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SUPREME COURT OF NEW JERSEY
Docket No. 085288

STATE OF NEW JERSEY, : Direct Certification on
: Motion of Supreme Court,
: R.12-1
Plaintiff-Respondent :
: CRIMINAL ACTION
: On Appeal From:
v. : Superior Court of New Jersey
: Law Division - Mercer County
: Indictment No.:MER-20-07-0221-I
OMAR VEGA-LARREGUI, : Sat Below:
: Hon. Darlene Pereksta, J.S.C.
Defendant-Movant. :
:
:
:

BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

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Preliminary Statement

The New Jersey State Bar Association (NJSBA) is the largest professional organization representing lawyers in New Jersey. Our members include practitioners who practice every conceivable area of law in state and federal courts. Our criminal practitioners include prosecutors and public and private criminal defense attorneys. A decision on the constitutionality of virtual grand juries and the future of grand jury presentations during the pandemic will impact the practices of all of our criminal practitioners, the lives of criminal defendants and the safety of the public at large.

A year into the pandemic, the NJSBA believes virtual grand juries, as implemented, deny defendants their constitutional right to a secret and deliberative body of grand jurors. In addition, the NJSBA has a great concern that individuals who are not technologically savvy and those who lack reliable internet access will be excluded from the grand jury process, resulting in a jury that is not reflective of a representative cross-section of the community because it is well-documented that low-income communities and people of color are disproportionately affected by the technology gap.

These concerns require immediate attention. The New Jersey Supreme Court must render virtual grand juries unconstitutional, as presently implemented. The NJSBA urges the Court to halt future

uses of virtual grand juries until they can be held in person in a manner that adheres to best safety practices and protocols suggested by the appropriate state and federal authorities. Given recent breakthroughs with vaccines, the NJSBA believes meeting these standards will be attainable in the very near future.

The NJSBA offers its position not as a critique of past practice, but rather in recognition of the unique and world-changing obstacles presented by the COVID-19 pandemic. This chapter in history requires all stakeholders to work together to find the best path forward in ensuring that justice continues to be served in an environment that takes into account the health and safety of all involved. The efforts made by the Judiciary to implement virtual proceedings in a wide array of court proceedings are commendable and have served to keep our judicial system moving throughout the pandemic. Virtual grand juries, however, are the exception and the type of proceeding that simply cannot be done virtually without grave consequences to the constitutional rights of the accused. For this reason, it is respectfully submitted that virtual grand juries must end.

Procedural History and Statement of Facts

The NJSBA relies on the procedural history and statement of facts as presented by the parties.

Legal Argument

The constitutionality of virtual grand juries, as implemented, must be reviewed through an analysis of the impact of virtual proceedings on the rights of individual defendants, as established by the state and federal constitutions. When virtual grand juries cannot guarantee the rights of those who face indictment, as is the case here, we must look to other options and continue to seek guidance from state and federal health officials.

I. VIRTUAL GRAND JURIES ARE UNCONSTITUTIONAL AND MUST BE SUSPENDED IMMEDIATELY

New Jersey's Constitution affords individuals charged with indictable offenses, and those who are the subject of investigations into indictable offense, the right to "presentment or indictment of a grand jury". N.J. Const., Art. I, Para. 8. The grand jury serves to "safeguard citizens against arbitrary, oppressive, and unwarranted criminal accusations. State v. LeFurge, 101 N.J. 404, 418 (1986) (citing United States v. Calandra, 414 U.S. 338, 342-43 (1974)). To put it simply, grand jurors serve as the gatekeepers to allow, or prevent, the state to bring charges on indictable offenses against individuals in our state courts. As stated more fully herein, the virtual grand jury procedures implemented by the state are unconstitutional because there is no assurance that secrecy is maintained, that jurors can

meaningfully review the evidence and deliberate with fellow grand jurors, and that there is an adequate and accurate record to challenge the proceedings by the defendant thereafter.

The New Jersey Rules of Court require "secrecy of proceedings of the grand jury". R. 3:6-7. Secrecy at the grand jury stage of a criminal case protects the interests of a wide-range of stakeholders in our criminal justice system. Further, it serves:

- (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 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 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.

State v. Clement, 40 N.J. 139, 143 (1963) (quoting United States v. Rose, 215 F.2d 617, 628-629 (3rd Cir. 1954)).

Although secrecy violations, by themselves, may not rise to the level of constitutional concern, when coupled with the inability of grand jurors to meaningfully review evidence and deliberate with fellow grand jurors and the possibility - and more likely, probability - of ensuring an adequate and accurate record

of the proceedings below, the constitutionality of those proceedings must be called into question.

Case law reinforces the constitutional mandate that grand jurors be able to properly receive the evidence in a presentation and hold meaningful deliberations on a proposed indictment, the charges contained therein, and the evidence used to support those charges. See State v. Hogan, 144 N.J. 216, 228-29 (1996). In holding that prosecutors have a duty to present grand jurors with evidence that negates the guilt of a defendant and is clearly exculpatory, the Court in Hogan articulated the importance of the constitutional guarantee of an informed and deliberative body of grand jurors:

Once the grand jury has acted, an "indictment should be disturbed only on the 'clearest and plainest ground,'" [State v. Perry, 124 N.J. 128, 168 (1991)] (quoting [State v. New Jersey Trade Waste Ass'n, 96 N.J. 8, 18-19 (1984)]), and only when the indictment is manifestly deficient or palpably defective. E.g., [State v. Wein, 80 N.J. 491, 501 (1979)].

. . . .

We have 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 whether to indict. See [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);

[State v. Del Fino, 100 N.J. 154, 164-65 (1985)] (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 (App. Div. 1976)] (dismissing indictment because prosecutor improperly encroached on independence of grand jury by telling some jurors that their initial vote not to indict was wrong).

Id.

While Hogan focused on exculpatory evidence, and the internet was barely in its infancy when Hogan was decided in 1996, the core principles on which that case was decided apply directly to virtual grand jury presentations.

Here, the grand jury transcript in State v. Omar Vega-Larregui reveals flaws that raise concerns similar to those highlighted in Hogan. Those concerns, as discussed in depth by other *amici* in this matter, include statements that call into question the grand jurors' abilities to: (1) see and hear evidence as it was presented, (2) read and understand the proposed indictment as it was shared by an unidentified individual, and (3) meaningfully participate in deliberations. Grand jurors cannot meet their constitutional obligations if they cannot carry out these key functions.

The ability to have a complete and accurate transcript is critical to a constitutional proceeding. In the underlying case,

the Defendant-Movant sets out the difficulty in merely sharing a document. See Defendant-Movant's Brief, p. 18-19. There are a number of references to an "Unidentified Speaker," for example, that makes it difficult to follow the discussion. Id. Furthermore, hypothetically, key testimony could be missed by virtue of a frozen screen, dropped wireless feeds, interruptions, and untold other reasons. In the virtual grand jury setting technological issues leading to incomplete transcripts will undermine a defendant's ability to challenge the sufficiency of the evidence presented to the grand jurors and exercise their constitutional right to confront a witness with prior grand jury testimony. See Stewart v. Dexter, 218 N.J. Super. 417, 420 (Law Div. 1986) ("[G]rand jury testimony may be necessary to impeach [witness's] testimony, refresh their recollection or test their credibility."); see also State v. Morrison, 188 N.J. 2, 12-13 (2006) (dismissing an indictment for crimes involving distribution of drugs where the evidence before the grand jury indisputably showed that the defendant and the victim were in joint possession, precluding distribution by one to the other).

Moreover, the technological shortfalls on display amplify concerns raised by fellow *amici* as to connectivity concerns for those who are less technologically savvy and those with lower incomes -- who are disproportionately from diverse populations -- who may lack reliable internet access.

The NJSBA first raised questions about whether virtual or hybrid-virtual proceedings would have a disproportional impact on diverse populations leading to a juror array not representative of the community in the July 2, 2020 Report of the Pandemic Task Force's Committee on the Resumption of Jury Trials. See Report of the Committee on the Resumption of Jury Trials, https://tcms.njsba.com/personifyebusiness/Portals/0/2020%20Pandemic%20Task%20Force/NJSBA%20RJT_Jury%20Selection%20Proposal.pdf.

The NJSBA repeated those concerns in two subsequent reports from the Committee on the Resumption of Jury Trials dated Sept. 2, 2020 and Nov. 9/Nov. 11, 2020. The NJSBA recommended that data about excused jurors be made available to the parties and that deferral requests be heard by a judge with counsel present to provide for transparency, preserve public confidence and ensure concerns about a representative jury array could be adequately addressed. See Report of the Committee on the Resumption Of Jury Trials of the New Jersey State Bar Association Pandemic Task Force, Part Two, <https://tcms.njsba.com/personifyebusiness/Portals/0/2020%20Pandemic%20Task%20Force/Report%20on%20Resumption%20of%20Jury%20Trials%20Part%202%209-2-2020.pdf>; and A Path to Virtual Civil Jury Trials Prepared by the New Jersey State Bar Association Pandemic Task Force Committee on the Resumption of Jury Trials November 9, 2020/Updated November 11, 2020, <https://tcms.njsba.com/personifyebusiness/Portals/0/2020%20Pandemic%20Task%20Force>

/NJSBA%20Report%20and%20Recommendations%20on%20Virtual%20Civil%20Jury%20Trials%2011-11-2020.pdf.

The Court recognized the importance of these issues, as well, in its Oct. 16, 2020 Order in State v. Dangcil, Docket No. 084990, where it denied an interlocutory application for emergent review of issues pertaining to whether a juror array derived from a hybrid-virtual jury selection procedure met the constitutional requirements of an array that is representative of the community, but indicated it would entertain an application for direct certification at the conclusion of the matter. The NJSBA filed an amicus brief in that matter highlighting its concerns noted above, and suggests that those issues are equally important here.

After considering the constitutional requirements of a grand jury indictment, and reviewing the shortfalls experienced in virtual grand jury proceedings as illustrated by the facts of this case, the NJSBA urges the Court to find that virtual grand juries, as presently implemented, are unconstitutional and should immediately cease. If this Court upholds the use of virtual grand juries prospectively, the NJSBA believes presentment of a criminal matter to a virtual grand jury, rather than an in-person grand jury, should require the same knowing and voluntary waiver as is required for criminal defendants to waive their right to indictment and proceed on criminal charges by way of accusation. See R. 3:7-2 ("Every crime shall be prosecuted by indictment unless the

defendant, after having been advised of the right to indictment, shall waive the right in a signed writing, in which case the defendant may be tried on accusation.”)

II. THE COURT SHOULD PROVIDE CLEAR GUIDANCE TO TRIAL COURTS IN CONNECTION WITH PREVIOUS INDICTMENTS RETURNED BY VIRTUAL GRAND JURIES

Should this Court find that virtual grand jury proceedings violate a defendant’s constitutional rights, it is not necessarily the case that all previous indictments returned by a virtual grand jury need be overturned. The Court should, however, provide guidance to trial courts about the appropriate circumstances under which challenges to virtual grand jury indictments can be properly considered.

In these unprecedented times, the Court may once again invoke its supervisory authority “to ensure the fairness and integrity of grand jury proceedings” just as it did immediately prior to the pandemic in State v. Shaw, 241 N.J. 223, 230 (2020). In establishing Assignment Judge-review of applications for multiple indictments, the Court advised that consideration should focus on “whether the State has new or additional evidence to present; the strength of the State’s evidence; and whether there has been any prosecutorial misconduct in the prior presentations.” Id.

Here, the Court should provide similar guidance about those circumstances under which challenges to virtual grand jury

proceedings conducted in good faith under the Court's prior rulings should be considered for dismissal without prejudice. Clear guidance will alleviate confusion and unnecessary delays in resolving matters.

III. THE COURT SHOULD TAKE STEPS TO RETURN TO IN-PERSON GRAND JURY HEARINGS AS SOON AS PRACTICABLE

The NJSBA believes the issues raised in this case are of constitutional magnitude and are subject to being repeated in other virtual grand jury presentations as long as virtual grand juries continue. The NJSBA advocates for a solution involving a return to the time-tested in-person proceedings conducted in a manner that is safe for all involved. The reality of in-person proceedings is imminent, given the Court's own phased planning, the demonstrable efforts of the state to make the vaccine available, and the availability of alternatives to virtual grand juries. The need to preserve the integrity of the grand jury system far outweighs the inconvenience of a brief holdover of grand jury proceedings until they can be implemented safely and without the constitutional infirmities that virtual grand juries present.

A. Court-Established Phases for a Return to In-Person Proceedings

On March 17, 2020, due to the onset of the COVID-19, Chief Justice Stuart Rabner entered an order cancelling grand jury panels through March 27, 2020. (March 17, 2020, Supreme Court Order - No

Grand Jury Selections or Sessions through March 27). The Court entered two additional Omnibus orders continuing its suspension of grand jury selections and sessions through May 31, 2020. (See March 27, 2020 Supreme Court Order; April 24, 2020 Supreme Court Order). On May 14, 2020, the Supreme Court entered an order implementing virtual grand jury proceedings in two counties. (See May 14, 2020 Supreme Court Order). On June 8, 2020, the Supreme Court amended the prior May 14, 2020 order, removing the requirement of defendant's consent to conduct a virtual grand jury proceeding. (See June 4, 2020 Supreme Court Order).

On June 10, 2020, the Court published the New Jersey Courts Post-Pandemic Plan (Plan). It includes a series of phases for returning the courts for in person proceedings. According to the Plan, Phase 2, which commenced on June 22, 2020, consisted of a gradual and limited return to court buildings, with 10-15% of judicial staff onsite and certain matters that cannot proceed remotely to be conducted onsite. Phase 3 envisions ongoing remote operations with gradually increasing events, which will eventually include new jury trials and 50-75% of judge and staff onsite. Phase 4 will commence "once a vaccine is available and/or herd immunity is established, and up to 75-80% of judges and staff on site." (See June 10, 2020 New Jersey Courts Post-Pandemic Plan).

B. The availability of vaccines brings in-person proceedings possible in the near future

On December 11, 2020, the U.S. Food and Drug Administration issued the first emergency use authorization (EUA) for a vaccine for the prevention of coronavirus disease 2019, which allows the Pfizer-BioNTech COVID-19 Vaccine to be distributed in the U.S. (See [U.S. Pfizer-BioNTech COVID-19 Vaccine | FDA, fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/pfizer-biontech-covid-19-vaccine](https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/pfizer-biontech-covid-19-vaccine)).

On December 18, 2020, the U.S. Food and Drug Administration issued an emergency use authorization (EUA) for the second vaccine for the prevention of coronavirus disease 2019, which allows Moderna COVID-19 Vaccine to be distributed in the U.S. (See [Moderna COVID-19 Vaccine | FDA, fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/moderna-covid-19-vaccine](https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/moderna-covid-19-vaccine)).

On February 5, 2021, Johnson and Johnson filed an application for Emergency Use Authorization with the U.S. Food and Drug Administration, for another COVID-19 Vaccine. (See [Johnson & Johnson requests U.S. authorization for its one-dose COVID vaccine - CBS News, cbsnews.com/news/covid-vaccine-johnson-johnson-request-emergency-use-authorization/](https://www.cbsnews.com/news/covid-vaccine-johnson-johnson-request-emergency-use-authorization/)).

As of February 8, 2021, over 1 million New Jersey residents have been inoculated with the one or more doses of the COVID-19

vaccine. (See CDC COVID Data Tracker, [covid.cdc.gov/covid-data-tracker/#vaccinations](https://www.cdc.gov/covid-data-tracker/#vaccinations)). Additionally, New Jersey has made great strides in expanding vaccine capacity and accessibility and expects to continue to increase the state's vaccination administration capacity in the coming weeks and months. In the last month, the state has opened six mega vaccination sites. See New Jersey COVID-19 Information Hub: Where, how, and when can I get vaccinated? | FAQ ([nj.gov](https://www.nj.gov)), [covid19.nj.gov/faqs/nj-information/slowing-the-spread/where-how-and-when-can-i-get-vaccinated](https://www.covid19.nj.gov/faqs/nj-information/slowing-the-spread/where-how-and-when-can-i-get-vaccinated).) With Johnson and Johnson's anticipated approval, the rate of vaccination among the public will only further increase, further opening the pathway for in-person court proceedings, pertinently, grand jury proceedings.

Vaccine accessibility has always been a strong consideration in determining the trajectory for returning to in-person proceedings. This is evident from the Court's Post-Pandemic Plan formulated in June 2020, which notably defined the accessibility of a vaccine as a benchmark to returning to in-person proceedings. The fact a COVID-19 vaccine has now been made available and will only become more accessible to the public in the near future should guide the Court in deciding to impose a moratorium on virtual grand jury proceedings without the consent of the parties, until in-person grand jury proceedings can be held, which, as noted above, appears to be imminent.

C. Alternatives to Virtual Proceedings Should be Immediately Explored

While virtual grand jury hearings were a noble effort to accommodate justice during the unusual circumstances of the pandemic, the constitutional infirmities that have arisen during their implementation require in-person alternatives to be considered and, if possible, implemented.

The NJSBA recognizes that individual courtrooms may not be spacious enough to accommodate in-person grand juries while adhering to social distancing guidelines in place. However, that should not end the discussion.

There are alternatives available that could provide constitutionally-sound in-person proceedings consistent with prevailing health and safety standards. Most of the issues raised in connection with virtual proceedings concern the inability to control the environment of the grand jurors. While it may not be possible to have all of the grand jurors in a single courtroom, perhaps multiple courtrooms with simulcasted viewing of the prosecutor and witnesses can be used. Venues other than the courthouse can also be explored, such as school gymnasiums where all participants could be easily spread out to meet the social distance parameters health officials recommend. The NJSBA respectfully suggests that all potential avenues of holding in-person grand jury hearings should be explored and exhausted to

determine whether proceedings can be conducted in a manner consistent with what the Constitution requires.

Conclusion

Based on the clear defects in the current virtual grand jury presentation procedure, and the deprivation of criminal defendants' constitutionally guaranteed rights, coupled with the advances in COVID-19 testing, ability to properly social distance, the increasing availability of the COVID-19 vaccine, and the declining trends in active COVID-19 cases, the NJSBA advocates for an order suspending virtual grand juries until the ability to conduct in-person grand jury proceedings consistent with current health and safety requirements has been established.

Respectfully submitted,

New Jersey State Bar Association

By _____ /s/

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Dated: 2/10/2021

