REDACTED

STATE GRAND JURY MATTER TO BE FILED UNDER SEAL

IN RE THE MATTER CONCERNING THE STATE GRAND JURY State of New Jersey, Appellant Diocese of Camden, Respondent	Supreme Court Of New Jersey DOCKET NO. 089571 PETITION FOR CERTIFICATION FROM: SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3795-22 SAT BELOW: GRETA GOODEN BROWN, P.J.A.D. MICHAEL J. HAAS, J.A.D. ARNOLD L. NATALI, JR., J.A.D. ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION - MERCER COUNTY DOCKET NO. SGJ-MCJ-1-21 SAT BELOW: PETER WARSHAW, P.J.CR. Criminal Action UNDER SEAL

SUPPLEMENTAL BRIEF AND APPENDIX (Dsa1 to Dsa11)
ON BEHALF OF
RESPONDENT DIOCESE OF CAMDEN

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PRELIMINARY STATEMENT

The issue in the instant appeal is whether a grand jury is authorized to return a presentment about clergy sexual abuse that is alleged to have taken place decades ago within the Roman Catholic Church (the "Church").

Grand jury presentments in New Jersey have historically called attention to public affairs and conditions within local government entities, such as prisons and police departments. However, targeting private individuals or entities in a presentment, having no connection to government, is not permitted. Criticizing public officials is permitted, and the court rule sets forth due process protections only for those public officials. The public conditions addressed in a presentment must be ongoing, as the grand jury's overarching purpose in returning a presentment is to improve the objectionable public condition.

Here, the State admits it is seeking a grand jury presentment that will call attention to decades-old conduct by Roman Catholic clergy in New Jersey dating back to 1940, as well as the Church administration's response to such allegations. But the State cannot convene a grand jury to return a presentment unless it addresses public affairs or conditions, censures public officials, or calls attention to imminent conditions.

The proposed presentment will not address any mismanagement within government. It will not censure public officials. It is not concerned with an imminent

condition, as the 2002 Memorandum of Understanding ("MOU") eradicated clergy sexual abuse within the Diocese.

In a desperate attempt to salvage its faltering plan for a presentment, the State throws a Hail Mary pass by claiming, for the first time on appeal, that the presentment will also address the State's own response, or lack thereof, to these old allegations of clergy abuse. Since the Attorney General's first press release in 2019 revealing his plan to secure a presentment, the focus has always been, until now, the history of sexual abuse by Roman Catholic priests. The State never intended to give the grand jury an opportunity to return a presentment criticizing the State.

Typically, a grand jury is convened to consider indictments. If the grand jury determines there is non-criminal activity that warrants public attention, the grand jury may return a presentment, including recommendations to remedy the exposed condition. Here, the State defies convention with its plan to convene a grand jury expressly for the purpose of returning a presentment, and by publicly announcing its intent to do so.

The propriety of the presentment's subject matter is a legal question. Nothing in the Rule prevents a judge from evaluating the legal question of whether the subject matter of a presentment is appropriate as soon as the subject matter is known, under the unique circumstances presented here. As such, Judge Peter Warshaw, P.J.Cr., appropriately determined that the subject matter of the proposed presentment is unauthorized.

The Diocese has always taken the position that the State should indict individuals, including priests, who committed crimes. But the grand jury is not authorized in New Jersey to investigate and report about events that took place long ago within a private, religious entity.

Both the trial court and the Appellate Division agreed that the State may not pursue the intended presentment. The Diocese of Camden respectfully requests that this Court affirm.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

The Diocese of Camden (the "Diocese") relies on the procedural history and statement of facts previously submitted to the Appellate Division and to this Court in its opposition to the State's petition for certification. The Diocese highlights the following facts.

[1] The Procedural History and Statement of Facts are combined because they are closely related.

In January 2002, the *Boston Globe* Spotlight series began reporting incidents of sexual abuse by Catholic priests in the Archdiocese of Boston. (Da148 to Da164). Thereafter, in an effort to address the reports that Church officials in Boston failed to report sexual abuse to civil authorities, moved abusive priests to different parishes, and concealed this conduct from other priests and parishioners, negotiations began in New Jersey lead by Peter C. Harvey, then Director of the Division of Criminal Justice (later Acting Attorney General) ("Director Harvey"), Ron Susswein, then Counsel to the Director of the Division of Criminal Justice (now Appellate Division Judge), and representatives from the five New Jersey Roman Catholic Arch/Dioceses. The negotiations resulted in the 2002 MOU, dated December 2, 2002, entered into by the Attorney General, Director Harvey, the Arch/Dioceses, and local county prosecutors. (Da114 to Da115; Da118). The MOU sets forth the procedures for the Arch/Dioceses to report allegations of child sexual abuse to the county prosecutor.

Pursuant to the terms of the MOU, the Diocese has reported all allegations of child sexual abuse to the appropriate county prosecutor. Of particular note, all of these reports allege sexual abuse that occurred ***before*** 2002, with the exception of only five ***un***substantiated allegations, none of which resulted in criminal prosecution. (Da115; Da173). Stated otherwise, in this century, clergy sexual abuse has ended within the Diocese.

The State claims that the Task Force hotline received calls that resulted in four arrests statewide within the past seven years (Psb39) yet omits that the only conviction of the four arrests related to sexual abuse took place in the early 1990s. (Db11 n.8; Da13 to Da32; Da40; Da42).

Sixteen years after the 2002 MOU, a Pennsylvania grand jury published a report about sexual abuse by Roman Catholic priests and recommended that Pennsylvania amend its criminal and civil statute of limitations to accommodate stale claims. (Pa29). Unlike New Jersey, Pennsylvania's grand jury is authorized by statute to investigate and issue reports on any subject matter.[2] (Db8 to Db9).

Immediately thereafter, then-New Jersey Attorney General Gurbir Grewal (the "Attorney General") issued several press releases stating his intent to target the Roman Catholic Church in New Jersey. The first press release dated September 6, 2018 states that the Attorney General had convened a Task Force to investigate allegations of sexual abuse by members of the clergy within the Catholic dioceses of New Jersey, and referenced the Pennsylvania report as the

[2] In 1978, the Pennsylvania Legislature enacted the Investigating Grand Jury Act granting grand juries "more extensive powers than previously recognized under former law." In re County Investigating Grand Jury of April 24, 1981, 459 A.2d 304, 306 (Pa. 1983). See 42 Pa. C.S. §4542, (authorizing an investigating grand jury report "proposing recommendations for legislative…action in the public interest"); §4552 (permitting "named individuals" in the report the opportunity to submit a response to the report).

catalyst. (Da9). Another press release dated January 17, 2019 states again that the target of the Task Force investigation is the Catholic Church. (Da14).

The Attorney General issued an additional press release on April 8, 2019, stating that the Roman Catholic Church's response to instances of clergy sexual abuse in New Jersey "will be the subject of a state grand jury presentment and report." (Da18). The Attorney General restated his intent to pursue a presentment against the Church in press releases on August 26, 2019 and September 20, 2019. (Da21; Da26).

Meanwhile, the Task Force proceeded with its investigation of the Roman Catholic Arch/Dioceses in New Jersey [redacted]

The Diocese[4] responded with a challenge to the grand jury's authority to return a presentment targeting the Catholic Church and its priests. [redacted]

LEGAL ARGUMENT

POINT I
COMMON LAW ORIGINS OF GRAND JURY PRESENTMENTS

The history of the grand jury was recently addressed by this Court in State v. Shaw, 241 N.J. 223 (2020). This Court described the English origins of the modern grand jury, and how the grand jury evolved over centuries to serve a dual function: to determine whether probable cause exists to suggest that crime has been committed, and to protect citizens against unfounded criminal prosecutions. Id. at 235.

But the grand jury has a third function: reporting. As this Court previously observed, "the term, 'presentment by a grand jury,' has also been employed for centuries to designate the findings of a grand jury with respect to derelictions in matters of public concern, particularly of officials, which may fall short of being criminal offenses." In re Presentment by Camden County Grand Jury ("Camden

[4] There is no adverse inference from the lack of participation in this appeal from the other Arch/Dioceses.

I"), 10 N.J. 23, 35 (1952). The Camden I Court reviewed centuries of presentments in New Jersey. Chief Justice Vanderbilt included the reason for the Court's historic review: "Because this power of grand juries in this State to make such presentments as to public affairs has been questioned, it is essential to inquire into the existence of the power it has exercised here from the earliest colonial days." Id. at 41. However, while Chief Justice Vanderbilt discussed the function of historic presentments, and listed the types of presentments returned in New Jersey over time, the opinion does not fully address the historic purpose of the grand jury presentment.

In England, in the seventeenth century, the role of the grand jury expanded to assume functions beyond its initial role as a criminal accusatory body. English grand juries began to act as a "county House of Commons, giving the opinion of the county on matters of public concern." Barry J. Stern, *Revealing Misconduct by Public Officials Through Grand Jury Reports*, 136 U. Pa. L. Rev. 73, 84 (1987). Grand juries rendered their opinion by reporting publicly on "matters of community concern and frequently complained that counties were not properly maintaining bridges and prisons...[and] question[ed] the conduct of public officials." Stern at 84 (citations omitted).

In colonial America, the grand jury's reporting function continued. Ronald F. Wright, *Why Not Administrative Grand Juries?* 44 Admin. L. Rev. 465, 468

(1992). The grand jury's "watchdog function" of "broad surveillance over government" was present in the colonies, and colonial grand juries assumed an even greater independence than their English counterparts as a result of the geographical separation between the colonists and the English government as well as the colonies' lack of representation: "Colonies that lacked a representative legislature often turned to grand juries as a substitute; grand juries regulated areas higher officials did not address." Renee B. Lettow, *Reviving Federal Grand Jury Presentments*, 103 Yale L.J. 1333, 1336-37, 1354 (1994). Colonial grand juries adopted a unique function as "multipurpose administrative bodies in a frontier culture. They were monitoring public officials, administering public affairs themselves, and even initiating legislative policy." Wright at 468. Grand juries "act[ed] in the nature of local assemblies: making known the wishes of the people, proposing new laws, protesting against abuses in government, performing administrative tasks and looking after the welfare of their communities." Stern at 84 (citations omitted).

After the Revolution, early state grand juries served as "popular control over government." Wright at 476. However, the publication of grand jury reports began to wane by the century's end. George H. Dession and Isadore H. Cohen, *The Inquisitorial Functions of Grand Juries*, 41 Yale L.J. 687, 707 (1932).

By the mid-nineteenth century, grand juries began to face generalized criticism in the United States. Wright at 483. The grand jury's reporting function also was called into question. As government increased in complexity, "grand jurors were no longer personally aware of conditions to investigate and were without the increasingly specialized auditing and management skills necessary to monitor government." Wright at 486, 492. Some state courts determined that a grand jury could not investigate or act upon a non-criminal matter unless specifically authorized by the state legislature. Wright at 485. Despite constraints placed on the grand jury's non-criminal investigative and reporting functions, "all jurisdictions...would not allow an indefinite inquiry into potential evils or infractions, or 'personal' matters." Wright at 488 (citing U.S. v. Kilpatrick, 16 F. 765 (W.D.N.C. 1883) (determining a grand jury cannot investigate general conduct or the private business of private citizens)).

In the early twentieth century, a significant judicial dissenting opinion from New York called into question the fairness of the grand jury's reporting function. In Jones v. People, 101 App. Div. 55, 92 N.Y. Supp. 275 (2d Dep't), appeal dismissed, 181 N.Y. 389, 74 N.E. 226 (1905), the dissenting opinion strongly criticized a grand jury report critical of the county board of supervisors. While the court majority approved the publication of the grand jury report, the dissent argued that the presentment was unfair in that it accused wrongful conduct without also

offering an opportunity for a defense. Richard H. Kuh, *The Grand Jury 'Presentment': Foul Blow or Fair Play?* 55 Col. L. Rev. 1103, 1112 (1955) (citing Jones, supra, at 280-281). Thereafter, that dissenting opinion in Jones was often cited in New York and elsewhere for its concerns relating to due process violations of grand jury reports. Kuh at 1112.

In 1952, this Court issued its seminal Camden I opinion. Thereafter, several prominent law review articles commented on the grand jury's reporting function, agreeing that private individuals may not be named in a grand jury report. In 1955, Richard Kuh, supra, wrote that "grand juries can properly perform a reporting function [regarding] those in government service." Kuh at 1122. Kuh explained that public employees assume the risk that a grand jury report might reveal mismanagement in public office, which in turn encourages public employees to "regard their office as a public trust." Kuh at 1122.

In 1956, another law review article examined the types of individuals that could be the subject of a presentment. J. Hadley Edgar, Jr., *The Propriety of the Grand Jury Report*, 34 Tex. L. Rev. 746 (1956). Clearly, public officials are subject to criticism in a grand jury report. Edgar notes that "the possibility of the report is the price of holding public office," echoing Kuh. Edgar at 751. Private citizens, however, may not be the subject of a grand jury presentment: "a private

citizen should not be subject to scorn in a report exposing him to an odium of wrongdoing." Edgar at 753 (citations omitted).

A law review article from 1954 commented that there were two types of grand jury reports: "the report in which individuals are named, and the report relating to general conditions in public institutions." Alan Reeve Hunt, *Legality of the Grand Jury Report*, 52 Mich. L. Rev. 711, 725 (1954). The article notes that statutes of many states "authorize or require the grand jury to make general investigations into the conditions of public institutions such as jails, hospitals, and the like." Hunt at 715 n.9. However, Hunt asserts that grand jury investigations of individuals violate a person's rights and reputation, and should therefore be suppressed: "[R]espect for individual rights and reputations demands that a grand jury which is not in a position to provide a trial of the personal accusations it makes should keep silent." Hunt at 725.

In 1953, an author noted that courts condemn reports that criticize individuals. Such reports are stricken "in situations where a private citizen is censured." *The Grand Jury – Its Investigatory Powers and Limitations*, 37 Minn. L. Rev. 586, 603 (1953).[5]

[5] This Court cited several of these law review articles in In re Monmouth Cty. Grand Jury, 24 N.J. 318, 323 (1957) (citing Kuh, Hunt, and the note from the Minnesota Law Review).

This view from the 1950s – that a private individual may not be the subject of a grand jury report – has not changed. In 1970, a law review article notes, "The various legal writings and opinions…generally seem to condemn the use of reports when they reflect on a *private citizen* rather than a public official. The logic of this public-official/institution versus private citizen distinction is clear. A majority of courts hold that criticism is the burden of holding public office. It has been noted that '[t]here is no greater deterrent to evil, incompetent and corrupt government than publicity.'" William P. Cannon, *The Propriety of a Breach of Grand Jury Secrecy When No Indictment Is Returned*, 7 Houst. L. Rev. 341, 352 (1970) (citations omitted).

A 1987 law review article notes, "It is uniformly held, however, that the reporting authority [of a grand jury] does not include the ability to criticize private persons." Stern, supra, 136 U. Pa. L. Rev. at 76 n.5 (citing Cannon, supra).

More recently, a scholar commented that, in several of the states that authorize reports/presentments, "the subject matter of the reports is limited to specific matters of public administration." Morril, supra, at 490. The cited provenance of this statement is Wayne R. LaFave et al., *Grand Jury Reports*, 3 Criminal Procedure § 8.3(h) (4th ed. 2023), which comments that certain state courts suggest that grand jury reports/presentments "criticizing individuals are permissible only when those persons are government officials, noting that such

reports fall within the tradition of the grand jury keeping the community informed of mismanagement in government."

The legal scholars confirm two points. First, to the extent they are permitted, presentments typically address conditions in public, government institutions. Second, if a grand jury is authorized to return presentments against individuals, the report may only name public officials, who, by accepting a public position, also accept public scrutiny by the grand jury.

POINT II
NEW JERSEY OPINIONS AND THE COURT RULE PROHIBIT THE STATE'S INTENDED PRESENTMENT

In this historical context, this Court issued several relevant opinions in the mid-twentieth century addressing presentments in New Jersey. Applying these opinions to the instant matter, it is clear that the State's intended presentment addressing decades-old allegations of sexual abuse by Roman Catholic priests, and the Church's response thereto, is unauthorized, as the subject matter does not address a public affair or condition, does not censure public officials, and the condition is not imminent.

A. Presentments are intended to address conditions within government

In 1952, this Court issued its seminal opinion in Camden I, where Chief Justice Vanderbilt wrote that the "maintenance of popular confidence in ***government*** requires that there be some body of laymen which may investigate any

instances of public wrongdoing." Camden I, supra, 10 N.J. at 65. And "the sound administration of ***government*** at every level depends in large measure on enlightened and informed public opinion...in this field the grand jury not only has rights but grave responsibilities." Id. at 34. And "[i]f presentments of matters of public concern were found necessary in the public interest in the relatively simple conditions of English and colonial life three centuries ago, how much more essential are they in these days when ***government*** at all levels has taken on a complexity of organization and of operation that defies the best intentions of the citizen to know and understand it." Id. at 65. Grand juries must "'consider the methods of administration of the county and city ***government*** and point out where there are defects and where improvements may be made.'" Id. at 59 (quoting 1907 statement by Chief Justice Gummere). Presentments are utilized "as to public affairs to improve the administration of ***government***." Id. at 60. (Emphasis added throughout). Clearly, grand jury presentments in New Jersey are intended to call attention to conditions within government.

At the time Camden I was decided in 1952, there was no court rule outlining the procedure for presentments. (Dsa1).[6] The Camden I Court cites no court rule, but instead refers to common law. By 1953, the Rules of Court were amended to include R.R. 3:3-9, the predecessor to the current Rule 3:6-9, which stated only

[6] For the Court's convenience, copies of R.R. 3:3-9 cited herein are included in the supplemental appendix. (Dsa1 to Dsa11).

that a "presentment may be made only upon the concurrence of 12 or more jurors." Dsa6). In 1961, R.R. 3:3-9 was amended to include the language that is now found in Rule 3:6-9: "A presentment…may refer to public affairs or conditions, but it may censure a public official only where his association with the deprecated public affairs or conditions is intimately and inescapably a part of them." (Dsa10).

Since 1961, both R.R. 3:3-9 and its successor Rule 3:6-9 include the term "public" to define both "affairs and conditions" and "officials." There is no ambiguity in the term "public official." See Costello v. Ocean County Observer, 136 N.J. 594, 613 (1994) ("the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs"). As such, the term "public affairs or conditions," which appears in the same subsection of the Rule, suggests that a presentment should address governmental affairs. The term "public" is defined as "of or relating to a government." https://www.merriam-webster.com/dictionary. The 1968 edition of Black's Law Dictionary defines "public" as "[p]ertaining to a state, nation, or whole community; proceeding from, relating to, or affecting the whole body of people or an entire community." Black's Law Dictionary (4th Ed. Rev. 1968). When promulgating Rule 3:6-9 and its predecessor, R.R. 3:3-9 in 1961, the Court

chose language consistent with the Court's concerns stated in Camden I that a grand jury must ensure the sound administration of government.

The State's brief claims that a presentment may refer to private matters, and points to a small number of presentments listed in Camden I where Chief Justice Vanderbilt's descriptions do not reveal important details of the presentment. The State cites a colonial-era presentment about someone who improperly branded livestock as binding precedent that presentments may call attention to private individuals. (Psb24). Colonial-era grand juries assumed a unique role addressing matters that would otherwise have been addressed by government. It is implausible that a grand jury today could return a presentment relating to the improper branding of livestock.

The State also refers to a presentment from 1892 about domestic abuse described in Camden I. (Psb24 to Psb25). That presentment called attention to the "number of cases of assault and battery committed by a husband on a wife" but recommended that a whipping post be established in New Jersey for sentencing "wife beaters." Camden I at 45. That presentment appears to have addressed domestic abuse generally, without naming individuals, and recommended changes to the sentencing structure.

Other presentments listed in Camden I cited by the State include the 1904 slaughterhouse presentment, which was only vaguely described by Chief Justice

Vanderbilt, making it impossible to glean the true subject matter of that presentment. Camden I at 49. The 1909 presentment addressing assaults at a manufacturing plant was actually about the lack of police response. Camden I at 54. The 1920 presentment addressing motor vehicle accidents was a presentment addressing conditions on public roadways. Camden I at 58.

Ultimately, these old presentments described by Chief Justice Vanderbilt in Camden I are not binding precedent. Chief Justice Vanderbilt did not opine as to whether the old presentments were appropriate or not. Nothing in Chief Justice Vanderbilt's description of these presentments indicates whether there was a challenge to the publication of the presentment, or whether there was an appeal. Chief Justice Vanderbilt's description of these old presentments does not provide sufficient detail to support the State's claim that a presentment may call attention to a private entity or a private individual.

The presentment in Camden I addressed conditions at the Camden County jail. In that opinion, the Court was not required to address the limits of a grand jury's authority to call attention to private matters. As such, Chief Justice Vanderbilt was not focused on whether the old presentments addressed private entities or private individuals. The Court's description of those historic presentments does not support a conclusion that there is a long history of presentments calling attention to conditions caused by private individuals or

private entities, as suggested by the State. (Psb24). In any event, presentments are grand jury documents, not precedential judicial opinions, so this Court is not bound by any previously returned presentment.

The State claims that the trial court's reliance upon the charge to the grand jury concerning presentments was misplaced. (Psb36). That charge provides that, during its investigation, the grand jury is authorized to visit public institutions and buildings. (Da183). The grand jury charge does not address what a grand jury can or cannot do if they are investigating a private entity or a private individual. The absence of any direction relating to private matters confirms that a grand jury has no authority to return a presentment against private entities or individuals.

Incredibly, the State, for the first time on appeal, claims that it intends to include the government's response, or lack thereof, to clergy sexual abuse over the past 85 years. (Psb3, Psb4, Psb12, Psb16, Psb18, Psb30, Psb33, Psb40). The State never claimed before Judge Warshaw that it intended for the grand jury to evaluate the ***State's*** own failure to detect clergy sexual abuse. As a result, Judge Warshaw's opinion does not address whether the grand jury is authorized to investigate and report on the Executive branch's failure to detect clergy sexual abuse decades ago. The original caption to this litigation,[7] [redacted], was In the Matter of the Investigation of Allegations of Sexual Abuse

[7] The Appellate Division *sua sponte* changed the name of the caption to protect the confidential nature of this grand jury proceeding. (Pa45).

Involving Members of the Clergy, which reveals the true focus of the proposed presentment. The principle of party presentation in our adversarial system prevents the State from arguing this issue for the first time on appeal. United States v. Sineneng-Smith, 590 U.S. 371, 375 (2020). In addition, the Office of the Attorney General does not need a grand jury to perform a self-critical analysis; it can issue a report on its own failure to detect clergy sexual abuse in the past without convening a grand jury to do so.

The Camden I Court made it clear that presentments are intended to address problems with the mismanagement of government. The grand jury has historically been a watchdog over government in order to maintain public confidence in government. Lettow at 1354; Camden I at 65. Chief Justice Vanderbilt opined that if presentments addressing conditions in government were necessary in colonial times, they were even more essential in the 1950s "when government at all levels has taken on a complexity of organization and of operation." Camden I at 65. As such, a grand jury is crucial for the "maintenance of popular confidence in government." Ibid. Now, 75 years after the Camden I opinion, no one can deny that modern government is even more complex than in the 1950s, making the grand jury presentment yet even more vital to maintain confidence in government. However, the grand jury is not authorized to return presentments in order to maintain confidence in the Roman Catholic Church.

The proposed presentment has no connection to government. Religious organizations are constitutionally separated from government. Presentments have historically called attention to the mismanagement of government, and offer recommendations for improvement. The intended presentment is wholly unrelated to government operations, and exceeds the grand jury's historic role as a watchdog over government.

B. Presentments may censure public officials, but may not target private individuals.

After its seminal opinion in Camden I, this Court revisited the authority of a grand jury to return a presentment in In re Presentment by Camden County Grand Jury ("Camden II"), 34 N.J. 378, 391 (1961). This opinion focuses on public officials. The Court recognized the concerns of scholars at that time about naming public officials in a presentment: "When an indictment is returned, the official becomes entitled to a trial…. Not so with a presentment. It castigates him, impugns his integrity, points him out as a public servant whose official acts merit loss of confidence by the people, and it subjects him to the odium of condemnation by an arm of the judicial branch of the government, without giving him the slightest opportunity to defend himself." Id. at 389-90. The Camden II Court noted that the authority of a grand jury to censure public officials is "frequently"

under attack,[8] and "[m]any jurisdictions refuse to permit them, restricting the sphere of a grand jury action to indictment if evidence of crime exists, or silence otherwise." Id. at 389 (citations omitted).

In 1961, after the Court issued its opinion in Camden II, the court rule was amended to provide procedural protections ***only*** for public officials, ***not*** private individuals. (Dsa10). The Court was clearly concerned at that time about the damaging effect of presentments upon individuals, reflecting the same concerns addressed by contemporary scholars. In order to reconcile those concerns, the 1961 amendment to R.R. 3:3-9 provided that a presentment may censure public officials, and afforded procedural protections only for public officials.

Now, Rule 3:6-9 provides protections to public officials in two sections. First, the Rule states that a presentment "may censure a public official only where that public official's association with the deprecated public affairs or conditions is intimately and inescapably a part of them." Then, if the Assignment Judge does not strike the presentment, "a copy of the presentment shall forthwith be served upon the public official who may, within 10 days thereafter, move for a hearing, which shall be held *in camera*. The public official may examine the grand jury minutes fully under such reasonable supervision as the court deems advisable, and

[8] Justice (later Chief Justice) Weintraub was one of those critics. His concurring opinion in Camden II claimed that a presentment was punitive. Public officials should not "accept such condemnation as the price of their public position." Camden II at 403.

be permitted to introduce additional evidence to expose any deficiency." R. 3:6-9(a), (c).

The absence of protections in the Rule for private individuals signifies that presentments may not criticize private individuals. Otherwise, public officials would have procedural protections, yet private individuals would have none, which does not align with the Court's holding in Camden II.

The State admits that it intends to name specific individuals in the presentment, and has even offered to permit those private individuals the same procedural protections set forth in Rule 3:6-9 that are afforded to public officials. (Psb44). Given that so many of the alleged incidents of abuse took place so long ago, most of the accused have passed away.[9] The State's offer to permit private individuals the same procedural protection as public officials is an admission that the Rule does not already protect private individuals. The State cannot rewrite the Rule, nor can it defy precedent that forbids individuals to be named in presentments. See Daily Journal v. Police Dep't of City of Vineland, 351 N.J. Super. 110, 117 (App. Div.), certif. denied, 174 N.J. 364 (2002) (a presentment may not issue against private individuals as presentments are strictly "limited to public employees and public officials").

[9] At oral argument before the trial court, the Diocese represented that it published the names of 61 credibly accused priests on its website. Of those 61 priests, only 6 were alive as of the date of oral argument on July 6, 2022. (1T102-24 to 103-13).

The State claims that the Diocese misunderstood the import of the Appellate Division's opinion in Daily Journal, supra. There, the Appellate Division addressed issues relating to a presentment calling attention to the Vineland Road Department that named three public officials, but also named private citizens. The trial court "redacted the names of any private citizens named in the presentment, concluding that they should be dealt with instead by way of indictment or disorderly persons complaints, because presentments were to be limited to public employees and public officials. The trial judge did not conclude that these private citizens had done nothing wrong; rather, he concluded only that they should not be named in the presentment." Id. at 117. The Appellate Division affirmed the trial court's decision, noting that presentments are intended to focus on public affairs, "not private citizen involvement in such matters." Id. at 124. This relatively recent Appellate Division decision confirms that private individuals may not be named in a presentment.

The State contends that the issue of whether the presentment will violate due process or fundamental fairness was never raised before the trial court. (Psb43). This is inaccurate, as the issue was raised at oral argument. (1T104-2 to 3 ("there is no due process involved"); 1T104-9 to 13 ("there's no due process whatsoever…no notice that will be issued to the individual, to the private individual, and no opportunity to be heard")). Judge Warshaw specifically

addressed the due process and fundamental fairness argument when he opined that the court would not countenance a presentment "particularly when the subjects of the report are deprived of any meaningful due process." (Pa28).

There is no authority for a grand jury to return a presentment for conduct of private individuals wholly unrelated to the operation of government. Unilaterally condemning private individuals, even those alleged to have committed crimes long ago, subverts the purpose of the grand jury, which is to protect individuals from unauthorized prosecution or condemnation. As Judge Warshaw astutely noted, this "is not the grand jury's history to write" as "this is not a situation where there is any official wrongdoing to be deterred." (Pa28).

C. The public condition exposed by a presentment must be imminent

There are limits to grand jury presentments. This Court in In re Monmouth Cty. Grand Jury, 24 N.J. 318, 324 (1957) issued this warning: "The jury cannot forage at will upon any whim it may entertain."

Historically, grand jury presentments in New Jersey have addressed government institutions, such as prisons, police departments, and local agencies. However, in 1957, five years following the opinion in Camden I, the Monmouth Court considered a presentment relating to a "general condition." "General" is defined as "involving, relating to, or applicable to every member of a class, kind, or group" and "involving, applicable to, or affecting the whole."

https://www.merriam-webster.com/dictionary. Black's Law Dictionary defines "general" as "available to all, as opposed to select" and "comprehending the whole or directed to the whole, as distinguished from anything applying to or designed for a portion only." Blacks, supra. The term "general condition" does not refer to conditions that affect a certain group of individuals, such as Roman Catholics.

In Monmouth, the Court considered two presentments, one of which addressed "widespread retailing of pornographic magazines and other such publications within Monmouth County." Id. at 321. The grand jury heard testimony from distributing companies and dealers, as well as a citizens' group that objected to the sale of such obscene literature. Ibid.

The Assignment Judge struck the presentment relating to obscene material. The Assignment Judge reasoned that an incoming grand jury was to hear the evidence to indict "those believed guilty of uttering, exhibiting, possessing or selling any obscene or indecent book, pamphlet, picture." Id. at 322. The actual presentment in Monmouth is not part of the instant record, so the only information about the presentment is gleaned from the Court's opinion.

On appeal, which was taken by the grand jury pursuant to the Rule, the Monmouth Court noted that presentments generally fall into two categories: those addressing "general conditions," and those censuring "particular persons," and

that, in New Jersey, presentments may relate to "matters affecting the public interest and general welfare." Id. at 323-324.

The Court specifically limited such presentments relating to the "public interest and general welfare" as follows:

> A grand jury, of course, cannot forage at will upon any whim it may entertain. Its expression must be limited to matters imminent and pertinent, relating to the public welfare and of ultimate benefit to the community served by the grand jury.
>
> [Id. at 325.]

A presentment relating to such a "general condition" must expose ongoing, "imminent" conditions. The clear, limiting language used by this Court in Monmouth is no less relevant today than it was when the opinion was issued in 1957. It is not dicta, a claimed by the State (Psb38); instead, the language defines the limits of the presentment at issue before the Monmouth Court.

The presentment in Monmouth is an exception to the typical presentment that addresses government mismanagement or public officials. It addressed the ongoing availability of obscene literature within Monmouth County. The condition was imminent. The sale of obscene literature affected the community as a whole, from business invitees to anyone who viewed the obscene material after purchase. The affected community was broad and inclusive. It was not limited to a specific group of Monmouth County residents. Or a specific religious group.

Monmouth is *sui generis*. It is the only opinion addressing a presentment about a general, imminent condition that jeopardized the entire community. The Monmouth presentment did not identify private individuals or private entities. Its precedential value to the instant appeal is limited. It is factually distinguishable from the State's proposed presentment. The proposed presentment will not address a condition that affected the community as a whole. Importantly, the condition addressed by the State's intended presentment is not imminent.

Another presentment cited by the State, which has absolutely no precedential value, for which there is no evidence of a challenge to its publication, and was not appealed, is the presentment involving the gas pipeline issued by the grand jury in In re Matter of the Explosion and Fires Caused by the Failure of the Texas Eastern Transmission Corporation's Natural Gas Pipeline in 1996. (Psa1). The pipeline presentment began, as is properly the case, when the grand jury was convened to consider indictments against Texas Eastern Transmission Corporation ("Texas Eastern") and its employees. (Psa3). After concluding that no criminality occurred, the grand jury returned the presentment, which was not critical of Texas Eastern or its employees. Instead, the pipeline presentment called attention to "several shortcomings in laws and industry practice which affect gas pipeline safety." (Psa4).

The State claims that the pipeline presentment is directed at Texas Eastern, a private entity. (Psb24). This is simply not accurate. The grand jury found no evidence that Texas Eastern was responsible for the digging that caused the dent in the pipeline that ultimately caused the explosion. (Psa28). The grand jury determined that Texas Eastern "took several steps to detect or prevent damage to its pipeline." (Psa28). Notably, the pipeline presentment does not name any private individuals.

The pipeline presentment falls into the rare category of one that addresses a "general condition." The pipeline at issue was indiscriminately placed underground, affecting the community at large. The affected community was broad-based, not specific to a certain group. The grand jury's concern was for all communities at risk for a future pipeline explosion, not a specific religious group who might be impacted. The risk of future harm was imminent.

While the pipeline presentment is not precedential, it is informative as it reveals how presentments are typically returned. The grand jury there was initially convened to consider whether to indict, unlike the instant matter where the grand jury would be convened expressly for the purpose of returning a presentment.

Here, the State intends to convene a grand jury to return a presentment about clergy sexual abuse in the Roman Catholic Church, a religious subset of the whole population. The State's brief attempts to revise its plan to target Roman Catholic

clergy by referencing throughout that it was planning on having the grand jury investigate "clergy abuse" without reference to any particular religion. However, it is uncontested that the impetus for the instant grand jury matter was the publication of the 2018 Pennsylvania grand jury report which addressed Roman Catholic clergy abuse. The Attorney General's initial press releases clearly indicated that the target of the investigation was Roman Catholic clergy. (Da9; Da14). Moreover, the State admits that it intends to name Roman Catholic clergy in the intended presentment, [redacted] (Psb6). There is no question that the "clergy" who will be identified in the presentment are exclusively Roman Catholic priests. The State is limiting the subject matter of the presentment, which therefore will not address a general condition affecting the community as a whole.

The State intends to "direct the public's attention" to age-old allegations of Roman Catholic clergy abuse. (Psb30). Yet clergy sexual abuse was brought to light 25 years ago following the reports out of Boston in 2002 and has remained in the public consciousness since then. In addition, in New Jersey, numerous civil complaints have been filed pursuant to the amendment to the civil statute of limitations, all of which are public records. In the Diocese of Camden, names of credibly accused priests are listed on its website, including each priest's assignments (where they ministered). (Db44). The public is already fully aware of

the history of clergy sexual abuse allegations, negating the need for a grand jury to call attention to the issue.

The condition sought to be addressed in the proposed presentment is not an imminent condition as required by this Court in Monmouth. There have been no credible allegations of child sexual abuse against priests in the Diocese for abuse that took place after 2002. (Da115). The 2002 MOU worked. For 23 years, the problem of clergy sexual abuse has ceased to exist in the Diocese. While the State claims that the Task Force received calls that resulted in four arrests (Psb39), the only conviction was for abuse that took place in the early 1990s, prior to the 2002 MOU. (Da13 to Da32; Da40; Da42). The State has no evidence that clergy sexual abuse within the Roman Catholic Church is a contemporary problem, because it is not.

[redacted]. However, absent the required "public" fulcrum, there is no authority for the grand jury's issuance of a presentment, especially one dealing with matters that cannot rationally be said to be "imminent."

D. The remedy for clergy sexual abuse is already in place

In 1907, Chief Justice Gummere noted that grand juries "'consider the methods of administration of the county and city government and ***point out where***

there are defects and where improvements may be made,'" which statement this Court included in the Camden I opinion. 10 N.J. at 59 (emphasis added). The ultimate purpose of a grand jury presentment is to improve the objectionable conditions.

In New Jersey, the Legislature has already amended the criminal and civil statutes of limitations for sexual abuse. The Legislature removed the limitations period for criminal prosecution of sexual abuse in 1996. N.J.S.A. 2C:1-6; N.J.S.A. 2C:14-2. More recently, in 2019, Senate Bill S477[10] amended the civil statute of limitations for sexual abuse, allowing otherwise stale claims to be litigated. N.J.S.A. 2A:14-2a(a)(1) and -2b(a); N.J.S.A. 2A:61B-1. The Legislature amended the statutes of limitation without any need for a recommendation through a grand jury presentment.

In addition, the parties to this litigation previously entered into the 2002 MOU. Director Harvey stated in a press release in 2002 that the "agreement, conceived as a vehicle to prevent predatory adults from abusing the young or the impaired, will serve as the watchtower for such protection. And, the agreement places New Jersey and the Division of Criminal Justice as a law enforcement leader in responding to the problems of sexual abuse." (Da138). The press release asserted that the MOU was the "most comprehensive and precise agreement of its

[10] SB477 was introduced on January 9, 2018, months prior to the publication of the Pennsylvania grand jury report on August 14, 2018.

kind in the nation for reporting sexual offenses to county prosecutors and local police agencies." (Da137). The MOU was executed without any grand jury involvement.

The MOU contemplated periodic review; however, the State never initiated a review of the terms of the MOU, leading to the inescapable conclusion that the State determined that the 2002 MOU was, and continues to be, successful. Yet the State erroneously contends that the periodic compliance review contemplated in the MOU is "hardly the kind of review that takes the place of a grand jury." (Psb39 n.9). The MOU contemplates only that the parties, not a grand jury, will perform a periodic review. Judge Warshaw commented that the Arch/Dioceses have "indicated a willingness to cooperate in this review" of the MOU, which "doesn't require the court to empanel a special grand jury." (Pa31). The trial court order specifically states that "nothing in this Order prevents the Attorney General from undertaking a comprehensive review of the 2002 Memorandum of Understanding." (Aa3). The State has no support for its claim that the grand jury is somehow better suited to review the MOU.

The State contends that a grand jury might recommend additional legislative or regulatory changes that would further prevent clergy sexual abuse. (Psb40). During oral argument below, Judge Warshaw commented to counsel for the State that the Office of the Attorney General could make recommendations directly to

the Legislature without a grand jury: "You don't need a grand jury to make recommendations to the Legislature. You know that. The Attorney General's Office has the ability to make recommendations regarding criminal legislation all the time…. If the Attorney General's Office wants certain criminal legislation considered, it has the ability to be heard quickly." (1T89-4 to 15). A grand jury will not have a greater understanding of possible recommendations than the Attorney General to address any additional improvements, if there are any.[11]

Since 2018, the State has sought a presentment, just like Pennsylvania. The Attorney General stated in press releases that New Jersey must follow Pennsylvania's lead. That it needs to keep up with its neighbor. To the contrary, Pennsylvania is clearly trying to keep up with New Jersey. Pennsylvania's grand jury report recommended that the Pennsylvania Legislature amend that state's criminal and civil statutes of limitations for sexual abuse, but New Jersey has already done so. The Pennsylvania grand jury report does not reference any kind of memorandum of understanding following the media reports out of Boston in 2002, which New Jersey had already accomplished. We do not need to keep up

[11] Recommendations directed at the Church's internal operations, if there were any offered by a grand jury, would be problematic. A grand jury cannot recommend legal reforms that would address the Church's non-criminal actions responding to clergy sexual abuse, such as the continued employment of abusive priests. The Church is not above the law, but its internal operations may not be regulated by the State. Although Judge Warshaw did not address the Diocese's claim that the intended presentment would violate the Establishment Clause, the Diocese has preserved this constitutional issue. (Db44).

with Pennsylvania. New Jersey has been the nation's leader in eradicating child sexual abuse in the Roman Catholic Church. In 2018, the Attorney General dismissively implied that New Jersey needed to act, when New Jersey had already accomplished what Pennsylvania was attempting to do. And we did so without a grand jury presentment.

In 2002, both the State and the Diocese called attention to the problem of clergy sexual abuse, following the Boston reports. The State and the Diocese resolved the problem by establishing reporting procedures set forth in the MOU. Yet now, by publicly pursuing a presentment against the Church for the problem it already resolved, the State is implying that the Diocese must be targeted in a presentment. The State is thus re-accusing the Diocese of the same previously-resolved condition – a novel form of double jeopardy.

In sum, Judge Warshaw did not abuse the court's discretion by preventing the State from convening a special state grand jury in order to return an unauthorized presentment, in a "thorough" opinion, according to the Appellate Division, that was properly affirmed. (Pa48).

POINT III
THE LEGAL ISSUE REGARDING THE PROPRIETY OF THE INTENDED PRESENTMENT'S SUBJECT MATTER MAY BE ADDRESSED NOW

Judge Warshaw properly concluded that the subject matter of a presentment may be assessed as soon as the subject matter is known. This legal question should be determined now rather than later.

This Court emphasized the importance of first determining whether the subject matter is appropriate. In Camden II, the Court determined that, pursuant to the Rule (at the time, R.R. 3:3-9), "the first obligation of an assignment judge on receiving the report is to determine whether the matters contained therein are the proper subjects of a presentment. If not, it should be suppressed to the extent of the impropriety." 34 N.J. at 392. The reasoning for this important step is clear: "the duty of the court to expunge the objectionable matter is unavoidable; the grand jury as an arm of the court cannot be permitted to overreach." Id. at 393.

Here, the Attorney General, as early as 2019, made it abundantly clear what the subject matter of the intended presentment would be. Immediately after the 2018 Pennsylvania grand jury report was published, the Attorney General charged the New Jersey Task Force with investigating Catholic clergy sexual abuse "'to find out whether the same thing happened here' and, if so, to 'take action against those responsible.'" (Psb4 (quoting Da10)). New Jersey's Attorney General

intended to replicate the Pennsylvania report,[12] which identified individual priests who allegedly committed abuse, as well as individuals within the Church hierarchy who purportedly covered up such abuse.

This is a unique matter, requiring a unique resolution. Typically, the subject matter of a presentment is not known until after it is returned to the Assignment Judge, as the grand jury's proceedings are sealed. Here, the Attorney General issued several press releases revealing the subject matter of the intended presentment, before a grand jury was even convened. The Attorney General referenced the Pennsylvania grand jury report, clarifying that the New Jersey presentment would also address historic allegations of sexual abuse by Roman Catholic priests.

Rule 3:6-9(c) requires the Assignment Judge to examine the presentment prior to publication, and to strike the presentment if "good cause" appears. Judge Warshaw assessed the record, including the press releases and the Pennsylvania grand jury report, and determined that a grand jury was not authorized to generate a presentment addressing events that took place decades ago in the Roman Catholic Church.

Judge Warshaw determined that "the Attorney General has made it crystal clear what's coming." (Pa22). The trial court determined it was not "obligated to

[12] Pennsylvania's statute broadly permits reports on any subject matter. See supra note 2.

refrain from considering the Camden Diocese's challenge until [it saw] precisely what the grand jury produces. The broad outline of what's coming has been promised by the Attorney General, and to paraphrase Bob Dylan, you don't need a weatherman to know which way the wind blows." (Pa22).

Judge Warshaw noted that the State's proposal to convene a grand jury "is a massive undertaking" that "will present challenges like no other." (Pa20). However, Judge Warshaw plainly stated that the court was not "concerned about the time or the work. If it's appropriate for that to be done, we'll do it." (Pa21). But the Diocese presented "a legitimate challenge" as to whether the grand jury is "legally authorized to do what the Attorney General's Office has promised it will do." (Pa21). Judge Warshaw concluded that the court is "absolutely entitled to consider a challenge such as that made by the Camden Diocese before plunging headlong into a protracted jury selection process." (Pa21).

Despite the Attorney General's public statements that he would seek a presentment against the Roman Catholic Church, like Pennsylvania, the State still maintains that the proposed presentment is too speculative to determine whether the subject matter is inappropriate. This claim is unrealistic at best, and disingenuous at worst. In the September 6, 2018 press release, the Attorney General stated he was troubled about the allegations in the Pennsylvania report, and that "[w]e owe it to the people of New Jersey to find out whether the same

thing happened here." (Da10). The Attorney General clearly intended to replicate the Pennsylvania report. The subject matter of the Pennsylvania report is the same subject matter of the proposed New Jersey presentment. This is a unique circumstance where the Attorney General publicly stated several times that he would seek a presentment, indicated what the subject matter would be, and cited the Pennsylvania report as a model. The intended presentment is not speculative or hypothetical.

The State argues that the absence of case law allowing an Assignment Judge to evaluate the subject matter of a proposed presentment prohibits this Court from doing so. (Psb14). The absence of precedent does not preclude a court from resolving any conflict. This Court promulgated Rule 3:6-9 contemplating the typical set of circumstances wherein a grand jury, initially convened to consider whether to indict, after finding no probable cause to do so, issues a presentment calling attention to public affairs or conditions. This is a novel issue. The Attorney General has never before issued press releases promising a presentment. This Court may apply existing case law to the unique circumstances here.

Rule 3:6-9(c) permits the Assignment Judge to strike a presentment for "good cause." The unique set of circumstances here, wherein the subject matter of the presentment has already been specifically identified by the Attorney General, establish "good cause" to not only analyze the subject matter of the promised

presentment at this time, but also to prevent a grand jury from considering such a presentment. Court rules must be flexible to accommodate unique circumstances not previously considered.

The State also notes that the trial court questioned whether the presentment could be written without naming individuals, and the State cites an Attorney General report from Maryland that was published with redacted names. (Psb17, n.5). The Maryland report is not a grand jury report; it is an Attorney General report. Comparing the New Jersey common law with Maryland's Attorney General's authority or even Pennsylvania's statute is pointless, because each state is markedly different, particularly where naming individuals is concerned.

The State objects to the trial court's assessment of the so-called "hypothetical" presentment. Yet it was the Attorney General who identified the precise subject matter of the intended presentment in multiple press releases. The Attorney General stated that a New Jersey grand jury should return a presentment like Pennsylvania. Judge Warshaw was able to evaluate the propriety of the presentment's subject matter because of the Attorney General's disclosure.

Rule 3:6-9(e) provides that the Assignment Judge's action taken pursuant to this rule is judicial in nature and "is subject to review for abuse of discretion." Judge Warshaw did not abuse the court's discretion by deciding this legal issue regarding the propriety of the presentment's subject matter as soon as the subject

matter became known. As such, the State's claim that Judge Warshaw should have waited for the presentment to be returned before analyzing the propriety of the subject matter is without merit under the unusual circumstances presented in the instant appeal.

CONCLUSION

The Attorney General intended to "expose past wrongs" and provide "justice for survivors." (Da21). Convening a grand jury to issue a presentment is just not the way. Prosecutors should indict clergy for decades-old crimes. Victims can take matters into their own hands and file civil complaints. The Diocese has settled many matters through the Independent Victim Compensation Program, which was established in 2019. But a grand jury may not return a presentment addressing old allegations of clergy sexual abuse that do not involve any government entity or any public officials, exposing a condition that the parties resolved in 2002.

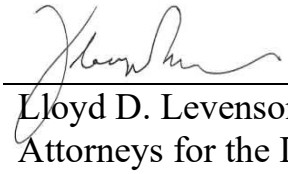
Allowing a grand jury to return a presentment targeting private individuals and a private, religious entity would establish a sweeping precedent. Other private entities and individuals could then be the target of grand jury investigations into non-criminal management of their affairs. Any private corporation – law firms, retail establishments, manufacturers, newspapers, athletic centers, etc. – could be unilaterally condemned by a grand jury. For good reason, there are limits to the

grand jury's authority to return a presentment. The State's intended presentment exceeds those limits.

The Diocese of Camden respectfully requests that this Court affirm the opinion of the Appellate Division, which affirmed Judge Warshaw order preventing the State from convening a grand jury to return a presentment about Roman Catholic clergy sexual abuse.

Respectfully submitted,

COOPER LEVENSON, P.A.

By: 

Dated: January 16, 2025

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