initially, by their very nature, large segments of the population are eliminated, *ab inito*, from serving on virtual Grand Juries, preventing a fair cross-section of the community from Grand Jury service and skewing the demographic background of the virtual panel members along socioeconomic lines. The so-called "digital divide" is an existential threat to Grand Jury composition. Additionally, the removal of the Grand Jury

process from secure, Court-supervised facilities and careless placement of this sacred process into homes and other unknown locations where virtual Grand Jurors might "dial in" their service, results in a loss of Grand Jury secrecy. Secrecy is a cornerstone of the Grand Jury process that protects both defendants and prosecutors alike. Finally, as demonstrated by the public statements of the Mercer County Prosecutor at or around the time of Mr. Vega-Larregui's indictment, technological issues necessarily arise in a virtual format that impugn and undermine the integrity and effectiveness of the virtual Grand Jury proceeding altogether. See July 15, 2020 WHYI Article (Aa80).

A. Virtual Indictments Deprive Defendants of Due Process and Their Right to Indictment by Grand Juries Drawn From a Fair Cross-Section of the Community

The right to indictment by Grand Jury has been interpreted by the New Jersey Supreme Court to unequivocally include the right to be indicted by a Grand Jury drawn from a fair cross-section of the community. *State v. Porro*, 158 N.J. Super. 269, 283 (App. Div. 1978) ("Every defendant has the constitutional right to have the Grand Jury that indicts him selected from a representative cross-section of the community."). Grand Juries drawn from a cross-section of the community "represent a democratic safeguard to our judicial system." *State v. Shaw*, 241 N.J. 223, 238 (2020) (citations, alterations, and quotation marks omitted). Indeed, Grand Juries "serve a dual purpose: to determine if probable cause

exists and **to stand between the defendant and the power of the State and protect defendants from unfounded prosecutions.**" *Id.* (emphasis added). The virtual Grand Jury format renders Grand Juries that are less inclusive, less diverse, and, therefore, less fair. Importantly, it ultimately results in Grand Juries not drawn from a fair cross-section of the community.

The New Jersey Supreme Court recently announced plans to eliminate implicit bias in the criminal legal system. See Rebecca Everett, *N.J. Supreme Court knows justice system has a race problem, plans changes within a year*, NJ.com (July 19, 2020), <https://www.nj.com/news/2020/07/nj-supreme-court-knows-justice-system-has-a-race-problem-plans-changes-within-a-year.html> (last accessed Jan. 27, 2021) (Aa86). In a NJ.com story entitled, "New Jersey Knows Justice System Has a Race Problem," AOC Acting Administrative Director Judge Glenn Grant described the plan as, "a commitment that we will follow through in concrete areas that we believe will make an important difference in terms of equal treatment, access and fairness questions." *Id.* Integral to ensuring equal treatment, access, and eliminating questions of fairness, is ensuring that our Grand Juries are comprised of a fair cross-section of New Jersey's diverse citizenry. The ACDL-NJ fears that the technology requirements of virtual Grand Jury service will exclude minority, poor, and elderly jurors, among others.

The ACDL-NJ's fears are warranted – minorities, the poor, and elderly are less likely to have access to internet connected devices. Indeed, studies have shown that: (1) among Black and Hispanic households, access to computers is approximately sixty-four percent (64%) and sixty-eight percent (68%), respectively, as compared to approximately 81% for White households; (2) that poorer households are significantly less likely to have access to computers and the internet as compared to the more affluent; and (3) that the elderly are significantly less likely to have access to internet connected devices or the wherewithal or confidence to use the technology that would be required to participate in the virtual Grand Jury process. See Camille Ryan, *Computer and Internet Use in the United States: 2016*, American Community Survey Reports, August 2018, available at www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-39.pdf (last accessed Jan. 27, 2021) (Aa93); Monica Anderson and Andrew Perrin, *Tech Adoption Climbs Among Older Adults*, Pew Research Center, May 17, 2017, available at www.pewresearch.org/internet/2017/05/17/tech-adoption-climbs-among-older-adults/ (last accessed Jan. 27, 2021) (Aa107). This is certainly contrary to the AOC's stated goal of eliminating disparities in our state's criminal justice system. We cannot be concerned about the elimination of bias in our criminal justice system only when the efficiency of our court dockets permit it. In this age of reckoning about the injustices of our nation's

past, criminally accused human beings in New Jersey deserve better than a Grand Jury system that excludes whole segments of the population from participating in the process.

The qualification for who can serve as a Grand Juror, like all other aspects of the Grand Jury process in our state, are a product of statute. The New Jersey statutory qualifications to be a member of a Grand Jury are that the individual must: (1) be 18 years of age or older; (2) be able to read and understand the English language; (3) be a citizen of the United States; (4) be a resident of the county in which the person is summoned; (5) not have been convicted of any indictable offense; and (6) not have any mental or physical disability which will prevent the person from properly serving as a juror. See N.J.S.A. 2B:20-1. Yet, the proliferation of virtual Grand Juries creates new "extra-statutory" qualifying factors for becoming a member of a Grand Jury that appear nowhere in the Legislature's comprehensive framework for conducting Grand Jury proceedings: reliable internet access, access to hardware, and technological acumen.

The transition to remote education in March of 2020 revealed enormous disparities between rich and poor homes in regards to internet and computer access. Poor and elderly residents are less likely to have private, uninterrupted access to an appropriate hardware and the internet. While the AOC has attempted to mitigate against the digital divide by, in some instances, supplying

equipment, that effort is insufficient. The actual use of the types of technology needed to conduct virtual Grand Jury proceedings still creates disparities along constitutionally impermissible lines. The AOC can bring a person a computer, but it cannot facilitate its seamless operation at all critical phases of the Grand Jury proceeding. Likewise, there can be no question that virtual interactions are wrought with opportunities for distraction, interruption, and other technical disruptions, as clearly occurred in this case.

As a result of technological incompetence and lack of internet access, the virtualization of Grand Juries creates a Grand Jury panel that is not representative of a fair cross-section of the community, notably the poor and elderly. While the defense bar and the judiciary rightly want to ensure that criminal justice is not indefinitely stalled by COVID-19, the right to an indictment by Grand Jury, Due Process, and a fundamentally fair Grand Jury proceeding cannot be sacrificed at the altar of judicial expediency. On balance, fundamental constitutional rights must always prevail over mere administrative efficiency.

When Mr. Vega-Larregui was indicted by a virtual Grand Jury without his consent, basic protections aimed at ensuring the fundamental fairness of the process were lacking. The result was a denial of his fundamental right to be indicted by a Grand Jury comprised of a fair cross-section of his community, as well as his

other due process rights. The appropriate remedy is dismissal of the indictment, and a statewide moratorium on the use of virtual Grand Juries until such time as the Virtual Grand Jury Program is modified to require a criminal defendant's consent, as originally intended.

B. Indictment By Virtual Grand Juries Results in the Loss of Grand Jury Secrecy

Pursuant to both the New Jersey Rules of Court and state statute, proceedings before a Grand Jury are to be held in secret in New Jersey. See N.J.S.A. 2B:21-3; R. 3:6-7. Grand Jury proceedings are kept secret in order to preserve the free and impartial administration of justice. See *State v. Donovan*, 129 N.J.L. 478, 481 (1943) ("The free and impartial administration of justice requires that the proceedings before Grand Juries shall, in some respects and to some extent, be kept secret[.]"). The benefits to Grand Jury secrecy flow to defendants and prosecutors alike.

At the outset of the Virtual Grand Jury Program in New Jersey, the Grand Jury charge was supplemented to purportedly strengthen the secrecy oath in order to address special requirements of participation in a virtual proceeding. These intended protections, however, are not enough for a process so critical to the fairness and core functioning of the criminal justice system.

Virtual Grand Jurors can easily record Grand Jury proceedings with their mobile phones, or use their mobile phones to call other people who will then be able to surreptitiously listen to the proceedings. Allowing Grand Jurors to operate from their homes, if we can even guarantee that they are in their homes when participating, also does not eliminate the risk that others in the same household will overhear the proceeding.

If a criminal defendant is exonerated by a Grand Jury that should be the end of the matter. A secret process makes certain that an individual is not branded a criminal simply because they were investigated, yet never indicted. The lack of secrecy inherent in the virtual Grand Jury process violates one's fundamental constitutional rights.

C. Technological Issues Undermine the Integrity and Effectiveness of the Virtual Grand Jury Proceeding

Technological issues also undermine the integrity and effectiveness of Virtual Grand Jury proceedings. Video freezes and buffers, and does not capture all of the cues so vital to judging credibility. Audio is imperfect over WiFi, and signal strength is not uniform in every household. Such issues, which without question frequently arise with platforms like Zoom - and, indeed, arose in this case - significantly undermine the integrity of the Grand Jury process when conducted in a virtual environment.

On July 9, 2020, the State presented this case to a Virtual Grand Jury. A review of the underlying Grand Jury transcript reveals serious issues relating to the efficacy and integrity of the Virtual Grand Jury proceeding. During the proceedings, the State, a handful of times, asked the members of the Grand Jury if they were able to hear the proceeding or had any questions for either the prosecutor or the witness. (See, e.g., 1T3-16 to 25, 1T4-2 to 10, 1T6-5 to 11, 1T11-4 to 8, and 1T15-18 to 22).³ The State, without even confirming that the Grand Jurors heard the questions, relied on the Grand Jurors' silence to mean that they did not have any questions for the prosecutor or witness, or that they were able to hear the proceedings. The type of egregious lapses in basic communication that are littered throughout the virtual Grand Jury transcript in this case are nothing short of stunning.

For example, during the virtual Grand Jury proceeding, the prosecutor stopped her examination of the witness to inquire whether the members of the Grand Jury could still hear her. (1T11-4 to 8). When no one answered, the State proceeded. However, logic dictates that if someone could not hear the proceeding, they also could not hear the question posed by the State. Therefore, the State should not have proceeded until it received an audible or

³ The Transcript of the virtual Grand Jury proceeding, dated July 9, 2020, is hereinafter referred to as 1T.

written response from each Grand Juror stating that they could hear. There is no indication in the record suggesting that occurred.

Moreover, it is not evident from the transcript that the prosecutor provided enough time for Grand Jurors to unmute their microphones to pose questions or raise a concern. Indeed, in one instance, the State noticed that the foreperson of the virtual Grand Jury was trying to speak, but the record does not reflect what she was saying because her microphone was off. (1T16-3 to 4). It is therefore unknown how many times a Grand Juror tried posing questions, or attempted to inform the State that he or she was having technological issues, but was muted and could not respond. It certainly begs the question as to whether Prosecutor Onofri was referring to this case when he made his public statements about technical issues that his office had in presenting cases virtually. See July 15, 2020 WHYI Article (Aa80).

The simple, yet material technological limitations of a virtual Grand Jury undermine the fundamental fairness of the process, thereby violating a defendant's constitutionally guaranteed rights in the absence of the consent of the defendant.

POINT II

**INDICTMENT BY VIRTUAL GRAND JURY VIOLATED MR.
VEGA LARREGUI'S CONSTITUTIONALLY GUARANTEED
RIGHT TO EQUAL PROTECTION UNDER THE LAW**

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees equal protection of the laws. See U.S. Const. amend. XIV. It prohibits any state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." *Id.* While Equal Protection claims are frequently made by or on behalf of individuals of a "protected class," courts have made clear that equal protection claims may also be brought under a class of one theory. See *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the [one] alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."). See also *DiBuonaventura v. Washington Twp.*, 462 N.J. Super. 260, 268 (App. Div. 2020).

Further, the conscious exercise of selectively enforcing the law is unconstitutional when based upon an unjustifiable standard such as race, religion, or other arbitrary classification. *State, Twp. of Pennsauken v. Schad*, 160 N.J. 156, 183 (1999). Such selective treatment is contrary to New Jersey and federal law. *State v. Andujar*, 462 N.J. Super. 537, 551 (App. Div. 2020) (defendant made out prima facie case that State's selective

performance of criminal record check on prospective juror was motivated by racial discrimination); *Whren v. United States*, 517 U.S. 806, 813 (1996) ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law ... the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause[.]").

Here, the State, by selectively implementing the Virtual Grand Jury Program only in certain counties, only to certain offenses, and not uniformly against all criminal defendants, violated Mr. Vega-Larregui's constitutionally guaranteed right to equal protection of the law. The State intentionally treated Mr. Vega-Larregui differently from other similarly situated criminal defendants, who were allowed to await presentment until such time that in-person Grand Jury presentments were feasible. The State sought and obtained Defendant's indictment by virtual Grand Jury, without his consent and under circumstances where he was not detained, while not seeking the virtual indictments of other criminal defendants similarly situated. The law cannot be enforced with such an unequal hand. See *Schad*, 160 N.J. at 183. There is no rational basis for treating Defendant differently based on such arbitrary classifications, which resulted in a clear discriminatory effect.

According to the Acting Director of the AOC, Judge Grant, one of the purported bases for conducting virtual Grand Juries is to

assist those individuals languishing in jails across the state awaiting indictment. See Glenn A. Grant, J.A.D., *Virtual Grand Juries?* New Jersey Law Journal (June 16, 2020), available at www.law.com/njlawjournal/2020/06/16/virtual-grand-juries/ (last accessed Jan. 27, 2021) (Aa74). Here, however, Mr. Vega-Larregui is not in jail. He was released. There was no rational basis for presenting Mr. Vega-Larregui's case to a virtual Grand Jury while waiting to present other cases for indictment, including those cases of incarcerated defendants, until such time that in-person Grand Jury proceedings are possible. Without a basis in reason, Mr. Vega-Larregui was singled out for disparate treatment.

Given the foregoing, it is clear that Mr. Vega-Larregui's equal protection rights have been violated. The remedy for that violation is dismissal of the indictment. Further, to prevent the same injustice from happening to other similarly situated defendants who have been "cherry picked" for presentment to a virtual Grand Jury without their consent in the same manner, to the exclusion of others, a statewide moratorium on the compulsory use of virtual Grand Juries is warranted until such time that the Virtual Grand Jury Program is modified to require a criminal defendants' consent.

POINT III

THE SUPREME COURT EXCEEDED ITS RULE MAKING AUTHORITY IN AUTHORIZING THE VIRTUAL GRAND JURY PROGRAM

The New Jersey Supreme Court, in authorizing the Virtual Grand Jury Program, overstepped its rule-making authority under the New Jersey Constitution. Through the authorization of the Virtual Grand Jury Program, the Court improperly created a new "extra-statutory" qualifying factor to becoming a grand juror that appears nowhere in the Legislature's comprehensive framework relating to Grand Juries—reliable internet access, technology, and technological know-how. In so doing, the Supreme Court encroached upon and usurped the powers of the Legislature.

The New Jersey Constitution requires that the "powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others[.]" N.J. Const. art. III, ¶1. This is the primary basis for the so-called separation of powers doctrine.

Article VI, section 2, paragraph 3 of the New Jersey Constitution provides the New Jersey Supreme Court with the authority to "make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts." The Court's rule-making power is limited,

however, to areas of practice and procedure in the courts of this State and "must not invade the field of substantive law[.]" See *Winberry v. Salisbury*, 5 N.J. 240, 248 (1950). "While the courts necessarily make new substantive law through the decision of specific cases coming before them, they are not to make substantive law wholesale through the exercise of the rule-making power." *Id.*

As outlined in detail above, the qualifications for becoming a member of the Grand Jury are a product of statute, promulgated by our Legislature. They are intended, in large part, to ensure that a defendant's right to an indictment by a Grand Jury comprised of a fair cross-section of the community. Rules relating to the qualifications of a juror, as evidenced by N.J.S.A. 2B:20-1, *et seq.*, are within the sole province of the Legislature, and do not concern the practice and procedure of the courts of our state or the attorneys that appear before them. Rather, they are substantive in nature, and have the effect of materially changing the make-up and functioning of the Grand Jury.

It would turn the 70 plus years of jurisprudence since *Winberry* on its head for this crisis, or any other crisis for that matter, to justify dispensing with our deep constitutional tradition of distributing authority among three co-equal branches of government. The question of re-shaping Grand Juries is not one of mere practice or procedure. Instead, it is a matter of substantive criminal and constitutional law that should never have

been exercised through the Court's rule making authority,ⁱ pandemic or no pandemic.

The Supreme Court has taxed its rule-making authority beyond its constitutionally delineated limits. Accordingly, it was not within the power of the Supreme Court to amend or create "extra-statutory" qualifying factors to becoming a Grand Juror in this case or any other. The Supreme Court departed from its rule-making authority, legislated without a case properly before it, and violated the time-honored principles of separation of powers by imposing the virtual Grand Jury program upon criminal defendants and prosecutors in New Jersey. Therefore, the Supreme Court's authorization of the Virtual Grand Jury Program was unconstitutional. The appropriate remedy is dismissal of the indictment and the requested moratorium on virtual Grand Jury proceedings in the absence of the consent of the defendant. We simply cannot operate a system of criminal justice where the separation of powers is ignored for expediency sake.

CONCLUSION

For the foregoing reasons, the ACDL-NJ respectfully submits that the Virtual Grand Jury Program is unconstitutional and that Defendant's virtual indictment should be dismissed. The ACDL-NJ further requests that the Court impose a state-wide moratorium on virtual Grand Jury proceedings until such time as the Virtual Grand

Jury Program is modified to require a defendant's consent, as originally intended by this Court.

In his dissent in *State v. Miller*, 216 N.J. 40, 73 (2013), New Jersey Supreme Court Justice Barry Albin lamented the plight of "an impoverished defendant, [who] was treated as just another fungible item to be shuffled along on a criminal-justice conveyor belt." Justice Albin continued, "Miller is more than another dispositional entry on a docket sheet, more than another statistic in some inexorable, impersonal process that knows no delays for justice." Omar Vega-Larregui, along with each and every one of the other criminal defendants who have been indicted through the flawed virtual Grand Jury process in New Jersey over the past several months, against their objections, have been treated as less than presumed innocent human beings with unassailable rights.

Respectfully submitted,

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