
Supreme Court of New Jersey

DOCKET NO. 085288
INDICTMENT NO. 20-07-0221-I

STATE OF NEW JERSEY, :
 :
 Plaintiff-Respondent, : CRIMINAL ACTION
 :
 v. : ON DIRECT CERTIFICATION
 : FROM A MOTION TO DISMISS
 : THE INDICTMENT IN THE SUPERIOR
 OMAR VEGA-LARREGUI : COURT, LAW DIVISION (CRIMINAL
 : PART)
 Defendant-Petitioner. :

BRIEF AND APPENDIX ON BEHALF OF
THE STATE OF NEW JERSEY

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COUNTERSTATEMENT OF PROCEDURAL HISTORY AND FACTS¹

On August 22, 2019, defendant Omar E. Vega-Larregui, was charged with possession of a controlled dangerous substance, third-degree, contrary to N.J.S.A. 2C:35-10a(1); possession of a controlled dangerous substance with intent to distribute, second-degree, contrary to N.J.S.A. 2C:35-5b(2); resisting arrest, disorderly persons offense, N.J.S.A. 2C:29-2a(1); obstructing the administration of law, disorderly persons offense, N.J.S.A. 2C:29-1; and possession of a controlled dangerous substance with intent to distribute on or near a public facility, second-degree, contrary to N.J.S.A. 2C:35-7.1a. Da1-10². Defendant was also charged with numerous motor vehicle violations. Da11-15. Defendant was not detained and released, subject to Level II monitoring. Aa5-8.

Dalia Seidl, Jury Manager, Mercer Vicinage, summoned 329 jurors for grand jury selection that was scheduled for February 13, 2020. Pa8-9. On February 12, 2020, the Honorable Peter E. Warshaw, Jr., P.J.Cr., selected a 23-person grand jury panel (hereinafter "the Grand Jury"). Pa9. The Grand Jury convened for in-person orientation on February 20, 2020. Ibid. Additionally, the Grand Jury convened and heard cases on February 27, March 5,

¹ Pursuant to this Court's order, dated January 13, 2021, this Court granted direct certification, "limited to defendant's constitutional challenge to the indictment returned by a Grand Jury proceeding that was conducted remotely, and related prayers for relief." To avoid repetition, the State has combined both the COUNTERSTATEMENT OF PROCEDURAL HISTORY and COUNTERSTATEMENT OF FACTS.

² The State adopts the citations to the record delineated in the defendant and Amicus' briefs to this Court.

and 12, 2020. Ibid.

On March 17, 2020, this Court, in response to the ongoing COVID-19 coronavirus public health emergency, cancelled all current grand jury sessions and postponed all grand jury empanelment dates. Aa11.

On March 27, 2020, this Court extended the suspension of all grand jury proceedings until April 24, 2020. Aa12. On April 24, 2020, this Court issued its Second Omnibus Order and again extended the suspension of grand jury proceedings through May 31, 2020. Aa13. In that order, this Court noted that “[t]he Judiciary and stakeholders will meet to explore potential options for conducting virtual grand jury selections and sessions[.]” Ibid.

On May 14, 2020, this Court ordered “the Administrative Director of the Courts...and Assignment Judges shall take steps to implement virtual grand jury proceedings...” Aa29. The Court noted, “[b]ased on current guidance from the New Jersey Department of Health, the COVID-19 virus will continue to disrupt normal court operations for months.” Aa28. The Court made this determination after the Working Group on Remote Grand Jury Operations (“Working Group”), which included “representatives of the Attorney General’s Office, and the Office of the Public Defender, and designees of the County Prosecutors Association of New Jersey (CPANJ), the ACLU, the New Jersey State Bar Association (NJSBA), and the private defense bar, in addition to judges and court staff[,]” recommended that “grand jury operations resume in certain counties in a virtual

format in a manner that upholds the solemnity and secrecy of those proceedings and safeguards the rights of defendants, victims, jurors, and the public.” Aa28-29. “The Working Group’s recommendation include specific requirements for technology options to be used for remote grand jury proceedings and for the provision of technological support to participating grand jurors.” Aa29. Grand juries in both Mercer and Bergen Counties were ordered to reconvene in a virtual format as soon as practicable. Aa32. The Supreme Court’s ordered modified several Rules to allow for the transition to a virtual format. See Aa29-31. The Supreme Court also required the State to obtain the consent of the defendant prior to the presentment of his/her case to the virtual grand jury. Aa32. The order also required the judiciary to provide “restricted-use devices (laptops or tablets) and related items, which shall be configured and administered solely by the Judiciary.” Aa32.

On May 20, 2020, the Honorable Mary C. Jacobson, A.J.S.C., extended the term of the Grand Jury through August 10, 2020. Pa9.

Prior to convening the Grand Jury, Dalia Seidl, the Jury Manager of the Mercer Vicinage, took the necessary steps to implement the provisions of the Court’s May 14, 2020 Order. Ibid. Specifically, Ms. Seidl “contacted each grand juror by phone and/or email and inquired as to their capacity to fulfill their grand jury service.” Ibid. Ms. Seidl noted that “of the 23 grand jurors selected and empaneled on February 13, 2020, one requested to be excused from service for reasons not related to technology. (The

grand juror was disqualified after moving to Camden County).” Ibid. It was also brought to the Jury Manager’s attention that five grand jurors confirmed a willingness to continue their service but “indicated that they lacked reliable personal technology to participate in virtual sessions.” Ibid. Consistent with the Supreme Court’s order and recommendation of the Working Group, the Jury Manager coordinated with the Administrative Office of the Courts (hereinafter “AOC”) to arrange for the delivery of SurfacePro laptops with broadband internet capability to the five grand jurors. Ibid.

In preparation for convening the Grand Jury, the Jury Manager worked with Mercer Vicinage ITO staff “to assist all jurors (those using their own technology and those using devices supplied by the Judiciary) to complete Zoom onboarding before the scheduled orientation session.” Ibid.; Pa5. “All grand jurors successfully participated in the orientation session” and “were required to demonstrate the capacity to use the technology, to see and hear the proceedings, to communicate with staff and each other, and to indicate if they experienced any difficulties or otherwise required assistance.” Pa9-10. Consistent with the Supreme Court’s May 15, 2020 Order, Judge Warshaw administered a supplemental charge to the Grand Jury during orientation on May 20, 2020. Pa10. Each grand juror also swore or affirmed a supplemental oath of secrecy. Ibid.

In accordance with the Supreme Court’s order, the AOC

implemented additional security features for virtual grand jury sessions. Pa10. Specifically, "...before each virtual session, grand jury staff check in each juror individually." Pa4, 10. "As part of that individual check-in process, the grand juror performs a 360-degree scan of their environment and staff confirm that the juror is in a private environment. Ibid. Jurors also are required to turn off cell phones and other devices during each session." Ibid. "[A]dditional security safeguards have been implemented for grand jury selections and sessions, including requirements for participants to establish named (not anonymous) Zoom accounts that jury staff verify prior to each session." Ibid.

On June 4, 2020, the Supreme Court issued an additional order which "eliminate[d] the requirement that cases proceed to a virtual grand jury only if the defendant consents. Cases may proceed to a grand jury convening remotely (rather than in person) with or without the defendant's consent." Aa34-35. The Court noted that "[t]he requirement that a defendant consent to presentation of charges to a grand jury convening remotely (rather than in person) has inhibited bringing cases before those ready grand juries." Aa34.

On July 9, 2020, the Grand Jury returned Indictment Number 20-07-0221-I, charging defendant with possession of a controlled dangerous substance, third-degree, contrary to N.J.S.A. 2C:35-10(a)(1) (Count I); possession of a controlled dangerous substance with intent to distribute, second-degree, contrary to N.J.S.A.

2C:35-5(a)(1) and 2C:35-5(b)(2) (Count II); possession of a controlled dangerous substance with intent to distribute on or near a public facility, second-degree, contrary to N.J.S.A. 2C:35-7.1(a), 2C:35-5(a)(1), and 2C:35-5(b)(2) (Count III); obstructing the administration of law or other governmental function, fourth-degree, contrary to N.J.S.A. 2C:29-1(a) (Count IV). Da16-19; see generally (T)³.

On July 9, 2020, Ms. Seidl and three other members of the grand jury staff were present for the presentation of State v. Omar Vega-Larregui. Pa10-11. "No technical issues were reported by grand jurors or other participants during the July 9, 2020 virtual grand jury session." Pa11. Ms. Siedl recalled that "the Assistant Prosecutor asked the grand jurors at various points if they could see and hear the proceedings and if they had any questions." Ibid. Ms. Siedl noted, "[w]hen some or all of the grand jurors did not answer audibly, such as by nodding their heads or remaining silent, as also occurs during in-person proceedings, the Assistant Prosecutor described their response orally on the record." Ibid. The Jury Manager also noted that the Grand Jury foreperson conducted the required pre- and post-deliberation technology checks to determine if any grand jurors had any issues during the proceeding or deliberations. Ibid. All of the grand jurors during this proceeding answered in the negative and confirmed that none of the grand jurors had any technical problems that affected their

³ "T" refers to Transcript of Proceedings, July 9, 2020.

ability to hear and/or observe the proceedings, deliberate, or vote. Ibid.

On July 24, 2020, the Supreme Court issued its Seventh Omnibus Order and ordered the implementation and resumption of virtual grand jury statewide. Aa37. The Supreme Court's order stated "[j]urors will be summoned for new grand jury selections starting on or after September 21, 2020, with those selections to be conducted in a virtual format consistent with the Court's June 9, 2020 Order[.]" Ibid.; Pa5.

On October 8, 2020, the Supreme Court issued its Ninth Omnibus order which permitted socially distanced, in-person, grand jury sessions. Aa55-56; Pa5.

On October 29, 2020, Mercer County selected its first virtual grand jury panel. Pa11. At the direction of Judge Jacobson, Ms. Seidl summoned a pool of 800 jurors for grand jury selection that was conducted on October 29, 2020. Ibid.

On October 29, 2020, Judge Warshaw chose two grand jury panels. Pa12. One of those panels would convene virtually and the second would convene in-person. Ibid. After the suspension of in-person proceedings due to the second wave of COVID-19, the second panel transitioned to an all-virtual format. Ibid.

During the October 29, 2020 selection, three potential jurors requested and were provided court issued tablets. Ibid. Three other potential grand jurors, who were ultimately selected for the in-person grand jury, utilized their cellphone for the grand jury

selection process. Ibid. After they were selected, they requested and were issued court provided tablets. Ibid. "More than one hundred residents of Mercer County have participated in county-level grand jury session." Ibid. "Of the county-level grand jurors, only 21 have required technology, which the Judiciary has provided to every juror." Ibid. As of January 29, 2021, "the judiciary has distributed over 150 tablets (with Broadband activated as necessary) to support participation in virtual grand jury selections and session." Pa6.

On November 16, 2020, the Supreme Court acknowledged that "[a] second wave of COVID-19 has struck New Jersey and the rest of the nation." Aa65. As such, the Court suspended all in-person grand jury proceedings and re-affirmed that all existing virtual grand jury sessions may continue. Aa66; Pa6.

On November 10, 2020, defendant filed a notice of motion to dismiss the indictment and a motion to suppress all evidence seized without a warrant. Da20-24. On December 21, 2020, the Honorable Darlene J. Pereksta, J.S.C., signed a consent order permitting the Association of Criminal Defense Lawyers of New Jersey to appear as amicus curiae. Aa9-10.

On January 13, 2021, this Court, pursuant to R. 2:12-1, granted direct certification on the limited issued a scheduling order. Aa1-3. Oral argument is scheduled for March 15 or 16, 2021. Aa3.

LEGAL ARGUMENT

POINT I⁴

CASES HEARD BY A VIRTUAL GRAND JURY
ARE NEITHER UNCONSTITUTIONAL NOR
FUNDAMENTALLY UNFAIR.

Presentment of cases to a grand jury that is conducting its proceedings virtually is neither unconstitutional, nor fundamentally unfair. It is evident that the Supreme Court and AOC, in consultation with the Working Group, devised a plan that fits within the parameters of the New Jersey Constitution. This in turn prevents the criminal justice system from grinding to a complete halt during these unprecedented times. Indeed, a review of the record quickly dispenses with the concerns raised by defendant and the ACDL-NJ and establish that the virtual grand jury proceedings are done in a constitutionally acceptable manner that promotes the continuation of grand jury proceedings in a safe and secure environment, not only for defendants, but for witnesses, victims, and jurors.

Both the defendant and ACDL-NJ argue the virtual grand jury process is unconstitutional. Specifically, defendant and ACDL-NJ contend the Supreme Court exceeded its rule making authority by relaxing and modifying the rules when it suspended in-person grand

⁴ This POINT responds to "POINT I" and "II" of defendant's brief, Db7-19; and "POINT I" and "III" of amicus' brief, Ab13-24, 28-30.

jury proceedings and opted to proceed virtually while the world combats a global health crisis. Db7-19; Ab13-24, 28-39. In their view, the modification to the rules raises the following constitutional concerns: (1) the virtual grand juries do not represent a fair cross-section of the community; (2) the virtual format results in the loss of grand jury secrecy; and (3) technological issues undermine the integrity and effectiveness of the virtual grand jury proceeding. Ibid. Defendant and the ACDL-NJ's contentions are wrong.

The New Jersey Constitution, as enacted in 1947, guarantees a person accused of a crime the right to be indicted by a grand jury before being placed on trial. N.J. Const. art I, ¶8. That paragraph states:

No person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases now prosecuted without indictment, or arising in the army or navy or in the militia, when in actual service in time of war or public danger.

[Ibid.]

"The grand jury's role has evolved over the centuries to serve 'dual function[s]': to decide 'if there is probable cause to believe that a crime has been committed and [to protect] citizens against unfounded criminal prosecutions.'" State v. Shaw, 241 N.J. 223, 235 (2020) (quoting United States v. Sells Eng'g. Inc., 463

U.S. 418, 423, 103 S.Ct. 3133 (1983) (internal quotation omitted)). The New Jersey Supreme Court recognized the grand jury as being an investigative body with expansive powers. State v. Francis, 191 N.J. 571, 587 (2007) (citing Branchburg v. Hayes, 408 U.S. 665, 688, 92 S.Ct. 2646, 2660 (1972) and United States v. Dionisio, 410 U.S. 1, 13, 93 S.Ct. 764, 771 (1973)). "In that way, the grand jury today operates as both a sword and shield." Ibid (citing United States v. Navarro-Vargas, 408 F.3d 1184, 1190-91 (9th Cir. 2005) (en banc)); Francis, 191 N.J. at 585. "Acting as both shield and sword, the grand jury indicts when a prima facie case is established, while standing guard to protect the innocent from 'hasty, malicious, and oppressive persecution.'" In re Monday Grand Jury Panel of Monmouth County Vicinage 9, 405 N.J. Super. 88, 95-96 (Law Div. 2008) (quoting State v. Del Fino, 100 N.J. 154, 164 (1985) (internal quotation and citation omitted)).

"In New Jersey, the grand jury 'is an arm of the court.'" Shaw, 241 N.J. at 238 (quoting In re Grand Jury Appearance Request by Loigman, 183 N.J. 133, 141 (2004). "It 'is a judicial investigative body' that serves 'a judicial function,' 'not a law enforcement agency or an alter ego of the prosecutor's office.'" Ibid. Indeed, "New Jersey Courts have also recognized the grand jury acts simultaneously in partnership with, and in opposition to, the prosecutor in each case." In re Monday Grand Jury Panel,

405 N.J. Super. at 95 (citing Francis, 191 N.J. at 586).

“Courts do not preside over or control [the grand jury’s] day-to-day functioning[]” and “[j]udicial involvement with and review of the grand jury is limited.” Shaw, 241 N.J. at 239 (citing United States v. Williams, 504 U.S. 36, 47, 112 S.Ct. 1735 (1992)). While the relationship between the grand jury and the judicial branch “has traditionally been...at arm’s length[,]” Ibid., it is the State and county prosecutors who have the responsibility and authority to present cases to a grand jury and seek an indictment. Id. at 238. “Grand juries, in turn, investigate allegations and decide whether the State has presented sufficient evidence to establish probable cause that a crime has been committed and that the accused committed it. Ibid. (citing State v. Hogan, 144 N.J. 216, 227 (1996)).

The critical inquiry in this case becomes - did the Supreme Court exceed its rule-making authority by authorizing the virtual grand jury process, thus in-turn, making the grand jury proceedings fundamentally unfair. The simple answer is no. Because the grand jury is an “arm of the court,” it is left to the Supreme Court, and specifically the Chief Justice, to ensure that grand jury functions effectively in the public interest. This is done through the implementation of the Court Rules. Pursuant to Article VI, §2, ¶3 of the New Jersey Constitution (1947),

The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

The Constitution further provides,

The Chief Justice of the Supreme Court shall be the administrative head of all the courts in the State. He shall appoint an Administrative Director to serve at his pleasure.

[N.J. Const. art. VI, §7, ¶1].

"Those two provisions give the Chief Justice and the Supreme Court sweeping authority to govern their own house." In re P.L. 2001, Chapter 362, 186 N.J. 368, 379 (2006).

"The Court's administrative authority is 'far-reaching' and 'encompasses the entire judicial structure [as well as] all aspects and incidents related to the justice system.'" Id. at 381 (quoting Knight v. City of Margate, 86 N.J. 374, 387 (1981); see also, 2 Proceedings of the Constitutional Convention of 1947, at 1180 (vesting courts with "[e]xclusive authority over administration"). "That authority includes not only 'responsibility for overall performance of the judicial branch,' but also 'all facets of the internal management of the courts.'" Ibid. (quoting In re Mattera, 34 N.J. 259, 272 (1961) and Lichter v. County of Monmouth, 114 N.J. Super. 343, 349 (App. Div. 1971)).

In Winberry v. Salisbury, the New Jersey Supreme Court

interpreted Article VI, §2, ¶3 of the New Jersey Constitution to mean that the rule-making power of the Supreme Court is confined to practice, procedure, and administration. 5 N.J. 240, 245, cert. denied, 340 U.S. 811, 71 S.Ct. 123 (1950). The Winberry court further held that when its rule-making authority is exercised in those areas, it is not subject to conflicting legislation. Ibid. However, the Court in Winberry ruled that in areas of substantive law, as opposed to procedural law, court rules must yield to legislation. State ex rel. Y.S., 396 N.J. Super. 459, 467 (Law Div. 2007).

Notably, “[i]n Winberry, [the Supreme Court] held that a court rule limiting the time in which to file an appeal fell within the Court’s constitutional authority over practice and procedure and that a statute conflicting with that rule exceeded the Legislature’s powers.” In re P.L. 2001, 186 N.J. at 380 (citing Winberry, 5 N.J. at 247-48). “If the rule does not directly determine the outcome of a proceeding, then it is characterized as procedural.” State ex rel. Y.S., 396 N.J. Super at 470 (internal citation omitted). Similarly, courts “also consider whether the rule is but one step in a series of steps in a ladder to final determination.” Ibid. (internal citation and quotation omitted). “If the rule provides one of these steps, then it is characterized as procedural.” Ibid.

While the right to grand jury is constitutionally required, the implementation of how the proceedings will be conducted is left to the discretion of the Supreme Court and Chief Justice, so long as those procedures fit within the bounds of the defendant's constitutional guarantees. The rules modified here are a matter of procedure, and not substantive as defendant and ACDL-NJ would otherwise suggest. See State v. Haines, 18 N.J. 550, 558-59 (1955) (holding the extension of service for a grand jury was a matter of procedure and not substantive, and within the rule-making power granted by the Constitution to the Supreme Court). Due to the global health crisis, the Supreme Court modified the rules in a manner to allow for cases to still proceed in a constitutionally acceptable manner.

The ACDL-NJ, nonetheless, contends this Court exceed its rule-making authority by creating an "extra-statutory" qualifying factor to become a grand juror. Ab28. Specifically, they contend the modifications to the rules were substantive in nature by requiring "reliable internet access, technology, and technological know-how." Ibid. It is undisputed that a grand juror, prosecutor, witness, or court personnel must have reliable internet access and the capability to access the proceeding to ensure participation in the proceeding. These requirements, however, are procedural and are in no way substantive in nature. Stated differently, these

requirements are procedural because they are determinative of how the proceeding is conducted and the modifications to the rules in no way "directly determines the outcoming of the proceedings." See State ex rel. Y.S., 396 N.J. Super at 470.

Furthermore, the Judiciary and AOC have eliminated any doubt that access to technology and the internet are "extra-statutory" qualifying factors. At the outset of their service, each grand juror is asked if they have the internet and technological capability to participate. Pa5, 9-10. The Judiciary provides tablets with broadband capabilities to any grand juror that makes such a request. Ibid. They have also provided trainings and orientation to the grand jurors, court staff, and prosecutors for the seamless transition to the virtual format. Ibid. In furtherance of making this transition seamless, IT personnel from the judiciary are on standby to assist any grand juror with any issue that may occur. Ibid.

These steps can hardly be seen as substantive and at odds with legislation or the constitution. The State submits that the act of providing tablets and internet access is more akin to the accommodations the courts provide individuals who seek accommodations, such as listening devices during in-person proceedings. Such accommodations ensure that the grand jury functions effectively in the public interest and allow members who

are hard of hearing to fulfill their civic duty. The same can be said for individuals without internet and technological capabilities. The Supreme Court has modified the way in which cases are presented and considered by a grand jury and made the necessary accommodations so that any individual, who is otherwise qualified, can continue to participate in the proceeding. As such, the Supreme Court did not exceed its rule-making authority by relaxing and modifying the court rules for grand jury to proceed in a virtual format because the rules are procedural in nature and not substantive.

Because the Supreme Court did not exceed its rule-making authority, the inquiry then turns to the issue of whether the virtual format is fundamentally unfair. Defendant and ACDL-NJ present three specific contentions that, in their view, render virtual grand jury unconstitutional. Specifically, they contend: (1) the virtual grand juries do not represent a fair cross-section of the community; (2) the virtual format results in the loss of grand jury secrecy; and (3) technological issues undermine the integrity and effectiveness of the virtual grand jury proceeding. Proceeding in a virtual format neither offends the constitutional protections afforded to a defendant, nor render the proceedings fundamentally unfair.

“The Judiciary’s power of review is rooted in the doctrine of

fundamental fairness, which is 'an integral part of due process.'" Shaw, 241 N.J. at 239 (State v. Saavedra, 222 N.J. 39, 67 (2015) (internal citation omitted); see also, State v. Miller, 216 N.J. 40, 71 (2013). "The 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.'" Saavedra, 222 N.J. at 67 (emphasis in original) (quoting Doe v. Poritz, 142 N.J. 1, 108 (1995) (internal quotation and citation omitted)). The Supreme Court has described the doctrine as "'an integral part of due process'" that "'is often extrapolated from or implied in other constitutional guarantees.'" Ibid. (quoting Miller, 216 N.J. at 71 (internal quotation and citation omitted); see also, Oberhand v. Dir., Div. of Taxation, 193 N.J. 558, 578, (2008); State v. Abbati, 99 N.J. 418, 429, (1985) (explaining underpinnings of the doctrine).

The doctrine is applied "'sparingly'" and only where the "interests involved are especially compelling"; if a defendant would be subject "'to oppression, harassment, or egregious deprivation,'" it is to be applied. Doe, supra, 142 N.J. at 108 (quoting State v. Yoskowitz, 116 N.J. 679, 712 (1989) (Garibaldi, J., concurring and dissenting)). The doctrine's "primary considerations should be fairness and fulfillment of reasonable

expectations in the light of the constitutional and common law goals.” Yoskowitz, supra, 116 N.J. at 706 (emphasis omitted) (quoting State v. Currie, 41 N.J. 531, 539 (1964)).

The State will address each of defendant and the ACDL-NJ’s contentions in turn.

A. Virtual Grand Juries Represent a Fair Cross-Section of the Community.

It is undisputed that “[e]very defendant has the constitutional right to have the grand jury that indicts him selected from a representative cross-section of the community.” State v. Porro, 158 N.J. Super. 269, 283 (App. Div. 1978); see also, Neal v. Delaware, 103 U.S. 370 (1881); Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163 (1972). However, “[a] particular grand jury is not required to be a mirror image of the community.” State v. Ramseur, 106 N.J. 123, 231 (1987) (citing Porro, 158 N.J. Super. at 267). A claim that a virtual grand jury fails to produce a fair cross-section of the community first “must identify a constitutionally cognizable group, i.e., a group capable of being singled out for discriminatory treatment.” State v. Bellamy, 260 N.J. Super. 449, 453 (App. Div. 1992) (quoting Ramseur, 106 N.J. at 215). “Challenges asserting constitutional rights, however, ‘must be shown to rest on fact. Mere conclusions are inadequate.’” State v. Timmendequas, 161 N.J. 515, 603-604 (1999) (quoting State v. Robinson, 128 N.J. Super. 525, 530 (Law Div. 1974) (holding

that defendant had not made out prima facie case for non-randomness in grand and petit jury selection process given that no figures or information regarding source of selection process were presented).

“The Constitution protects [defendants] from consideration by a grand jury selected as a result of systemic exclusion, intentional design or scheme which excludes any identifiable class of persons solely because of that classification.” State v. Porro, 152 N.J. Super 259, 265 (Law Div. 1977), *aff’d*, 158 N.J. Super. 269 (App. Div.), *cert. den.*, 439 U.S. 1047, 99 S.Ct. 724 (1978). “This rationale extends to the situation where a grand jury will be absent or proportionally lacking members of a cognizable class.” Ibid. (citing Virginia v. Rivers, 100 U.S. 313 (1880), and State v. Smith, 55 N.J. 476 (1970)). “There is no constitutional tolerance for the systemic and deliberate exclusion of members of any cognizable class, notwithstanding the underlying motive or good faith of those entrusted with the selection process.” Id. at 266 (internal citations omitted).

No constitutionally cognizable group has been excluded and defendant and ACDL-NJ have not produced any evidence to even suggest that there is a systemic exclusion of any group. Rather, the ACDL-NJ “fears that technology requirements of virtual Grand Jury service will exclude minority, poor and elderly jurors, among others.” Ab17. This contention is belied by the record. It is of

particular note that the Grand Jury, who indicted defendant on July 9, 2020, was selected in-person and prior to this Court's First Omnibus Order which suspended in-person proceedings due to the global health crisis. Pa9. In fact, the Grand Jury transitioned with ease to a virtual format. As noted by Ms. Siedl, none of the grand jurors expressed any doubt in their ability to fulfill their grand jury service virtually. Ibid. Of the 23 members of the Grand Jury, only five members requested tablets with internet capabilities so that they were able to continue their service and only one grand juror was dismissed after the transition because they no longer resided in Mercer County. Ibid. Thus, any suggestion that the Grand Jury does not represent a fair cross-section of the community is without merit.

Furthermore, the certifications of Mr. McLaughlin and Ms. Seidl confirm that the selection process has remained the same for in-person and virtual grand jury panels. Pa3-4. As noted by the statewide Manager of Jury Programs and Jury Manager for the Mercer Vicinage, not one juror "has been excluded from selection or from serving on a virtual grand jury based on lack of technology." Pa6, 12. As of January 29, 2021, the Judiciary has distributed over 150 tablets with internet access to support the participation in virtual grand jury selections and sessions. Pa6. While the AC DL-NJ is quick to note socio-economic factors could lead to the

exclusion of a cognizable group, they fail to present any evidence of such exclusion.

Furthermore, the steps taken by the judiciary and AOC staff members evidences their commitment to not only provided the technology required to participate in virtual grand jury, but to utilize the equipment so they can in-fact participate. As noted by Mr. McLaughlin, court staff "establish[ed], test[ed], refine[d], and document[ed] protocols for implementation of the Court's Orders in the pilot counties, Bergen and Mercer." Pa3; see also, Pa9-10. This also included training AOC staff members, grand jurors, and assistant prosecutors in using the technology so that the grand jury process could proceed during this global pandemic. Pa3, 5. Thus, the system that was put into place by this Court's order and implemented by the AOC and judiciary, did not systemically exclude a cognizable group. Rather, it shows a careful plan to ensure not a single potential grand juror was excluded for socio-economic or technological reasons and ensured that the grand juries represents a fair cross-section of the community. As such, the AC DL-NJ's constitutional claim must fail.

B. The Safeguards Put in Place by This Court's Order and the Directives of the AOC Ensure the Secrecy of the Grand Jury Proceedings.

"It is well-settled that grand jury proceedings are generally secret." Barlyn v. Dow, 436 N.J. Super. 161, 170 (App. Div. 2014)

(citing State v. Clement, 40 N.J. 139, 142 (1963); Doe v. Klein, 143 N.J. Super. 134, 140 (App. Div. 1976)). "Rule 3:6-7 implements the historical requirement as to the secrecy of grand jury proceedings by expressly requiring all persons present during the proceedings, except witnesses, to take an oath of secrecy." Daily Journal v. Police Dept. of City of Vineland, 351 N.J. Super. 110, 124 (App. Div. 2002). "It has long been recognized that the proper function of our grand jury system depends upon the secrecy of the proceedings." Ibid. (citing Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218, 99 S.Ct.1667, 1672 (1979); United States v. Proctor & Gamble Co., 356 U.S. 677, 681, 78 S.Ct. 983 986 (1958)); see also, Butterworth v. Smith, 494 U.S. 624, 630, 110 S.Ct. 1376, 1380 (1990); In re Application for Disclosure of Grand Jury Testimony, 124 N.J. 443, 449 (1991).

Once empaneled, the Legislature requires every grand juror to:

swear or affirm that you will support the Constitution of the United States and of this State; that you will diligently inquire into all matters brought before you to the best of your skill, knowledge and understanding; that you will take no action through envy, hatred or malice nor for fear, favor or affection or for reward or the hope of reward; that you will make a true presentment of all matters coming before you, and that you will keep secret the proceedings of the grand jury?
[N.J.S.A. 2B:21-3].

"The grand jury's duty to uncover criminal wrongdoing and

screen out charges not warranting prosecution underlies the long-standing rule safeguarding the confidentiality of its proceedings." Barlyn, 436 N.J. Super. at 171 (quoting In re Grand Jury Testimony, 124 N.J. at 449). The New Jersey Supreme Court identified five policy considerations that justify grand-jury secrecy:

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

[In re Grand Jury Testimony, 124 N.J. at 449-450 (quoting State v. Doliner, 96 N.J. 236, 247 (1984) (internal quotation and citation omitted))].

In embracing the important role secrecy plays in the grand jury deliberation process, the New Jersey Legislature and Supreme Court have adopted the following rules: (1) N.J.S.A. 2B:21-3 establishes a secrecy component as part of the grand jury oath; (2) R. 3:6-7 requires an oath of secrecy to be taken by "all persons ... present while the grand jury is in session"; (3)

N.J.S.A. 2B:21-10a provides for the punishment of a grand juror who "purposely discloses any information concerning the proceedings of a grand jury, other than as authorized or required by law. As noted by the United States Supreme Court, secrecy is paramount "to insure the utmost freedom to the grand jury in its deliberations." Proctor & Gamble, 356 U.S. at 677, 79 S.Ct. at 983.

In the virtual grand jury context, defendant and the ACDL-NJ offer nothing but speculation to support their assertion that a virtual format does not sufficiently protect grand jury secrecy. In relaxing and modifying the rules, this Court ensured that grand juries would maintain their required secrecy so that they could safely convene and continuing hearing cases. In its May 14, 2020 Order, the Supreme Court mandated that the supplemental charge and oath

reinforce the requirement of secrecy in a virtual format, including the requirement that grand jurors (i) must not allow anyone to observe or hear grand jury proceedings; (ii) must not record, photograph, or broadcast grand jury proceedings in any way; (iii) must inform the prosecutor immediately if someone interrupts or accesses the proceeding; and (iv) must inform the prosecutor of any technical issues experienced during the proceeding so that they can be resolved[.]
[Aa30].

As noted by the Manager of Jury Programs and Jury Manager of the Mercer Vicinage, "before each virtual session, grand jury staff

check in each juror individually. As part of that individual check-in process, the grand juror performs a 360-degree scan of their environment and staff confirm that the juror is in a private environment." Pa4, 10. Additionally, "[j]urors are requested to turn off cell phones and other devices during each session." Ibid. This process allows court staff to confirm the grand jurors are upholding their oath to maintain secrecy during the proceedings. In fact, in this case the Grand Jury was specifically reminded of their oath and the consequences of violating their vow of secrecy. Court staff instructed,

[s]eeing as there are no issues from the jurors, I will remind you that under New Jersey Law any unauthorized disclosure of information concerning grand jury proceedings is a crime punishable by up to 18 months imprisonment. If you are approached by anyone soliciting information concerning the proceedings before you as grand jurors, you are to report such attempts to us at once. Against the grand jury proceeding is secret. Please do not disclose any part of the proceedings to anyone, not even friends or family members.

[(T:17-5 to 17-15); Aa143].

Defendant and the ACDL-NJ, nonetheless, argue that grand jury secrecy is lost because there exists "insufficient safeguards to prevent participation by third parties in the grand jurors' or witnesses' locations during the virtual session and to prevent the simultaneous recording of the grand jury proceeding." Db16; Ab21-22. This argument is premised upon the notion that the grand jurors

are not following instructions and upholding their oaths. This argument must fail because “[t]he authority is abundant that courts presume juries follow instructions.” State v. Herbert, 457 N.J. Super. 490, 503 (App. Div. 2019); see also, State v. Simon, 161 N.J. 416, 444 (1999) (noting “[s]olemn declarations in open court carry a strong presumption of verity”).

There exists a presumption that every member of the virtual grand jury is following instructions and upholding their oath of secrecy. There exists no evidence in the record, and defendant and the ACDL-NJ fail to point to any evidence, to suggest that any of the grand jurors violated the instructions and oaths, or the secrecy of the proceedings was in any way compromised. Moreover, as noted by the Manager of Jury Programs, “[t]he technical security of virtual grand jury proceedings has not been compromised. No one has breached or hacked a virtual grand jury selection or session.” Pa6.

Defendant and the ACDL-NJ’s contentions rest upon the idea that the virtual format compromises grand jury secrecy, because the Judiciary cannot combat against every conceivable avenue in which secrecy could be compromised. They further contend a grand juror could surreptitiously record the proceeding because it is conducted virtually. Risk of a violation of secrecy equally exists, whether the proceedings is conducted in-person or virtual. We

presume, however, that no such recording occurs because the grand jurors are upholding their oath and following the court's instructions.

Furthermore, the ACDL-NJ's contention that the State should seek a defendant's consent prior to the presentment of a case to the grand jury equally violates the considerations that justify grand-jury secrecy and create logistical hurdles that are not easily overcome. While on its face, requesting consent from the defendant prior to a grand jury proceeding may appear minute, it raises the exact concerns this Court has contemplated when it determined the long-standing principal that grand jury proceedings must be conducted in secrecy. See, In re Grand Jury Testimony, 124 N.J. at 449-450 (quoting Doliner, 96 N.J. 247). This added requirement injects the defendant directly into the secretive process, by infringing upon the State's right to present a case to a grand jury and extinguishes the secrecy of the proceeding. See, infra, POINT II. Thus, inhibiting the grand jury's ability to function properly. See, Daily Journal, 351 N.J. Super. at 124.

Additionally, the obligation to seek consent also creates an issue with the State's ability to seek a direct indictment against the target of an investigation. By requiring consent, the State would be obligated to disclose to a target, who has not been charged on a criminal complaint, they are, in fact, a target of an

investigation. This raises not only the policy considerations outlined by this Court for grand-jury secrecy, but constitutional considerations if the target is not represented by counsel. Such a requirement completely circumvents the role of the grand jury and the secrecy they are bestowed to properly conduct their business. As such, the ACDL-NJ's suggestion that consent is required by a defendant before their matter is presented to a grand jury is without merit. Therefore, defendant's argument that virtual grand jury violates the secrecy of the grand jury must be rejected.

C. Defendant and the ACDL-NJ Present No Evidence that the Use of Technology in a Virtual Format Undermines the Ability of a Grand Jury to Hear a Case.

Defendant and the ACDL-NJ argue the use of technology during a virtual grand jury session renders the proceeding fundamentally unfair. Specifically, they both argue that technology is unreliable and fails to ensure that all of the grand jurors are able to hear all of the evidence presented before it. Db17-19; Ab24. Separately, defendant contends "[t]here exists a palpable risk for jurors to be conducting their own factual and/or legal research online related to the matters before them." Db11-15. These contentions find no support in the record. The procedural safeguards put in place by the Judiciary and AOC, as well as the prosecutor's questions throughout the proceeding, establish a

continued "check-in" to ensure the technology is functioning properly and every grand juror is engaged in the process. Furthermore, these concerns and the concern about independent research prior to or during a case exist equally if the matter was presented to an in-person or virtual grand jury. Thus, defendant and the ACDL-NJ's contentions are not unique to the virtual format and should not serve as a basis to find the proceedings fundamentally unfair. Because it is presumed each grand juror is upholding their oath and following the instructions, it is equally presumed that the grand jurors are paying attention during the proceedings, answering truthfully if they had any technological issues, and are not conducting independent research. As such, defendant and the ACDL-NJ's contentions must be rejected.

"To fulfill its 'constitutional role of standing between citizens and the state,' the grand jury is asked to determine whether 'a basis exists for subjecting the accused to a trial.'" Hogan, 144 N.J. at 227 (quoting Del Fino, 100 N.J. at 164, and Trap Rock Indus., Inc. v. Kohl, 59 N.J. 471, 487 (1971), cert. denied, 405 U.S. 1065, 92 S.Ct. 1500 (1972)). "Specifically, the grand jury must determine whether the State has established a prima facie case that a crime has been committed and that the accused has committed it." Ibid. (citing State v. New Jersey Trade Waste Ass'n, 96 N.J. 8 (1984)).

Our Supreme Court has "demonstrated a greater willingness to review grand jury proceedings where the alleged deficiency in the proceedings affects the grand jurors' ability to make an informed decision to indict." Hogan, 144 N.J. at 229; Shaw, 241 N.J. at 241; State v. Murphy, 110 N.J. 20, 35 (1988) (recognizing general reluctance of courts to dismiss indictments, but noting that indictment may be dismissed if alleged misconduct infringes on grand jury's decision-making function); Del Fino, 100 N.J. at 164-65 (criticizing grand jurors for voting to indict without having been present at all grand jury sessions, and stating that grand jurors who vote to indict must be informed of evidence presented at each session); see also, State v. Hart, 139 N.J. Super. 565, 568-69 (App. Div.) (dismissing indictment because prosecutor improperly encroached on independence of grand jury by telling some jurors that their initial vote not to indict was wrong).

The Judiciary took great steps to ensure a seamless transition to a virtual format. In doing so, they not only provided tablets and internet capability to any grand juror who needed one but ensured the grand jurors would understand how to use the technology. In doing so, they made IT staff available at all times to assist with any issue that may arise. Notably, the grand jury foreperson conducts a pre-deliberation and post-vote technology check. Pall. As the record in this case establishes, the foreperson

asked the Grand Jury, "[a]ll right. Did anyone have any technical issues with hearing this case." (T:16-5 to 16-6); Aa142; see also, Pa11. Every single one of the grand jurors answered in the negative. (T:16-7 to 16-8); Aa142. Similarly, and prior to deliberation, court staff instructed the grand jurors,

Seeing as there are no issues from the jurors, I will remind you that under New Jersey Law any unauthorized disclosure of information concerning grand jury proceedings is a crime punishable by up to 18 months imprisonment. If you are approached by anyone soliciting information concerning the proceedings before you as grand jurors, you are to report such attempts to us at once. Against the grand jury proceeding is secret. Please do not disclose any part of the proceedings to anyone, not even friends or family members.

[(T:17-5 to 17-15); Aa143].

Additionally, throughout this presentation the Assistant Prosecutor confirmed that each grand juror could hear her and the witness. Pa11; (T:3-24 to 4-3; 11-4 to 11-7); Aa129-30, 37. It is evident that these additional questions posed to the grand jurors and instructions given by court staff safeguarded the proceeding from any technological issues that could have arisen. Asking these types of questions to the grand jurors confirms they heard the evidence before them and could appropriately determine if the State presented a prima facie case.

Furthermore, defendant and the ACDL-NJ speculate about technical issues that could occur during a proceeding, while

simultaneously ignoring the steps the judiciary has taken to expeditiously resolve those issues. Defendant and the ACDL-NJ are quick to speculate that the audio over the internet is unreliable but offer no evidence that such issues have compromised any of the deliberations by any of the State's grand juries. Furthermore, the ACDL-NJ's selective reading of the transcript in no way taints the Grand Jury's deliberations in this case. While the ACDL-NJ suggests that there were repeated issues with the presentment of this case to the Grand Jury, they overlook the obvious - the questions posed by the prosecutor and the foreperson were done as a matter of procedure and not due to a technical issue. Thus, defendant and the ACDL-NJ's speculation about technological issues is without merit.

Finally, defendant's contention that grand jurors ignore the instructions given to them and conduct outside research into facts and law is speculative and finds no support in the record. Defendant's argument ignores the fact that the risk of a grand juror conducting outside research either in a virtual or in-person format is the same.

Prior to being sworn, the grand jury is instructed on their role. Specifically, they are instructed,

The Grand Jury is an independent legal institution. It functions under our Constitution as the representative of the community. It is an arm of the court, not part

of the prosecutor's office. The Grand Jury does not assist the prosecutor. The prosecutor assists the Grand Jury.

Individual grand jurors are not permitted to conduct an independent investigation of the alleged charges, such as visiting the crime scene. However, you are not limited in your investigations to matters brought to your attention by the prosecutor. As a group, and as determined by a majority of the grand jurors present, you may decide that conditions exist that warrant investigation because you believe a crime has been committed. In that connection, you are empowered to require the production of evidence, to compel witnesses to appear before you, and to return indictments if the evidence justifies that action. The prosecuting attorney is available to advise you on legal questions and, if necessary, you may request additional instructions from the court.

You may act only on the basis of the evidence you receive. You are not to return an indictment unless the State has presented evidence which together with the reasonable inferences you draw from that evidence, leads you to conclude that (1) a crime has been committed and (2) the accused has committed it. Furthermore, when determining whether to return an indictment, you should not consider the potential punishment in the event of a conviction.

[Administrative Directive #12-06, "Standard Grand Jury Charge - For Statewide Use (approved July 20, 2006)].

Thus, clearly establishing that the grand jury is specifically instructed to consider the merits of each case presented before it and they are explicitly not allowed to conduct their own research. In fact, "[t]he authority is abundant that

court's presume juries follow instructions." Herbert, 457 N.J. Super. at 503. This Court has stated, "[t]hat the jury will follow the instructions given is presumed." State v. Loftin, 146 N.J. 295, 390 (1996). "The presumption is founded in part on necessity." Herbert, 457 N.J. Super. 503. "[T]he courts must rely upon the jurors' ability and willingness to follow the[]...instruction without cavil or question." Id. at 503-04 (quoting State v. Manley, 54 N.J. 259, 270 (1969). "The presumption is '[o]ne of the foundations of our jury system.'" Id. at 504 (quoting State v. Burns, 192 N.J. 312, 335 (2007)).

Defendant offers no proof that any of the grand jurors in his case, nor any virtual grand jurors statewide, conducted outside research on the law or facts that would call into question any indictment. Our entire criminal justice system is founded on the notion that jurors uphold their oaths and follow instructions. This notion protects both defendants and the State and ensures a fair and impartial jury will decide the matter before it. Defendant's argument is purely speculative and has no basis in fact or law.

None of the defendant or the ACDL-NJ's contentions render the virtual grand jury proceeding fundamentally unfair. Rather, the record establishes a careful implementation of safeguards that were put in place by the Judiciary, in consultation with the

Working Group, to ensure that the criminal justice system could still virtually function in a constitutionally acceptable manner. Proceeding in a virtual format allows for the State to continue to present cases to the grand jury, and if indicted, allows for a defendant to receive full discovery of his case from the State and potentially work towards a resolution or litigate dispositive motions. The opposite is also true - the grand jury also has the ability to exonerate a defendant stand accused by the State of criminal offenses. This is evidenced by the fact that grand juries across the State have entered numerous full or partial no bills and exonerated defendants.

POINT II⁵

DEFENDANT'S CONSTITUTIONAL RIGHT TO
EQUAL PROTECTION WAS NOT VIOLATED IN
THIS CASE.

The ACDL-NJ presents no evidence of actual harm suffered by the defendant in this case. Indeed, the defendant's case was presented to a sworn grand jury and they, after hearing the evidence presented by the State, returned an indictment against defendant. The ACDL-NJ's contentions misconstrue the Supreme Court's orders and infer a hierarchy of cases that should have been presented to the grand jury before defendant's case. In essence, the ACDL-NJ contends the defendant's right to equal protection was violated because the State honored his constitutional right to grand jury. The honoring of a defendant's right to grand jury can hardly be seen as a violation to his right of equal protection. As such, the ACDL-NJ's contentions must be rejected.

"Within the New Jersey Constitution, the principles of both equal protection and due process derive from the same constitutional language, which states: '[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying life and

⁵ This POINT responds to "POINT II" of the ACDL-NJ's amicus brief. Ab25-28.

liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.'" State v. Pimental, 461 N.J. Super. 468, 490 (App. Div. 2019) (citing N.J. Const. art. I, ¶1). "Article I does not contain the terms 'equal protection' or 'due process.' However, 'it is well settled that the expansive language of that provision is the source for both of those fundamental [state] constitutional guarantees.'" Ibid. (quoting Sojourner A. v. N.J. Dep't of Human Servs., 177 N.J. 318, 332 (2003) (internal quotation omitted)).

"The analysis of due process and equal protection under the New Jersey Constitution slightly differs from analysis of those fundamental rights under the United States Constitution." Id. At 491 (citing Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985)). In Robinson v. Cahill, 62 N.J. 473, 491-92 (1973), the New Jersey Supreme Court adopted "a balancing test in analyzing claims under the state constitution." Ibid. (quoting Greenberg, 99 N.J. at 567 (internal quotation omitted)). "That balancing test considers 'the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.'" Ibid. "In later cases, the Court at times has applied traditional federal tiers of scrutiny to an equal protection analysis, instead of a balancing test." Ibid.

"Equal protection does not preclude the use of

classifications, but requires only that those classifications not be arbitrary." Portiz, 142 N.J. at 91 (quoting City of Cleburne, Texas v. Cleburne Living Ctr., 471 U.S. 432, 439 (1985)). Where a government action "does not treat a 'suspect' or 'semi-suspect' class disparately, nor affect a fundamental right, the provision is subject to a 'rational basis' analysis." Pimental, 461 N.J. at 491. (quoting State v. Lagares, 127 N.J. 20, 34 (1992) (internal citation omitted)). Under this analysis, the government action only must be "rationally related to the achievement of a legitimate state interest." Ibid. (citing Byrne, 91 N.J. at 305, 450 A.2d 925); see also Lewis v. Harris, 188 N.J. 415, 443 (2006).

In this case, the ACDL-NJ fails to identify any actual harm the defendant, or similarly situated defendants, have suffered because of the virtual grand jury process. As noted by this Court, "1400 defendants are currently detained in county jails awaiting indictment. Additional defendants on pretrial release also await indictment." Aa28. The Court, based on the guidance from health officials noted that "the COVID-19 virus will continue to disrupt normal court operations for months[,] "ibid., and established a plan for grand jury to continue in a virtual format. Aa28-33. In fact, the Court recognized, "[t]he value of exploring a virtual grand jury process remains compelling, and, indeed, since the entry of the May 14, 2020 order the number of defendants detained

preindictment has increased from 1400 to 1,540.” Aa35. Thus, a compelling interest exists to both honor a defendant’s right to grand jury and while simultaneously ensuring the criminal justice system is functioning effectively in the public interest.

In an attempt to cast doubt on the virtual grand jury process, the ACDL-NJ attempts to place defendant in a suspect classification. However, the definition of that class appears fluid and non-existent. The ACDL-NJ draws numerous distinctions between detained and non-detained defendants; defendants in Mercer County as opposed to defendants in other counties; and classifications of charged offenses. Ab26-27. This Court’s order makes it clear that no such classifications exist. While Mercer and Bergen counties were chosen as the pilot counties for this program, presentment of a case in a pilot county in no way violated the defendant’s right to equal protection. Of particular note, is the fact that all in-person court proceedings were still suspended, including grand jury proceedings. Aa11-35. This pilot program presented the only opportunity for the State to honor a defendant’s right to grand jury, while thousands of other similarly situated defendants statewide were forced to wait for their opportunity to be heard. Simply put, the ACDL-NJ’s complains this defendant’s constitutional rights were violated because he received a benefit others did not. Thus, any contention that defendant was “cherry

picked" for this process while other defendants were afforded an in-person proceeding is belied by the record.

Rather, the record establishes that over 3,000 cases have been presented to grand juries statewide. Pa7. In Mercer County, 208 cases have been presented to grand juries, which have resulted in 208 indictments, 114 partial no-bills, and 10 full no-bills. Pa13. Regardless of the offenses charged or whether the defendant was detained, the State presented cases that were ready for the grand jury's consideration.

The ADCL-NJ's argument infers that the State endeavored upon a sophisticated selection process which resulted in the hand-selection of this defendant, thereby ignoring countless other defendants. By making this inference, the ACDL-NJ suggests that the Court's order and the State created or should create a hierarchy of cases that could have been presented before defendant's case and that other defendants were given the option to wait until in-person grand jury proceedings resumed. The Court's order and the State's scheduling of cases in no way contemplated such a hierarchy or selection process. Instead, the selection process undertaken here was done as a matter of typical routine. The only considerations undertaken by the State in this case - like all cases - was case preparedness, availability of the witness, and availability of the grand jury.

The ACDL-NJ's proposed classifications and hierarchy also infringe upon the State and County Prosecutors right to present cases to the grand jury. See, Shaw, 241 N.J. at 238 ("State and county prosecutors have the responsibility and authority to present cases to a grand jury and seek an indictment"). Undoubtedly, an emphasis is placed on cases where the defendant is detained over non-detained defendants. This is due in large part to the stringent time constraints placed upon the State under the "Criminal Justice Reform Act," N.J.S.A. 2A:165-1, et al. This in no way, however, prevents the State from seeking an indictment for a non-detained defendant's case.

Furthermore, the ACDDL-NJ contends virtual grand jury proceedings are unconstitutional because they lack the consent of the defendants. Consent of defendants adds an element to the proceeding that would otherwise not exist. As noted above, the requirement to seek a defendant's consent violates the secrecy of the grand jury proceeding. See, supra, POINT I-B. Additionally, it acts as a barrier for State and County Prosecutors from their responsibility to present cases to the grand jury. Shaw, 241 N.J. at 238. As noted by this Court in its June 4, 2020 Order, "[t]he requirement that a defendant consent to presentation of charges to a grand jury convening remotely (rather than in person) has inhibited bringing cases before those ready grand juries." Aa34.

Indeed, not one defendant consented to the presentment of their cases to the virtual grand jury. By eliminating this requirement from the pilot program, the State was no longer bound to the constraints placed on it by defendants who did not wish for their matters to proceed. Thus, placing the virtual program on equal footing with in-person proceedings. The ADCL-NJ's contentions would leave the State handcuffed to the idea that it was forced to only present cases where the defendant was detained, while simultaneously ignoring the mounting numbers of non-detained defendant cases that require consent before it can present their case to the grand jury.

In furtherance of their argument, the ACDL-NJ contend "[w]ithout a basis in reason, [defendant] was singled out for disparate treatment." Ab27. However, 3,000 cases presented to grand juries statewide hardly seems like this defendant was singled out. At the core of the ACDL-NJ's complaint is the concept that this defendant was singled out because he was afforded his constitutional right to grand jury. This flawed logic has no basis in fact or law. Equally true is the fact that the solution the ACDL-NJ proffers creates the very issue they are complaining of. Suggesting a hierarchy or classification, where detained defendants are required to be indicted before non-detained defendants, only creates numerous constitutional concerns. By

mandating such a hierarchy and classification, any non-detained defendant could presumably claim a violation of their constitutional rights to grand jury, equal protection, and speedy trial. Thus, creating the very problem they are seeking to solve.

Furthermore, by suggesting the Court and State adopt such a hierarchy, the ACDL-NJ is creating an equal protection violation for all defendants that does not exist in the traditional in-person setting. No such hierarchy or classifications existed when the State presented cases to an in-person grand jury. However, now, as the world combats a global pandemic, the ACDL-NJ's suggestion to present cases where defendants are detained leads to one inescapable conclusion - an arbitrary classification that completely denies a constitutional right to a majority of this State's defendants. Simply put, the ACDL-NJ seeks to create classifications where none exist, thereby violating the constitutional rights of all defendants.

The ACDL-NJ presents no evidence of actual harm suffered by the defendant in this case. The record establishes that the defendant's case was presented to a sworn grand jury and they, after hearing the evidence presented by the State, returned an indictment against defendant. While the process is not traditional, and was done in a virtual format, it in no way violated defendant's right to equal protection. The ACDL-NJ cannot

seriously argue that his right to equal protection and due process were violated when he was afforded the opportunity to have his matter heard by a grand jury, while thousands of other defendants around the State are waiting for that same opportunity. As such, the ACDL-NJ's contentions must be rejected.

CONCLUSION

For the above-mentioned reasons and authorities cited in support thereof, the State respectfully requests this Court find the virtual grand jury program constitutional.

Respectfully submitted,

ANGELO J. ONOFRI
MERCER COUNTY PROSECUTOR



By: RANDOLPH E. MERSHON III
Assistant Prosecutor
NJ Attorney ID No. 123752014

DATED: February 12, 2021

STATE OF NEW JERSEY,

Plaintiff,

v.

OMAR VEGA-LARREGUI,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION CRIMINAL PART
MERCER COUNTY

INDICTMENT NO.
DOCKET NO.

CRIMINAL ACTION

**CERTIFICATION OF BRIAN J.
MCLAUGHLIN**

Brian J. McLaughlin, of full age, hereby certifies as follows:

1. I am employed by the State of New Jersey Judiciary, Administrative Office of the Courts (AOC), as the statewide Manager of Jury Programs.
2. In my position, I am responsible for the oversight of petit jury, grand jury, and state grand jury operations, including providing vicinage-level jury managers with subject matter guidance on statewide jury policies and procedures.
3. My responsibilities include training and supporting vicinage-level jury management offices in implementing Supreme Court policies regarding jury management, as well as the procedures approved by the Court, the Judicial Council, the Administrative Director of the Courts, and other Judiciary authorities.
4. During the ongoing Covid-19 pandemic, my responsibilities have included overseeing the implementation of the Supreme Court's Orders authorizing virtual grand juries on a temporary basis. Those Orders include:
 - a. The Court's May 14, 2020 Order (authorizing a pilot program for virtual grand jury proceedings in two pilot counties, namely Bergen and Mercer, as recommended by the Supreme Court Working Group on Remote Grand Jury Operations, conditioned on the Judiciary's provision of technology as needed for jurors to participate in virtual sessions and on integration of additional protocols to uphold the sanctity and secrecy of the grand jury proceedings);

- b. The Court's June 4, 2020 Order (eliminating the requirement that cases can only be presented to a grand jury convening remotely if the defendant has consented to proceeding remotely);
- c. The Court's June 9, 2020 Order (expanding the virtual grand jury program to also permit selection of grand juries in a virtual format, either in the initial pilot counties or in other counties, and providing that the Judiciary will provide technology as necessary for summoned jurors to participate in virtual selections as well as in sessions); and
- d. The Court's June 25, 2020 Order (expanding the virtual grand jury program to also include State Grand Jury proceedings).

(See the Court's May 14, 2020 Order; June 4, 2020 Order; June 9, 2020 Order; June 25, 2020 Order).

5. In addition to the above-listed Orders, the Court also has addressed statewide grand jury proceedings during the ongoing Covid-19 pandemic in its Covid-19 Omnibus Orders and other Orders. Those Orders include but are not limited to:

- a. The Court's September 17, 2020 Eighth Omnibus Order (confirming that all counties are virtually selecting new grand jury panels, and providing that grand juries in all counties will be equipped and ready to convene in a virtual format on or before December 1, 2020);
- b. The Court's October 8, 2020 Ninth Omnibus Order (reinforcing that grand juries will be selected virtually, and confirming that before December 1, 2020 all counties will have the capacity for virtual grand juries; and permitting in-person grand juries, either in court locations, or, if court locations are not available, then in non-court locations as coordinated by the County Prosecutor, with court approval); and
- c. The Court's November 16, 2020 (suspending in-person grand jury sessions based on rising Covid-19 cases, hospitalizations, and deaths; permitting virtual grand

juries to continue to convene; and permitting grand jury panels that previously met in person to be converted to meet virtually, conditioned on the Judiciary providing technology and training as necessary for grand jurors to participate in virtual sessions).

6. In my capacity as statewide Manager of Jury Programs, I have worked with the Jury Managers in each County to understand and implement the provisions of the Court's Orders governing grand jury proceedings during Covid-19, as well as the administrative policies and protocols established to implement those Orders.
7. During the early months of the virtual grand jury program, I worked especially closely with the Jury Managers and other Vicinage staff, including in the Information Technology (IT) Division, to establish, test, refine, and document protocols for implementation of the Court's Orders in the pilot counties, Bergen and Mercer. This process included several mock virtual grand jury sessions in June 2020 with vicinage staff and assistant county prosecutors.
8. I supported Vicinage staff in developing, testing, and ensuring adherence to the protocols established in the May 15, 2020 Supplement to Directive #23-06 ("COVID-19- Virtual Grand Jury Pilot Program - (1) Supplement to the Grand Jury Charge; and (2) Supplement to the Oath of Secrecy").
9. That Supplement to Directive #23-06 enhanced the already substantial notices, oaths, and reminders to grand jurors to emphasize the sanctity of the proceedings, the requirement of absolute secrecy, and the potential for punishment if any violation occurs. It promulgated a supplement to the grand jury charge and a supplement to the oath of secrecy for virtual grand juries. Those approved supplements were issued to all grand jurors convening in a virtual format in the pilot counties of Bergen and Mercer, and to subsequent panels statewide.¹

¹ On September 30, 2020, an update (to the May 15, 2020 supplement to directive #23-06) clarified operational requirements for administration of the supplemental grand jury charge and oath and refined the language to cover new grand jury panels (rather than grand juries empaneled before COVID-19 that then reconvened in a virtual format. That updated supplement also has been distributed statewide, and the approved supplements (to the grand jury charge

10. The summoning of a pool of jurors for a grand jury selection has remained largely unchanged despite the other temporary modification necessitated by COVID-19. Under N.J.S.A. 2B:20-3, all prospective jurors must complete the standard qualification questionnaire, either through the eResponse online juror portal or by completing a hard copy questionnaire mailed to jurors who do not respond online. Prospective jurors must complete the standard juror qualification questionnaire before requesting to be disqualified, excused, or rescheduled.
11. Pursuant to N.J.S.A. 2B:20-9a, the Assignment Judge or their designee is authorized to handle requests for disqualification, pre-reporting excusal, or rescheduling of service. Those requests have continued to be handled in a standardized manner during COVID-19.
12. The standardized procedures for addressing financial hardship and minor childcare excuse requests used prior to the Covid-19 remain in place under the Court's approved plan (See, for example, the childcare certification form posted on the Judiciary's Juror webpage).
13. In furtherance of the security parameters set forth in the Court's May 14, 2020 order, before each virtual session, grand jury staff check in each juror individually. As part of that individual check-in process, the grand juror performs a 360-degree scan of their environment and staff confirm that the juror is in a private environment. Jurors also are required to turn off cell phones and other devices during each session.
14. In various contexts, the Judiciary has demonstrated its capacity to use Zoom to conduct remote proceedings that are (to the greatest possible extent) secure from outside attack and configured and managed to minimize other risks. In addition to general security measures, additional security safeguards have been implemented for grand jury selections and sessions, including requirements for participants to establish named (not anonymous) Zoom accounts that jury staff verify prior to each session.

and secrecy oath) have been issued to all county and state grand jurors. (See the attached September 30, 2020 Updated Supplement to Directive #23-06).

15. Vicinage staff in various divisions provide technology and assistance to summoned and selected jurors who otherwise could not participate in the grand jury process (both selection and sessions). This includes configuring and administering Judiciary tablets (with Broadband capacity) and delivering those tablets to jurors who require them to participate in virtual proceedings.
16. Consistent with statewide protocols, Vicinage staff in Jury Management and IT offer general and individualized training to summoned and selected jurors to facilitate their participation in remote proceedings using Zoom.
17. Pursuant to the Court's Orders, virtual grand juries started in only two counties, beginning with more straightforward matters so that all participants could become familiar and develop expertise with the process.
18. The virtual grand jury program expanded to include State Grand Jury, with the first State Grand Jury panel reconvening in a virtual format for orientation on August 10, 2020 and for the first virtual presentment by the Division of Criminal Justice on August 17, 2020. Additional county-level virtual grand juries were established starting with Atlantic County on September 22, 2020.
19. In September 2020, the Division of Criminal Justice and the First Assistant Prosecutors Association requested the Judiciary's participation in a follow-up training for County Prosecutors, First Assistants, and other Assistant Prosecutors regarding the virtual grand jury process. Along with other central office and vicinage staff, I participated in that virtual training on October 1, 2020. Over one hundred Assistant Prosecutors attended the training session.
20. The Court in its October 8, 2020 Ninth Omnibus Order permitted socially distanced in-person grand jury sessions, either in court locations or in other locations as coordinated by the County Prosecutor. I worked with Jury Managers in summoning jurors for virtual selections for panels scheduled to convene virtually or in person with social distancing and other mandatory health precautions.

21. The Court in its November 16, 2020 Order suspended in-person grand jury sessions based on worsening Covid-19 trends in all counties in New Jersey. I worked with Jury Managers to summon for new grand jury selections and, as applicable, to assist in converting grand jury panels that previously met in person to convene in a virtual format.
22. I have continued to work with Jury Managers to summon for additional grand jury selections and to support virtual grand juries throughout New Jersey.
23. While the Court never has mandated presentment of cases to virtual grand juries, as of January 29, 2021, 19 counties are using virtual grand juries. Virtual panels also are established and equipped (with technology and training) in the remaining two counties, although cases are not being presented.
24. The Judiciary has supported otherwise qualified jurors²in participating in virtual selection and serving on virtual panels by providing technology and training in all cases. No juror has been excluded from selection or from serving on a virtual grand jury based on lack of technology.
25. As of January 29, 2021, the Judiciary has distributed over 150 tablets (with Broadband activated as necessary) to support participation in virtual grand jury selections and sessions.
26. The technical security of virtual grand jury proceedings has not been compromised. No one has breached or hacked a virtual grand jury selection or session.
27. Statewide, there are a total of 45 sitting county-level virtual grand juries, involving more than 1000 grand jurors.

² N.J.S.A. 2B:20-1 and N.J.S.A. 2B:21-2 sets forth the qualifications for grand jurors.

28. Since June 18, 2020, virtual grand jury panels statewide have handled over 3,000 presentments. Of the 3,000 presentments, over 70 defendants have received full no-bills and over 190 defendants have received partial no-bills.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated 2/12/21

Brian J. McLaughlin
Brian J. McLaughlin

STATE OF NEW JERSEY,

Plaintiff,

v.

OMAR VEGA-LARREGUI,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION CRIMINAL PART
MERCER COUNTY

INDICTMENT NO.

DOCKET NO.

CRIMINAL ACTION

CERTIFICATION OF DALIA SEIDL

Dalia Seidl, of full age, hereby certifies as follows:

1. I am employed by the State of New Jersey Judiciary, Mercer Vicinage, as the Jury Manager.
2. In my position, I am responsible for jury management of the Mercer Vicinage. This includes petit jury, county-level grand jury, and those Mercer County residents summoned for Grand Jury. I also have certain statewide administrative oversight responsibilities for State Grand Jury.
3. My responsibility is to implement Supreme Court policies regarding jury management, as well as procedures approved by the Court, the Judicial Council, the Administrative Director of the Courts, and other Judiciary authorities.
4. During the ongoing Covid-19 pandemic, my responsibilities have included implementing the Supreme Court's Orders authorizing virtual grand juries on a temporary basis. They include the Court's May 14, 2020 Order authorizing a pilot program for virtual grand jury proceedings, starting with empaneled grand juries in two pilot counties (Bergen and Mercer) and subsequent Orders modifying and expanding that pilot program, as well as administrative protocols established to implement the Court's action. (See the Court's May 14, 2020 Order; June 4, 2020 Order; June 9, 2020 Order; June 25, 2020 Order; and grand jury-related provisions of the Court's Covid-19 Omnibus Orders.)
5. At the direction of the Assignment Judge, the Hon. Mary C. Jacobson, A.J.S.C., I summoned a pool of 329 jurors for a grand jury selection scheduled and conducted on February 13, 2020, just before in-person grand jury selections and

sessions were suspended. (See the March 17, 2020 Notice to the Bar).

6. At the February 13, 2020 selection, Criminal Presiding Judge Peter Warshaw selected a 23-person grand jury panel ("the grand jury").
7. That grand jury panel selected on February 13, 2020 convened in person for orientation on February 20, 2020 and for sessions on February 27, March 5, and March 12, 2020.
8. Pursuant to Judge Jacobson's May 20, 2020 Order, the term of the grand jury was extended through August 10, 2020.
9. The panel was suspended based on the Covid-19 pandemic. Consistent with the Court's May 14, 2020 Order, the grand jury panel reconvened in a virtual (video) format on June 18, 2020.
10. Before the grand jury convened in a virtual format, I took steps to implement the provisions of the Court's May 14, 2020 Order.
11. I contacted each grand juror by phone and/or email and inquired as to their capacity to fulfill their grand jury service. Of the 23 grand jurors selected and empaneled on February 13, 2020, one requested to be excused from service for reasons not related to technology. (The grand juror was disqualified after moving to Camden County).
12. Another five grand jurors confirmed willingness to serve but indicated that they lacked reliable personal technology to participate in virtual sessions. I coordinated with the Administrative Office of the Courts to arrange for delivery of SurfacePro tablets (with Broadband internet capacity) to those five jurors.
13. I also worked with Mercer Vicinage ITO staff to assist all jurors (those using their own technology and those using devices supplied by the Judiciary) to complete Zoom onboarding before the scheduled orientation session. All grand jurors successfully participated in the orientation session. As part of the orientation process, the grand jurors were required to demonstrate the capacity to use the

technology, to see and hear the proceedings, to communicate with staff and each other, and to indicate if they experienced any difficulties or otherwise required assistance.

14. I provided technical instructions to all members of the grand jury panel, including information to contact Mercer Vicinage jury and ITO staff if they experienced any technical or other issues. (See "Create Free Zoom Account" and "Tech Tips").
15. Consistent with the May 15, 2020 Supplement to Directive #23-06, Judge Warshaw administered a supplemental charge to the grand jury during its May 20, 2020 orientation. Each grand juror also swore or affirmed a supplemental oath of secrecy. (See May 15, 2020 Supplement to Directive #23-06 ("COVID-19-Virtual Grand Jury Pilot Program - (1) Supplement to the Grand Jury Charge; and (2) Supplement to the Oath of Secrecy)).
16. The grand jury panel convened for its first virtual session on June 18, 2020. It met again for virtual sessions, and handled presentments, on June 25, July 2, and July 9, 2020.
17. Before each virtual session, grand jury staff checked in each juror individually. As part of that individual check-in process, the grand juror performed a 360-degree scan of their environment and staff confirmed that the juror was in a private environment.
18. This grand jury panel convened for the fourth time on July 9, 2020. (The grand jurors reaffirmed their commitment to uphold the standard and supplemental oath of secrecy).
19. Over the course of its first three virtual sessions the grand jury panel handled a total of eight presentments, returning eight indictments, as well as two partial no-bills.
20. At its July 9, 2020 session, the Mercer County Prosecutor's Office presented six matters to the grand jury panel. The grand jury returned six indictments and five partial no-bills.
21. Four grand jurors used technology provided by the Judiciary to participate in the July 9, 2020 virtual session.

22. I was present in the July 9, 2020 virtual grand jury session, along with three additional grand jury staff. No technical issues were reported by grand jurors or other participants during the July 9, 2020 virtual grand jury session.
23. I have reviewed the transcript of the July 9, 2020 virtual grand jury session, which is consistent with my recollection. As noted in the transcript, the Assistant Prosecutor asked the grand jurors at various points if they could see and hear the proceedings and if they had any questions. When some or all of the grand jurors did not answer audibly, such as by nodding their heads or remaining silent, as also occurs during in-person proceedings, the Assistant Prosecutor described their response orally on the record.
24. I recall, and the transcript reflects, that the foreperson conducted the required pre-deliberation technology check. Before deliberating in the breakout room, the foreperson asked the members of the grand jury whether they experienced any technical problems that affected their ability to hear and/or observe the proceedings. At the July 9, 2020 session, the grand jury answered in the negative.
25. I recall, and the transcript reflects, that the foreperson also conducted the required post-vote technology check. After the vote in the breakout room, the foreperson asked the members of the grand jury if there were any technical problems that affected their ability to deliberate and vote. At the July 9, 2020 session, the grand jury answered in the negative.
26. Since the Supreme Court authorized virtual grand juries as a temporary solution during the ongoing Covid-19 pandemic, two panels selected before the pandemic have reconvened for virtual sessions.
27. I have overseen the selection of four additional panels; two on October 29, 2020 and two on January 14, 2021. Following the selection of these panels, they have met virtually.
28. At the direction of Judge Jacobson, I summoned a pool of 800 jurors for a grand jury selection scheduled and conducted on October 29, 2020.

29. The October 29, 2020 selection was the first grand jury selection done virtually in Mercer. On October 29th, Judge Warshaw selected two panels that day: one to be fully virtual and the other to meet in-person. (See the Court's October 8, 2020 Ninth Omnibus Order authorizing in-person panels.) Forty-six jurors were selected for the two panels - 23 jurors for each.
30. The in-person panel had one in-person session prior the closing of courthouse due to the Court's suspension of in-person grand jury sessions because of the second wave of the Covid-19 pandemic. (See the Court's November 16, 2020 Order). This panel then became fully virtual for the remainder of their term.
31. Prior to October 29, three summoned jurors requested equipment for the selection. Another three summoned jurors utilized their personal cell phones or personal equipment for the selection, and were empaneled as jurors for the in-person panel. (See the Court's June 9, 2020 Order authorizing the use of personal smartphones and other technology during the selection process). When the in-person panel became virtual, these three jurors requested and were provided with tablets to enable them to participate in the grand jury sessions virtually.
32. More than one hundred residents of Mercer County have participated in county-level virtual grand jury sessions. (Additional Mercer County residents have participated in virtual State Grand Jury sessions and in virtual selections for county-level and State Grand Jury and for hybrid jury trials).
33. Of the county-level grand jurors, only 21 have required technology, which the Judiciary has provided to every juror.
34. No juror has been unable to participate in virtual selection or virtual sessions based on a lack of technology.
35. At the outset of virtual service, the technological skills of summoned and selected grand jurors vary. In an isolated instance early on in the process, a selected grand juror, who had difficulty with her audio, received assistance from her grandson prior to the start of the session. The Assistant

Prosecutor conducting the session immediately noticed the presence of the grandson, and directed that he leave the room, which he did.

36. In another instance, after receiving technology and training from the Judiciary, a grand juror empaneled in-person prior to the pandemic, who previously did not have an internet address and who did not have experience with digital technology, was able to fully participate in sessions when the panel reconvened virtually.
37. Virtual grand jury sessions and selections are continuing in Mercer County, with a total of 208 matters having been presented to virtual panels, resulting in 208 indictments, 114 partial no-bills, and 10 full no-bills.¹

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated

2/10/21



Dalia Seidl

¹ It is important to note that many cases presented in grand jury involve multiple defendants. Where there may be a no-bill on one defendant, there may have been an indictment for another defendant or defendants involved in that same case. Accordingly, the 208 cases presented involved more than 208 defendants. Of the 208 cases presented, 208 defendants were indicted, and 10 defendants were fully no-billed.