REDACTED

Supreme Court of New Jersey

DOCKET NO. 089571

IN RE THE MATTER CONCERNING THE STATE GRAND JURY :

CRIMINAL ACTION
UNDER SEAL

On Petition for Certification of the Final Judgment of the Superior Court of New Jersey, Appellate Division.
Docket No. A-003795-22

Entered: June 4, 2024
Sat Below:
Hon. Greta Gooden Brown, P.J.A.D.
Hon. Arnold L. Natali, Jr., J.A.D.
Hon. Michael J. Haas, J.A.D.

REPLY BRIEF OF PETITIONER STATE OF NEW JERSEY

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August 1, 2024

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PRELIMINARY STATEMENT

Although the Diocese of Camden alone argues that the courts resolved the issues in this appeal correctly, it cannot deny that this dispute involves weighty legal questions with profound implications for victims and the public alike. The Diocese does not deny that the courts below were the first in history to review a presentment before a grand jury issued one. The Diocese embraces the sweeping rule that presentments can never derive from private misconduct, no matter how much the conduct impacts the public affairs or conditions. And it confirms these new, broad legal rules were issued in secret, precluding public knowledge that a grand jury presentment on clergy abuse is now categorically prohibited in New Jersey, and preventing any effort at reform. The importance of each rule would suffice for certification; together, the need for review is overwhelming.

ARGUMENT

POINT I

THE DIOCESE FAILS TO REHABILITATE THE ERRORS COMMITTED BELOW IN LIMITING THE GRAND JURY'S PRESENTMENT POWER.

The Diocese attempts to defend the decisions below, but it cannot jusitfy either of their broad legal holdings: it cannot identify a single instance in which a court adjudicated (let alone foreclosed) an anticipated presentment before one was returned, and it cannot identify any case establishing its categorical rule that

presentments can never address private conduct, no matter how much the conduct affects the public. These two novel holdings call for certification.

A. The Diocese Fails To Justify The Courts' Unprecedented Decision To Rule On The Validity Of A Hypothetical Presentment.

The Diocese all but admits that this case is the first to evaluate the validity of an anticipated presentment. (Op11). Yet it cannot identify a single source of law that supports this approach—not a rule, a case, or even a prior example.

As Rule 3:6-9 lays out, the Assignment Judge must review a presentment after a grand jury returns one, not when a judge merely anticipates one will issue. (Pp9-12); R. 3:6-9(b) (providing for review only of a presentment that has been "returned … to the Assignment Judge"). Although the Diocese acknowledges Rule 3:6-9 as the governing rule, it argues this Rule does not expressly forbid a court from reviewing the hypothesized presentment. (Op7-8). But for one, that misunderstands how the Rules operate: they consistently establish the exclusive procedures to follow, without then needing to also expressly foreclose all other options. Cf. R. 2:5-1(a) (detailing how to commence an appeal). For another, this Rule in particular must be exclusive, as it provides the AJ multiple tools—e.g., striking or redacting parts of a presentment—that could only be employed once the grand jury acts. Finally, the assertion that Rule 3:6-9 does not foreclose review of a hypothetical presentment does not make up for the Diocese's failure to identify any source of law actually authorizing a court to do so.

Nor does the judiciary's limited role in supervising the grand jury justify the premature review below. (Op10-12). The Diocese's unsupported claim that this authority encompasses the right to dictate which harms the grand jury may investigate is contrary to "the grand jury's investigative independence," State v. Bell, 241 N.J. 552, 560 (2020); see State v. Francis, 191 N.J. 571, 586 (2007), and the prosecutor's "broad discretion" to determine what cases to present, State v. Perry, 124 N.J. 128, 167-68 (1991); see Bell, 241 N.J. at 560; see also In re Essex Cnty. Grand Jury Investigation, 368 N.J. Super. 269, 280-81 (Law Div. 2003) (noting "the Court's supervision of the grand jury is limited" by design to protect the "separation of powers"). While the Diocese claims that this case is different, because deferring a decision until after a grand jury investigates would be resource intensive, see (Op9-10), the Division of Criminal Justice is charged with deciding the proper use of the State Grand Jury's time and with bearing the ultimate financial burdens. See N.J.S.A. 2B:22-8(a); Bell, 241 N.J. at 560. And below, the Division presented a plan for reducing these costs. (Ab14-15).[1]

Finally, the Diocese's claim that review of a hypothetical presentment is appropriate because the State made its intentions sufficiently clear likewise fails.

[1] The Diocese makes much of the procedures needed to select a State Grand Jury for this matter. See (Op9). But a normal pool from which to select a grand jury is already 100 individuals, and the Division below embraced a number of tools—including questionnaires in advance—that would resolve jury selection swiftly.

See (Op9-11). The State has never denied that it intends to seek a presentment regarding sexual abuse by clergy and the response thereto. But that alone does not answer the myriad questions that remain, including whether the hypothetical grand jury will identify ongoing harms or make proposals for reforms, which go to the heart of the Diocese's own legal claims. Compare (Op2) (arguing problem of clergy abuse "eradicated" and not imminent in light of MOU, even before the grand jury evaluates MOU's efficacy) and (Op11 n.4) (distinguishing a previous presentment involving conduct by a private pipeline company because the report "recommend[ed] changes to federal and state statutes and regulations," while speculating that a grand jury in this matter will have no such recommendations). Further, the Diocese has no answer to the fact that courts engaging in the review laid out in Rule 3:6-9 can employ tailored tools to address any deficiencies that materialize, such as striking or redacting any deficient portions of a presentment, instead of shutting down the process wholesale.[2] Certification is warranted.

[2] The Diocese argues repeatedly that a prior Attorney General said sexual abuse by clergy "will be" the subject of a presentment. (Op5, 8, 10). While poorly phrased, it is clear from context that the then-Attorney General meant the State will investigate and seek such a presentment. See (Da18) (State "will work … hard to determine if the Church was aware of the abuse but failed to take action …." (emphasis added)); (Da21) (same); (Da26) (similar). Regardless, these two words in six-year-old press releases are no basis to disregard the traditional rules governing judicial review of presentments.

B. The Diocese Identifies No Support For The Categorical Holding That No Presentment May Address Widespread Abuse By Clergy.

The Diocese fails to rehabilitate the extraordinary holding that decades of widespread sexual abuse by clergy and the failure of the response thereto do not concern "public affairs or conditions." Rather, its embrace of the new sweeping rules that grand jury presentments may only ever concern "public entities and public officials" (Op17) and "imminent" misconduct (Op14) confirms the weight and breadth of the decisions below—and thus the need for review.

First, the Diocese's argument that presentments are exclusively limited to "government entities or public officials" ignores the Rule's text, actual practice, and this Court's precedents. Rule 3:6-9(a) says that presentments may touch on "public affairs or conditions," not only "public entities or officials." Cf. State v. O'Donnell, 255 N.J. 60, 72 (2023) (had "Legislature intended" to limit statute's scope to public officials alone, "it would have said so"). And that decision was deliberate: as this Court already explained, the drafters of our 1947 Constitution "approved presentments of public affairs as they had been known in New Jersey from earliest colonial times." In re Presentment by Camden Cty. Grand Jury, 10 N.J. 23, 65 (1952) (Camden I). That matters, since New Jersey presentments historically addressed a range of public harms that were caused by private actors, including domestic violence and public nuisances, see id. at 41-58; (Ab20-21). That is why this Court has long recognized that presentments may address any

"matter of general public interest … to which, in the discretion of the jury, the attention of the community should be directed." In re Presentment by Camden Cty. Grand Jury, 34 N.J. 378, 391 (1961) (Camden II).

The Diocese has no effective rebuttal to this consistent text and case law. The Diocese, to be sure, provides evidence that presentments can address harms from government conduct. See (Op12-14) (citing precedents and presentments involving acts of public entities and officials). But that alone hardly shows that presentments may only involve such acts.[3] Nor does its reliance on a grand jury charge relating to presentments fill that gap: that charge refers to presentments involving "a public office or public institution" as an "example" of a permissible subject, compare (Op13-14) with (Da483), and in any event, these charges "are not binding statements of law," O'Donnell, 255 N.J. at 79. The Diocese supplies nothing, before the decisions below, endorsing this categorical limitation.

[3] So too for the Diocese's reference to the portion of Rule 3:6-9 that recognizes a subset of presentments censure a public official and thus require some further process. (Op16-17). The Diocese alludes to due process concerns that may arise if a future presentment named specific clergy without according such procedural protections. (Op17-18). This speculation does not justify barring a presentment outright. Instead, the State agreed to provide notice and a hearing for persons so named. (Pp15-16). The Diocese rejects this proffer because the Rules do not expressly provide for it, (Op17), but the State is aware of no reason that it cannot voluntarily offer such process, especially when the Diocese itself argued that the Rules are not exclusive procedural pathways. And should such procedures fall short, Rule 3:6-9(c) allows for more tailored tools like redactions at that time.

The Diocese's response to the history is especially strained. The Diocese acknowledges the 1996 presentment relating to a gas explosion attributable to a private corporation, see (Ab21), but distinguishes that report as having proposed reforms to governing statutes and regulations, see (Op11 n.4). Initially, that is a cramped description of the 1996 presentment, which indisputably focused on private conduct too. See (Aa21) ("The Grand Jury recommends that gas pipeline operators foster the development and use of internal inspection tools which can detect mechanical damage to pipelines."). But more fundamentally, as the State has long maintained, a future State Grand Jury could consider reforms to prevent the tragedy of widespread abuse by clergy and failures of the response thereto from recurring. See, e.g., (Ab25; Pp15). The Diocese replies only that no New Jersey grand jury would have any meaningful reforms to offer given that certain statutes of limitation for this conduct were "abolished." See (Op5 n.3). Yet that puts the cart before the horse: a grand jury must be allowed to evaluate, in the first instance, whether such reform is needed. And if the grand jury does decide to propose such reforms, the Diocese's distinction falls away.[4]

[4] Indeed, that a Pennsylvania grand jury chose to focus its attention on reforms to its statutes of limitations, see (Op5), hardly means a New Jersey grand jury must be limited to the same subject. Moreover, it is simply untrue that all New Jersey limitations periods have been abolished; certain sexual contact or child endangering offenses have limitations periods, as do conspiracies to obstruct the investigation of sexual offenses. See, e.g., N.J.S.A. 2C:1-6(b)(3)-(4).

Second, the Diocese's contention that any presentment on sexual abuse by clergy would fail some atextual imminence requirement fails. (Op14). For one, this limit overreads one line of dicta from one case, see In re Monmouth Cnty. Grand Jury, 24 N.J. 318, 324 (1957), as subsequent decisions later clarified, see (Ab32). In any event, the Diocese's claim that no imminent public conditions are implicated is premised on the Diocese's unsupported assertions that there is nothing further to learn regarding the sexual abuse scandal, and that there are no ongoing harms stemming therefrom. (Op15-16). But if a presentment could be shut down whenever the target of the grand jury's investigation represented that it had already addressed the conduct, it is hard to see how any presentment could proceed. The grand jury, and not a potential subject, gets to assess which "public affairs or conditions" merit investigation and require a presentment.

POINT II

THE DIOCESE DOES NOT DENY THAT THESE ISSUES ARE CONSEQUENTIAL, YET FAILS TO JUSTIFY RESOLVING THEM IN SECRET.

The importance of this appeal cannot be overstated. See R. 2:12-4. The Diocese does not dispute that the decades of abuse perpetrated by clergy across New Jersey is a wrenching harm that should never be repeated; that the courts below definitively precluded any use of the grand jury's presentment power to learn from this harm, suggest reform, and/or provide some measure of justice to

victims; or that the decisions below remain a secret, preventing the public from understanding why the State has failed to pursue this presentment.

The Diocese's attempts to nevertheless defend the secrecy are unavailing. Although the Diocese correctly argues that grand jury proceedings are secret, R. 3:6-7, this Court has repeatedly reasoned that appellate rulings resolving broad legal rules governing the grand jury's powers are not. See (Pa42-43) (letter from Supreme Court Clerk, never acknowledged by the Diocese, noting judiciary's "policy of open access to [its] records" and practice of publishing opinions even in grand jury proceedings where the record is sealed, and collecting cases).

[redacted]

Indeed, the sole relevant fact is (as the parties agree) public knowledge: the State seeks a presentment on this subject. (Op5, 8, 10). Whether this subject is a lawful one is an abstract legal dispute that must be publicly resolved.[5]

[5] The Diocese gets no further arguing that the Assignment Judge's review under Rule 3:6-9 would occur under seal, and so this case can proceed secretly too. (Op19-20). Instead, opinions from this Court assessing the presentment power have previously been published. E.g., Monmouth Grand Jury, 24 N.J. 318. After

Finally, the Diocese distorts the State's interest in transparency. The State is hardly looking to score a "public relations" victory, (Op20), nor is it remotely true that "[t]he opinions below are relevant only to the parties to this litigation," (Op19)—two claims that wholly disregard victims of clergy abuse. Instead, the bases for seeking a public judicial opinion in this case are entirely justified: both to ensure that victims understand the proper scope of the presentment power (in this case and in future ones), and to enable victims, government officials, and/or members of the public to seek reforms to this power if they believe it warranted. The Diocese does not explain how public knowledge or public accountability as to the presentment power are possible without a public opinion. Such an opinion is now only possible if this Court grants review in this consequential case.

CONCLUSION

This Court should grant certification and reverse the judgment below.

Respectfully submitted,

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Date: August 1, 2024

all, appellate courts often issue public opinions even if the underlying record is sealed. See, e.g., In re State Grand Jury Investigation, 217 N.J. 430 (2014).