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Supreme Court of New Jersey
DOCKET NO. 089386

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Certification Granted from a Final Order of the Superior Court of New Jersey, Appellate Division.
v.	:	
DELSHON J. TAYLOR, JR.,	:	Sat Below:
Defendant-Petitioner.	:	Hon. Heidi Willis Currier, P.J.A.D. Hon. Ronald Susswein, J.A.D. Hon. Christine M. Vanek, J.A.D.

AMICUS CURIAE BRIEF ON BEHALF OF
THE ATTORNEY GENERAL OF NEW JERSEY

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March 12, 2025

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PRELIMINARY STATEMENT

For 44 years now, New Jersey has had in place a tough, deterrence-based approach to gun crime. We have greatly expanded that law over time, while allowing since 1989 a procedure to mitigate its severity in cases where the prosecutor views the "interests of justice" to warrant waiving the otherwise-mandatory prison term. Almost since that "escape valve" was put in place, our courts have allowed limited judicial review of prosecutors' denials of that form of relief for "patent and gross abuses of discretion." That standard was confirmed by this Court in 2017. It has been our standard for 34 years.

Only now, for some unknown reason, has the defense challenged that standard, although virtually every case it cites in support has been around for just as long as the cases affirming its use here. Since this is all settled, the defense has not met its burden of showing the "special justification" needed to depart from precedent. It presents nothing aside from abstract notions of consistency with caselaw in other contexts for support. That is not enough.

Should this Court hold that change is needed, however, we would ask that you make clear that the "abuse of discretion" standard is itself highly deferential to the views of the prosecutor, that a defendant's burden in challenging that decision is heavy – here, "clear and convincing" – and that judges are not free to supplant the prosecutor's views with their own.

We would also ask that you make any such change prospective only as this change in the law would have nothing whatsoever to do with improving the reliability of evidence put before a jury. It would only affect how much deference a judge owes a prosecutor in terms of the length of time a defendant must serve before becoming eligible for parole.

STATEMENT OF PROCEDURAL HISTORY AND FACTS

The Attorney General relies on the Counterstatement of Procedural History and Counterstatement of Facts set forth in the State's brief, as well as that set forth in the Appellate Division's opinion.

LEGAL ARGUMENT

POINT I

IN AN UNBROKEN, DECADES-LONG LINE OF CASES, OUR COURTS HAVE CONSISTENTLY APPLIED THE "PATENT AND GROSS" ABUSE OF DISCRETION STANDARD WHEN REVIEWING PROSECUTORS' DECISIONS NOT TO WAIVE THE GRAVES ACT MANDATORY MINIMUM, AND DEFENDANT PROVIDES NO REASON FOR CHANGE AFTER THIS COURT CONFIRMED THAT STANDARD EIGHT YEARS AGO.

Our courts have shown no difficulty applying the "patent and gross" abuse of discretion standard when evaluating a prosecutor's refusal to waive the Graves Act's mandatory minimum under N.J.S.A. 2C:43-6.2. The holdings setting and applying that standard stretch back 34 years, to 1991 – only two

years after the law was amended to allow this lenity. No party (until now) has claimed "confusion" surrounding this standard of review or that it needs to be fixed, as this Court confirmed it to be the applicable standard in State v. Benjamin, 228 N.J. 358 (2017), and even though the cases defendant cites for a lesser standard have themselves existed for decades and were referenced in Benjamin itself. We can only wonder what prompts all this now.

If anything, judicial review has only grown more robust since Benjamin. Even though that case rejected defense efforts to obtain discovery from prosecutors as to past waiver decisions in order to show a patent and gross abuse of discretion in the case at bar, the ensuing caselaw has since developed so that prosecutors' decisions are indeed routinely scrutinized by comparisons with those same prior cases. Now, an Assignment Judge can ask a prosecutor to explain why the case at bar is less worthy of waiver than specific cases the prosecutor agreed to waive in the past, even to the point that a failure to respond to such a case-comparison request permits the court to conclude the prosecutor acted arbitrarily in the case in question, constituting a patent and gross abuse of discretion. Given that, there is no need for this Court to change the standard of review and defendant's claim fails.

While much of the statutory law, caselaw and related guidelines have evolved significantly since the Graves Act became law, one throughline has

been the standard of review for prosecutors' waiver decisions. The Graves Act itself was "[e]nacted in 1981 as 'a direct response to a substantial increase in violent crime in New Jersey,'" and "is intended 'to ensure incarceration for those who arm themselves before going forth to commit crimes.'" State v. Nance, 228 N.J. 378, 390 (2017) (quoting State v. Des Marets, 92 N.J. 62, 68 (1983)). "Underlying this statute is a legislative intent to deter individuals from committing firearm-related crimes by calling for a mandatory minimum term of imprisonment for those convicted of Graves Act offenses." Benjamin, 228 N.J. at 367 (quoting Des Marets, 92 N.J. at 71). "The history of the legislation makes it clear that its focus is deterrence and only deterrence; rehabilitation plays no part in this legislation." Des Marets, 92 N.J. at 68.

To ensure that legislative will was followed, "the Supreme Court took steps to ensure strict adherence to the mandatory minimum sentencing framework adopted by the Legislature," State v. Rodriguez, 466 N.J. Super. 71, 94-95 (App. Div.), leave denied, 247 N.J. 234 (2021), including a 1981 memorandum from Chief Justice Wilentz to all trial judges "prohibiting conventional plea bargaining of Graves Act offenses," Des Marets, 92 N.J. at 66 n.3, and "setting forth the limited circumstances when a judge may approve a negotiated plea involving dismissal of an offense carrying a mandatory custodial term." Rodriguez, 466 N.J. Super. at 95.

In 1989, the Legislature enacted N.J.S.A. 2C:43-6.2 to "mitigate the undue severity that might accompany the otherwise automatic application of the mandatory minimum sentence under the Graves Act." Benjamin, 228 N.J. at 368. This statute provides a "limited exception that allows certain first-time offenders to receive a reduced penalty if the imposition of a mandatory term would not serve the interests of justice." Ibid. N.J.S.A. 2C:43-6.2 provides

> On a motion by the prosecutor made to the assignment judge that the imposition of a mandatory minimum term of imprisonment under [the Graves Act] for a defendant who has not previously been convicted of [a Graves Act] offense . . . does not serve the interests of justice, the assignment judge shall place the defendant on probation pursuant to [N.J.S.A. 2C:43-2(b)(2)] or reduce to one year the mandatory minimum term of imprisonment during which the defendant will be ineligible for parole. The sentencing court may also refer a case of a defendant who has not previously been convicted of an offense under that subsection to the assignment judge, with the approval of the prosecutor, if the sentencing court believes that the interests of justice would not be served by the imposition of a mandatory minimum term.

Relief under this statute "arises in two ways. The prosecutor can make a motion to the assignment judge for a waiver of the mandatory minimum penalty. Alternatively, the sentencing judge may refer the matter to the assignment judge if the prosecutor approves the referral. In either procedure, the prosecutor must approve the waiver before the assignment judge is authorized to impose one of the two reduced penalties." Rodriguez, 466 N.J. Super. at 96 (citing Benjamin, 228 N.J. at 368-69).

Shortly after N.J.S.A. 2C:43-6.2's enactment, the Appellate Division addressed whether its effective delegation of sentencing authority to the prosecutor violated the separation-of-powers doctrine. In State v. Alvarez, 246 N.J. Super. 137 (App. Div. 1991), in an opinion by Judge Stern, the court held the statute to be constitutional. In so ruling, it observed that the legislative history "reflects that the Legislature wanted to establish an 'escape valve' for the extraordinary cases where the mandatory three-year ineligibility term was not in the 'interests of justice', but wanted to leave to the prosecutor the right to authorize and approve such reduction if he or she believes that the mandatory minimum would 'not serve the interests of justice.'" Id. at 145. The court looked to Judge Shebell's separate opinion in State v. Cengiz, 241 N.J. Super. 482 (App. Div. 1990), in the context of a similar provision in the Comprehensive Drug Reform Act. It noted Judge Shebell "would also require a procedure" whereby a defendant, aggrieved by the prosecutor's failure to make a sentencing recommendation other than one otherwise mandatory, "may move before the assignment judge or designated judge of the vicinage for a Leonardis-type[1] hearing as to whether the prosecutor's rejection or refusal is grossly arbitrary or capricious or a patent abuse of discretion." Alvarez, 246

[1] State v. Leonardis II, 73 N.J. 360 (1977) (establishing "patent and gross" abuse of discretion review for cases where a prosecutor rejects an application for PTI).

N.J. Super. at 146-47 (quoting Cengiz, 241 N.J. Super. at 497-98 (Shebell, J.A.D., dissenting in part)) (emphasis added). Alvarez upheld N.J.S.A. 2C:43-6.2 because under it, the assignment judge retains ultimate authority to decide whether the prosecutor acted within the proper bounds of discretion: "In such circumstances, the defendant may not just challenge the prosecutor's decision in a conclusory manner; he must make a showing of arbitrariness constituting an unconstitutional discrimination or denial of equal protection constituting a 'manifest injustice,' and should be required to do so by moving papers designed to convince the Assignment Judge that any kind of hearing on the issue is warranted." Id. at 148.

Then, in State v. Watson, 346 N.J. Super. 521 (App. Div. 2002), certif. denied, 176 N.J. 278 (2003), again in an opinion by Judge Stern, the court re-affirmed Alvarez's holding that a defendant's burden in challenging a prosecutor's refusal to authorize an application under N.J.S.A. 2C:43-6.2 is to show that the refusal amounted to a "patent and gross abuse of discretion:"

> If the prosecutor does not so move or consent, the defendant may seek application by arguing to the Assignment Judge that the prosecutor's refusal is a patent and gross abuse of discretion. See State v. Alvarez, 246 N.J. Super. 137, 147 (App. Div. 1991). More specifically, the defendant must show that in refusing to move or consent to make such an application to the trial court, the decision was arbitrary and amounted to unconstitutional discrimination or denial of equal protection. Alvarez, 246 N.J. Super. at 148. [Watson, 346 N.J. Super. at 535 (emphasis added).]

Thereafter, 2007 legislative amendments "greatly expanded" the Graves Act. Rodriguez, 466 N.J. Super. at 97. Before those amendments, the Graves Act applied "only where a person was convicted of possessing or using a firearm while in the course of committing certain predicate crimes or possessing a firearm for an unlawful purpose under N.J.S.A. 2C:39-4(a)." The revisions now "impose a Graves Act mandatory sentence for anyone convicted of unlawful possession of a firearm, regardless whether the defendant was concurrently committing another crime or had a purpose to use the firearm unlawfully." Ibid. What is more,

> [t]he "simple" unlawful possession offense in N.J.S.A. 2C:39-5 was not only added to the Graves Act list but also was upgraded from a third-degree crime to a second-degree crime. Prior to this revision, most persons charged with simple possession of a firearm – the most commonly-charged gun offense – were entitled upon conviction to a presumption of non-incarceration, i.e., probation, pursuant to N.J.S.A. 2C:44-1(e). Under the revised statute, those persons are subject both to the mandatory minimum sentencing provisions of the Graves Act and the presumption of imprisonment that applies to second-degree convictions pursuant to N.J.S.A. 2C:44-1(d). [Rodriguez, 466 N.J. Super. at 97-98.]

Due to this broad expansion of the Graves Act and strengthening of our gun laws, the Attorney General issued a statewide directive in 2008. See Directive to Ensure Uniform Enforcement of the "Graves Act" (Oct. 23, 2008, as corrected Nov. 25, 2008) ("Directive"). The Directive was issued to "ensure statewide uniformity in the enforcement of the Graves Act, and to

provide reasonable incentives for guilty defendants to accept responsibility by pleading guilty in a timely manner so as to maximize deterrence by ensuring the swift imposition of punishment." Id. at 4. The Directive "channels the exercise of a prosecutor's plea-bargaining discretion, thereby addressing the separation-of-powers concerns raised in Alvarez." Rodriguez, 466 N.J. Super. at 98-99. "Recognizing the trial court system might be overwhelmed unless the significantly expanded number of Graves Act offenders were provided incentive to waive their right to a jury trial by pleading guilty," the Directive instructs prosecutors to tender a "standardized" plea offer, invoking N.J.S.A. 2C:43-6.2 to reduce the term of parole ineligibility to one year. Ibid., citing Directive at 13. Per the Directive, unless (1) the defendant is ineligible for a waiver due to a prior Graves Act conviction, (2) there is a "substantial likelihood that the defendant is involved in organized criminal activity," (3) "the prosecuting agency determines that the aggravating factors applicable to the offense conduct and offender outweigh any applicable mitigating circumstances," or (4) "the prosecuting agency determines that a sentence reduction to a one-year term of parole ineligibility would undermine the investigation or prosecution of another," "[t]he prosecuting agency as part of the State's initial plea offer shall agree to move pursuant to N.J.S.A. 2C:43-6.2 for a reduction to a one-year term of parole ineligibility." Directive at 7-14.

The Directive also requires the prosecutor's office to "document in the case file its analysis of all the relevant aggravating and mitigating circumstances, whether or not the agency moves for or approves a waiver or reduction pursuant to N.J.S.A. 2C:43-6.2." Id. at 13. It also provides that "[a] copy of all case-specific memorializations required by this Section shall also be maintained in a separate cumulative file in order to facilitate such audits as the Attorney General may from time-to-time direct to ensure the proper and uniform implementation of this Directive." Id. at 14.

Thereafter, the Graves Act was again amended, again increasing its stringency. This time, the change increased the mandatory term of parole ineligibility from one-third to one-half the sentence imposed or three years, whichever is longer, to one-half the sentence imposed or 42 months, whichever is longer. L. 2013, c. 113, § 2.

In the wake of these changes, the caselaw concerning N.J.S.A. 2C:43-6.2 continued to evolve, including this Court's decision in Benjamin. There, the Court rejected the argument that a defendant could compel the prosecutor's office to provide discovery of case-specific memorializations and cumulative files of its prior decisions to recommend Graves Act waivers for cases other than the defendant's. In its analysis, the Court noted that the State's opposition was based on its claim that "numerous safeguards exist to ensure

fair application of section 6.2," including the Directive itself and that "because all waiver applications . . . pass through the assignment judge, that judge is in the 'best position' to identify discriminatory practices." 228 N.J. at 366.

This Court thus examined "whether sufficient procedural safeguards are in place to protect a defendant's right to challenge the denial of a Graves Act waiver." Benjamin, 228 N.J. at 370. It looked to State v. Lagares, 127 N.J. 20 (1992), and State v. Vasquez, 129 N.J. 189 (1992), concerning delegations of sentencing discretion to prosecutors in the Comprehensive Drug Reform Act. It noted that in both cases, "we upheld the statutory delegation of sentencing discretion to prosecutors, provided that (1) the Attorney General promulgated guidelines to help prosecutors uniformly apply the statute; (2) prosecutors stated on the record the reasons supporting their decision in order to enable judicial review and ensure compliance with the guidelines; and (3) a court could review and overturn the prosecutor's decision if a defendant demonstrates that the prosecutor acted arbitrarily and capriciously." 228 N.J. at 371 (citing Lagares, 127 N.J. at 28-33; Vasquez, 129 N.J. at 195-96).

It then examined in detail whether the Graves Act "provides the procedural safeguards required by this Court in Lagares and Vasquez" and found it did. 228 N.J. at 371-73. Concerning the third part of the inquiry, regarding the adequacy of judicial review, the Court deemed the framework

provided by Alvarez and Watson sufficient. In the process it accepted the sufficiency of the "patent and gross" abuse-of-discretion standard:

> Third, since the Appellate Division's 1991 decision in Alvarez, upholding section 6.2, defendants have been able to seek judicial review of prosecutors' waiver decisions. In order to do so, a defendant must, by motion to the assignment judge, demonstrate "arbitrariness constituting an unconstitutional discrimination or denial of equal protection" in the prosecutor's decision. Alvarez, supra, 246 N.J. Super. at 148; State v. Watson, 346 N.J. Super. 521, 535 (2002) (explaining defendant must show "prosecutor's refusal [was] a patent and gross abuse of discretion"). Once a defendant makes this threshold showing, the defendant can obtain a hearing to review the prosecutor's decision if the assignment judge concludes that the "interests of justice" so require. Alvarez, supra, 246 N.J. Super. at 148-49. This judicial backstop ensures that prosecutorial discretion is not unchecked because the assignment judge retains "ultimate authority" to review the prosecutor's waiver decisions for arbitrariness and discrimination. Id. at 146-47. [Benjamin, 228 N.J. at 372-73 (emphasis added).]

Benjamin ultimately held that defendants are not entitled to the sought-after discovery in view of the adequacy of this very framework: "We therefore conclude that defendants are not entitled to discovery of a prosecutor's case-specific memorializations and cumulative files when challenging the denial of a Graves Act waiver in an Alvarez motion because there are sufficient procedural safeguards in place for meaningful judicial review of a prosecutor's waiver decision." 228 N.J. at 375 (emphasis added).

Given this holding, it comes as no surprise that the Appellate Division has since observed that Benjamin "confirmed" the application of the "patent

and gross" abuse-of-discretion test in this context:

> Alvarez adopted the patent and gross abuse of discretion standard of judicial review that applies to the review of a prosecutor's decision to admit a defendant to pretrial intervention (PTI). Id. at 147-48. See also State v. Leonardis, 73 N.J. 360, 370 (1977). The Supreme Court has since confirmed that a prosecutor's decision under N.J.S.A. 2C:43-6.2 is reviewed under this highly deferential standard. Benjamin, 228 N.J. at 364 (a defendant may "appeal the denial of [the Graves Act] waiver to the assignment judge upon a showing of patent and gross abuse of discretion by the prosecutor.") [Rodriguez, 446 N.J. Super. at 97 (emphasis added).]

It has similarly ruled in other published cases that this is now a settled question. See State v. Andrews, 464 N.J. Super. 111, 120 (App. Div. 2020) ("[i]n accordance with Alvarez, defendants may 'appeal the denial of a waiver to the assignment judge upon a showing of patent and gross abuse of discretion by the prosecutor.'" (quoting Benjamin, 228 N.J. at 364)); See also State in the Interest of E.S., 470 N.J. Super. 9, 22 n.2 (App. Div. 2021) ("we refer to motions by defendants under N.J.S.A. 2C:43-6.2 seeking relief from a prosecutor's 'patent and gross abuse of discretion' in refusing to agree to a sentencing downgrade for a firearms offense charged under the Graves Act, N.J.S.A. 2C:43-6.2. See State v. Benjamin, 228 N.J. 358, 364 (2017) (exemplifying such judicial review)"), aff'd as modified on other grounds, 252 N.J. 331 (2022) (emphasis added).

This challenge to the correctness of the standard of review seems of recent vintage. And the Appellate Division has had no difficulty rejecting it,

not only in this case but in State v. Thelisme, 2024 WL 3517882 (App. Div.) (Aa1), leave denied, 258 N.J. 498 (2024). There, the court noted the defense claim that "the trial court erred in applying a 'patent and gross abuse of discretion' standard in deciding his motion [to overturn the prosecutor's denial of a Graves Act waiver] instead of the less demanding arbitrary-and-capricious standard." As the court added, the defendant there "contends the caselaw of the issue of what standard a court should apply in deciding a Graves Act waiver motion is 'less clear' and that 'sound jurisprudential reasons' exist to adopt the lower standard. We disagree." Id. at *4. The court explained:

> The law on the applicable standard is clear. In Benjamin, our Supreme Court analyzed at length the legal process for obtaining a Graves Act waiver. 228 N.J. at 368-73. The Court held that to obtain judicial review of a prosecutor's denial of a Graves Act waiver request, a defendant must demonstrate the denial was arbitrary and not arbitrary in a capricious sense but "'arbitrariness constituting an unconstitutional discrimination or denial of equal protection' in the prosecutor's decision." Benjamin, 228 N.J. at 372 (quoting Alvarez, 246 N.J. Super. at 148). Contrary to defendant's assertion, that more demanding standard does not align "more closely with the 'abuse of discretion' standard than with the 'patent and gross abuse of discretion' standard."
>
> The Court's meaning is clear. The Court described Alvarez as holding defendants were allowed to "appeal the denial of a waiver to the assignment judge upon a showing of patent and gross abuse of discretion by the prosecutor." Id. at 364 (citing Alvarez, 246 N.J. Super. at 146-49). The Court cited Watson and quoted its holding that a "defendant must show 'prosecutor's refusal [was] a patent and gross abuse of discretion.'" Benjamin, 228 N.J. at 372 (alteration in the original) (quoting Watson, 346 N.J. Super. at 535). If the Court believed "a patent and gross abuse of

> discretion" was not the correct standard, it would have said so and it wouldn't have referenced the holdings in Watson and Alvarez applying that standard. [Id. at *4 (emphasis added).]

The Thelisme court added that "[s]ince its release, we have followed Benjamin and have reviewed Graves Act waiver decisions under 'a patent and gross abuse of discretion' standard." Ibid (citing Rodriguez, Andrews and State in the Interest of E.S.). It noted, "[w]e perceive no lack of clarity in the caselaw regarding the application of the patent and gross abuse of discretion standard in reviewing Graves Act waiver decisions." Ibid.

Finally, the Thelisme court noted its agreement with the applicability of the patent-and-gross standard, and even if it did not it was bound by Benjamin:

> Defendant argues "sound jurisprudential reasons" exist to employ the lower arbitrary-and-capricious standard and contends Benjamin and Rodriguez reflect "confusion." We don't see any confusion in those decisions. Even if we disagreed with the Court, and we don't, we can't reverse the Supreme Court. "[A]s an intermediate appellate court, we are bound by the Supreme Court's holdings and dicta." State v. Jones, ___ N.J. Super. ___, ___ (App. Div. 2024) (slip op. at 27); see also Bacon v. Atl. City Transp. Co., 72 N.J. Super. 541, 547 (App. Div. 1962) (declining to review authorities standing for a legal doctrine the Supreme Court has subsequently rejected, we recognized the Appellate Division is "an intermediate appellate tribunal, bound by the final determinations of our Supreme Court"). Accordingly, we conclude the trial court appropriately decided defendant's motion under a patent and gross abuse of discretion standard. [Id. at *5.]

Post-Benjamin, our courts have consistently (and with no evident difficulty) applied the "patent and gross abuse of discretion" standard, as per

Benjamin, Alvarez, Watson, Rodriguez, and Andrews. See State v. Chia, 2017 WL 3469545 (App. Div. 2017) (Aa7) at *3 (applying "patent and gross abuse of discretion" standard; "[i]n Benjamin, supra, the Court reaffirmed the standard a defendant must satisfy to successfully challenge the prosecutor's decision"); State v. Vicari, 2017 WL 2875401 (App. Div. 2017) (Aa12) at *3 (citing Watson and Alvarez in applying patent and gross abuse-of-discretion standard); State v. Mount, 2019 WL 7116194 (App. Div. 2019) (Aa19) at *2 (Alvarez and Cengiz hold that defendant must show prosecutor's refusal was "grossly arbitrary or capricious or a patent abuse of discretion"); State v. Billard, 2019 WL 3371130 (App. Div. 2019) (Aa22) at *2 (same); State v. Smith, 2020 WL 4745277 (App. Div. 2020) (Aa24) at *3 (per Alvarez, "defendants may 'appeal the denial of a waiver to the assignment judge upon a showing of patent and gross abuse of discretion by the prosecutor.' Benjamin, 228 N.J. at 364."); State v. Balbi, 2020 WL 2846617 (App. Div. 2020) (Aa29) at *7 (applying "patent and gross abuse of discretion" standard); State v. Harris, 2020 WL 969829 (App. Div.) (Aa35) at *3 (citing Alvarez and Watson to apply "patent and gross abuse of discretion" standard), certif. denied, 242 N.J. 117 (2020); State v. Mejia-Hernandez, 2021 WL 3477843 (App. Div.) (Aa39) at *9 (citing Alvarez and Cengiz in holding defendant must show prosecutor's refusal was "grossly arbitrary or capricious or a patent abuse of

discretion"), certif. denied, 248 N.J. 554 (2021); State v. Randolph, 2022 WL 3010986 (App. Div. 2022) (Aa49) at *6-7 (trial judge applied patent and gross abuse of discretion standard; citing Alvarez and Cengiz to hold defendant must show prosecutor's refusal was "grossly arbitrary or capricious or a patent abuse of discretion"), certif. denied, 254 N.J. 201 (2023); State v. Driesse, 2025 WL 479467 (App. Div. 2025) (Aa56) at *6 ("[o]nly if a defendant shows that the prosecutor's decision was a patent and gross abuse of discretion should it be overturned. See Benjamin, 228 N.J. at 364 (permitting a 'defendant to appeal the denial of a waiver to the assignment judge upon a showing of patent and gross abuse of discretion by the prosecutor')"). See also 32 New Jersey Practice, Criminal Practice and Procedure § 43.6 (Incarceration – The Graves Act) ("[t]he defendant's burden on this appeal [from denial of a Graves Act waiver] is to demonstrate to the assignment judge that the prosecutor's decision constituted a patent and gross abuse of discretion") (2024 ed.).

In the face of this, defendant offers no basis to conclude that the system in place for 34 years (to say nothing of the past eight years since Benjamin), is in any way dysfunctional or in need of change. As this steady line of Appellate Division cases since Benjamin shows, Benjamin is precedential on the issue. That is especially so given its express citation to the "patent and

gross abuse of discretion" standard as forming a core part of the "sufficient procedural safeguards in place for meaningful judicial review" it relied on to reject the defendant's claim. Defendant is thus wrong to argue that was not part of the Court's holding. See State v. Rose, 206 N.J. 141, 183 (2011) ("matters in the opinion of a higher court which are not decisive of the primary issue presented but which are germane to that issue . . . are not dicta, but binding decisions of the court") (emphasis added). Indeed, two of the cases he relies on most heavily (Lagares and Vasquez) were not only cited in Benjamin, but squarely relied on to provide the analytical framework it utilized when it then cited the "patent and gross abuse of discretion" standard as applicable and providing sufficient procedural protection to deny the broad discovery sought.[2]

Thus, rules of stare decisis come into play. "[E]ven in constitutional cases, the doctrine [of stare decisis] carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." State v. Brown, 190 N.J. 144, 157-58 (2007) (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000), and United States v.

[2] We note that virtually all the cases defendant relies on to support his argument (Lagares, Vasquez, State in re V.A., 212 N.J. 1 (2012) and Flagg v. Essex Cty. Prosecutor, 171 N.J. 561 (2002)) predate Benjamin. Yet none were cited by the Court to take the course defendant wishes for. The only case defendant cites that postdates Benjamin is State v. A.T.C., 239 N.J. 450 (2019), which confirms the Court was fully cognizant of the issue and capable of adopting the standard defendant seeks when that is its purpose.

Int'l Bus. Machs. Corp., 517 U.S. 843, 856 (1996)). See also State v. Olenowski, 253 N.J. 133, 153 (2023) ("[s]pecial justification to overturn precedent might exist when the passage of time illuminates that a ruling was poorly reasoned, when changed circumstances have eliminated the original rationale for a rule, when a rule creates unworkable distinctions, or when a standard defies consistent application by lower courts").

Here, no such justification exists. All defendant can say is that the standard of review is intellectually inconsistent with this Court's rulings in other contexts. But that does not prove it is not working properly, or judges are not able to effectively fulfill their role. Indeed, the defense bar has been expressly put on notice of this question for decades and done nothing. That silence speaks volumes. Aside from this defendant and the defendant in Thelisme, the bench and bar have not sought to change the standard despite 30-plus years of opportunity and eight years since Benjamin. No effort was made even though the Appellate Division (via Judge Stern on both occasions), in State v. Mastapeter, 290 N.J. Super. 56 (App. Div.), certif. denied, 146 N.J. 569 (1996), and Watson in 2002, all but invited challenges to it, given the absence of guidelines at the time and the standard of review. See Mastapeter, 290 N.J. Super. at 65 ("[w]e have not had occasion to reexamine [the Alvarez] test since the Supreme Court's decisions concerning review of similar

decisions by the prosecutor under the Comprehensive Drug Reform Act;" citing Lagares and Vasquez for the propositions that "prosecutorial guidelines required; defendants can challenge prosecutor's decision as 'arbitrary and capricious exercise of prosecutorial discretion'"); Watson, 346 N.J. Super. at 535 ("[s]ignificantly, neither party suggests that Alvarez is out-of-date in light of the decade of litigation which has evolved concerning analogous provisions of the Comprehensive Drug Reform Act . . . Neither party suggests that Attorney General Guidelines are required, and we do not consider the subject"). It follows from the long silence that followed that the defense bar saw nothing wrong with the system as it has been or that it required a fix.

How much less any need for change is now. Since the Directive in 2008 and Benjamin's endorsement of our system of review in 2017, more recent developments have only strengthened a defendant's ability to meet the burden of showing a patent and gross abuse of discretion. In State v. Andrews, the State's failure to respond to an Assignment Judge's request (that it explain why a waiver was not granted to that defendant when waivers had been granted in other cases the judge thought were similar) was itself a basis for relief. Andrews held that although Benjamin rejected a right to discovery from the prosecutor as to statements of reasons in prior cases, judges are not prevented "from maintaining those files and relying on them in evaluating 'the

prosecutor's waiver decisions for arbitrariness and discrimination.'" Andrews, 464 N.J. Super. at 123. Quoting Justice Albin's dissent in Benjamin, Andrews noted that "[n]othing prevents the judiciary from maintaining [the statements of reasons filed in other cases] in a central file so that historical information will be available to . . . assignment judges." Ibid., (quoting Benjamin, 228 N.J. at 377-78 (Albin, J., dissenting)). Andrews held that the trial court's "robust review and analysis were sound, [finding a patent and gross abuse of discretion after comparing the case at bar to cases the judge asked about] and fulfilled the role contemplated in Benjamin to 'ensure that prosecutorial discretion is not unchecked." 464 N.J. Super. at 124 (emphasis added).

Rodriguez later described the import of this "robust review": "Under the analytical paradigm embraced in Andrews, when a trial court identifies other cases where it appears similarly situated defendants were granted a Graves Act waiver, the prosecutor must explain why those other defendants were not similarly situated to the defendant at bar." Rodriguez, 466 N.J. Super. at 103. "The failure to respond to the trial court's concerns, as in Andrews, . . . permits the court to conclude that the prosecutor acted arbitrarily, constituting a patent and gross abuse of discretion." Ibid. (citing Andrews, 464 N.J. Super. at 124) (emphasis added).

Thus, the legal landscape has much changed. Now, we frequently see

defendants and courts presenting prosecutors with prior waiver cases with which to compare the defendant at bar. See, e.g., Andrews, 464 N.J. Super. at 117-18 (identifying three cases for comparison as allegedly similarly situated); Rodriguez, 466 N.J. Super. at 91 (identifying three cases for comparison); Thelisme, 2024 WL 3517882 at *2 ("defendant included a list of thirty cases in which the State had granted Graves Act waiver requests" and in a reply "included a list of an additional ninety-three cases in which the State had granted Graves Act waiver requests"); Randolph, 2022 WL 3010986 at *5 (ten cases submitted for comparison). Case comparisons were made here too.

The Attorney General certainly accepts this as part of the process. He merely notes that it seems unique when compared to other contexts, in terms of the depth and breadth of review. In fact, in Benjamin itself, this Court noted that in the context of PTI, where prosecutors also exercise substantial discretion, "the defendant [claiming disparate treatment] could not prevail merely because she could show that the prosecutor approved PTI for others 'charged with similar offenses.'" 228 N.J. at 374 (quoting State v. Sutton, 80 N.J. 110, 120 (1979)). "Rather, the defendant needed to prove that she received 'less favorable treatment than identically situated individuals.'" Ibid. (emphasis added). See also State v. Liepe, 239 N.J. 359, 378 (2019) (rejecting as invalid any effort to make "comparison[s] between defendant's sentence and

sentences recounted in sixteen Appellate Division decisions." "This Court . . . has never imposed on a trial court the obligation to demonstrate that a sentence comports with sentences imposed by other courts in similar cases").

Finally, our courts have repeatedly overrode prosecutors' decisions in this context, thus demonstrating that the "robust review" provided in this area does indeed have teeth. See Andrews, 464 N.J. Super. at 123 (affirming assignment judge's override of prosecutor's rejection); Mount, 2019 WL 7116194 at *3 ("this is a rare instance in which a judicial override of a prosecutor's Graves Act waiver denial is appropriate"); Smith, 2020 WL 4745277 at *1 (finding judge's override appropriate, not disturbed on appeal).

Suffice it to say that any claim that the current system of "robust review" needs more alteration ignores its history. Defendant has not provided the sort of "special justification" needed for a change in governing precedent. Despite the fact that the existence of all the tools needed to make his claim have existed nearly as long as Alvarez itself, all he can do now is cite the old cases, but nothing else, ignoring what has come since. His claim must fail.

POINT II

SHOULD THIS COURT CHANGE THE STANDARD OF REVIEW FOR GRAVES ACT WAIVERS, IT SHOULD EMPHASIZE THAT THE ABUSE-OF-DISCRETION STANDARD IS ITSELF HIGHLY DEFERENTIAL, CAN ONLY BE OVERCOME BY CLEAR AND CONVINCING EVIDENCE, AND JUDGES ARE NOT FREE TO SUBSTITUTE THEIR VIEWS FOR THOSE OF THE PROSECUTOR.

If this Court finds the high bar of stare decisis overcome, the Attorney General respectfully urges it to emphasize that the prosecutor's decision in this context must be afforded a high degree of deference; that the standard of review imposes a "heavy" burden on defendants; and that courts are not free to second-guess the prosecutor's decision by simply supplanting their judgment of the relevant factors for that of the prosecutor. The Legislature has explicitly given the prosecutor's views primacy here. This Court should ensure that remains the case going forward. The Attorney General takes this opportunity to stress this, as it comes in a context where judges reviewing a prosecutor's discretion are doing so in a manner where the everyday roles are reversed.

In State v. Bender, 80 N.J. 84 (1979), this Court explained what is meant by an "abuse of discretion" and what must be shown to sustain such a finding. It also differentiated that term from a "patent and gross abuse of discretion," doing so in reviewing prosecutorial decisions in the context of refusing to admit a defendant into PTI:

> The phrase "abuse of discretion" is frequently used in judicial discourse, but nevertheless defies precise definition. Ordinarily, an abuse of discretion will be manifest if defendant can show that a prosecutorial veto (a) was not premised upon a consideration of all relevant factors, (b) was based upon a consideration of irrelevant or inappropriate factors, or (c) amounted to a clear error in judgment. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). In order for such an abuse of discretion to rise to the level of "patent and gross," it must further be shown that the prosecutorial error complained of will clearly subvert the goals underlying Pretrial Intervention. [Bender, 80 N.J. at 93.]

Thus, the two standards have common elements, with the patent-and-gross standard completely overlapping the lesser standard and adding that "such an abuse of discretion" must also be so significant as to "clearly subvert" the goals inherent in the legal framework at issue (there PTI, here the Graves Act). See also Flagg v. Essex County Prosecutor, 171 N.J. at 572 ("a 'patent and gross abuse of discretion is more than just an abuse of discretion . . . ; it is a prosecutorial decision that has gone so wide of the mark sought to be accomplished . . . that fundamental fairness and justice require judicial intervention").

Further, in describing "abuse of discretion" elsewhere, this Court has equated it with the "arbitrary and capricious" standard. Compare State v. Lagares, 127 N.J. 33 ("[t]o protect against . . . arbitrary action," the Court held, "an extended term may be denied or vacated where defendant has established that the prosecutor's decision to seek the enhanced sentence was an

arbitrary and capricious exercise of prosecutorial discretion") with State in re V.A., 212 N.J. at 24-26 (discussing Lagares; "[s]imilarly, here, we also impose on a juvenile . . . a similar abuse of discretion standard to be met when the family court reviews the prosecutor's [juvenile] waiver decision made in connection with the Guidelines issued") (emphasis added).

In so ruling, the V.A. Court denoted other features of the "abuse of discretion" standard, all of which would apply here (as they always have under the higher standard that has applied all along). It held prosecutors' decisions are entitled to "generous deference" under that standard: "we have embraced the abuse of discretion standard as presumptively representative of a generous deference to prosecutorial actions." Id. at 22. It explained that "[i]n Lagares, we imposed a 'heavy' abuse of discretion standard to be carried by a defendant seeking to avoid a prosecutor's application made in compliance with guidelines issued, in deference to the legislative determination that the sentencing enhancement was the new norm." Id. at 25 (emphasis added). It thus defined whose burden it was to make such a showing, what that burden was, and that judges are not free to second-guess decisions by prosecutors when they engage in the proper analysis:

> As in Lagares, we hold that a juvenile must show clearly and convincingly that a prosecutor abused his or her discretion in order to secure relief. . . . The purpose of the family court's review is not to allow the judicial body to substitute its judgment when

> assessing the factors that the Attorney General has required prosecutors to consider when making a waiver decision. [V.A., 212 N.J. at 26 (emphasis added).]

These concepts have known meanings. "Clear and convincing" is that "which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable (the factfinder) to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." State v. Hernandez, 170 N.J. 106, 127 (2001) (quoting In re Samay, 166 N.J. 25, 30 (2001)). The "burden of establishing clear and convincing evidence . . . falls somewhere between the ordinary civil standard of preponderance of the evidence and the criminal standard of proof of beyond a reasonable doubt." State v. C.W., 449 N.J. Super. 231, 257-58 (App. Div. 2017). It is such that "a strong presumption favors a contrary result" and is a "challenging burden" to meet. Id. at 258 (emphasis added).

Also axiomatic is that the assignment judge is not free to substitute his or her judgment for that of the prosecutor. That is particularly worthy of emphasis here, as under the Directive, the prosecutor's waiver decision will most often be based on review and weighing of the aggravating and mitigating factors found in N.J.S.A. 2C:44-1. Indeed, that very rule of deference is often invoked in appellate review of a sentencing court's calculus involving identical

factors. That deference should apply with greater force here as it comes in tandem with the "clear and convincing" burden a defendant must meet to obtain relief, to say nothing of the comparative review, which does not happen in ordinary sentencing. And as noted, the law on this is settled: "An appellate court is not to substitute its assessment of aggravating and mitigating factors for that of the trial court." State v. Bieniek, 200 N.J. 601, 608 (2010).

Instead, "[a]ppellate review of sentencing decisions is relatively narrow and is governed by an abuse of discretion standard." State v. Blackmon, 202 N.J. 238, 297 (2010). While appellate intervention may be appropriate "when a reviewing court determines that a sentencing court failed to find mitigating factors that were clearly supported by the record," the cases "do not require, however, that the trial court explicitly reject each and every mitigating factor argued by a defendant." Bieniek, 200 N.J. at 608-09 (emphasis added). Rather, "we have 'assured our trial judges that when they 'exercise discretion in accordance with the principles set forth in the Code and defined by us . . ., they need fear no second-guessing." Id. at 607-08 (quoting State v. Ghertler, 114 N.J. 383, 384 (1989) and State v. Roth, 95 N.J. 334, 365 (1984)). The same is true when a prosecutor follows the Directive. Thus, trial courts reviewing a prosecutor's denial of a Graves Act waiver are cast more in the role of an appellate court reviewing a trial court's sentencing analysis.

Again, we urge this Court to make that level of deference explicit here as it arises in a context that inverts the typical roles of courts and prosecutors. In the usual setting, courts take a prosecutor's views on aggravating and mitigating factors purely under advisement, as a party to the sentencing instead of as the primary decisionmaker, as the prosecutor is here. We urge this Court to remind assignment judges not to engage in de novo finding of aggravating and mitigating factors, or the weight they are due, or in case comparisons. Our concern is that unless this Court makes such a statement, there is a likelihood that judges may, out of habit, find themselves acting in the same manner they routinely do as sentencers. This would make any cure worse than the non-extant "problems" with the current standard, since (as noted above) defendant makes no showing whatever that the present system is dysfunctional.

Finally, we urge this Court to endorse the Rodriguez analysis in its entirety, especially its treatment of how judges are to review a prosecutor's evaluation of cases that have been brought to his or her attention by the judge as "similarly situated" and where waivers were allowed by the prosecutor's office (the "comparative analysis methodology"). See Rodriguez, 466 N.J. Super. at 102-16 (parts III and IV of decision). We view those parts of Rodriguez as providing a comprehensive and valuable teaching opinion. And even though the opinion speaks in terms of analyzing a prosecutor's decisions

through the "patent and gross" lens, all of its analysis is actually undertaken by applying the features that standard shares with the regular "abuse of discretion" test, beginning with its statement that "a prosecutor's assessment of the fact-sensitive distinctions between the case at bar and other cases claimed to involve similarly situated defendants is entitled to the same deference given to the prosecutor's assessment of any other relevant circumstance." Id. at 105. So, too, that the "comparative analysis methodology" is meant to serve as a "judicial backstop" to guard against prosecutorial arbitrariness and "may not be used as an artifice to allow a trial court to 'substitute its own discretion for that of the prosecutor.'" Ibid.

The same goes for the invalidity of comparing cases where different charges are lodged (definitionally rendering them not similar); or the difference between cases resolved by plea from those that were not (rendering them dissimilar); or identifying the "true outlier." As Rodriguez observes on the latter, "[a] trial court applying the comparative analysis methodology must be circumspect when relying on a small cadre of cases, much less one or two anecdotal examples, in determining whether defendant has adequately 'demonstrated arbitrariness constituting an unconstitutional discrimination or denial of equal protection' in the prosecutor's decision." Id. at 110 (quoting Andrews, 464 N.J. Super. at 120 (quoting Benjamin, 228 N.J. at 372)). "We

therefore believe requiring near-perfect consistency in exercising prosecutorial discretion is not only unworkable, but also fundamentally at odds with the substantial deference afforded to prosecutors under Alvarez and Benjamin." Ibid. Indeed, the following is equally apt for both the "patent and gross" standard and regular abuse of discretion, as it draws on logic common to both:

> A patent and gross abuse of discretion is not automatically established by finding one or two cases where similarly situated defendants were granted a waiver. It is conceivable that the earlier decision, rather than the one currently under review, is the aberration – albeit one that was not challenged as such because it worked to that defendant's advantage. A prosecutor's decision to extend leniency in a particular case does not mean the die has been cast in all future cases involving similar circumstances. Were it otherwise, prosecutors might be dissuaded from granting waivers in close cases for fear of setting binding precedent, thus reducing their ability to exercise reasoned discretion in future cases. [466 N.J. Super. at 111.]

We highlight these aspects of Rodriguez to urge this Court to endorse them, no matter what standard of review applies. They (and the entirety of that decision) retain their validity under both standards as they draw on maxims common to both. We feel compelled to do so given the long-standing nature of the precedents at issue and how our courts have long been bound to follow them, leading to a well-developed body of law. Much judicial wisdom has been expressed in the precedents in this area. It should not be rendered non-precedential simply because a long-standing standard of review was changed many years down the road, for no reason related to its operation.

Before leaving this issue, we make two observations as to defendant's claims. First, he is wrong to say there is a "presumption" in the Directive in favor of a waiver. Nothing of the kind exists. And for this Court to somehow state there is one would inject confusion where none exists. For judges to hold prosecutors to a "presumption" would undercut the "heavy," "clear and convincing" burden defendants face when making challenges in this area, as it would the "generous deference" courts must show prosecutors' decisions. So too, the idea that a prosecutor is somehow less able to apply an "interests of justice" standard than a judge ignores our unique role: "In representing the State in a criminal action, the prosecutor is endowed with a solemn duty – 'to seek justice, not merely to convict.'" State v. Garcia, 245 N.J. 412, 435 (2021) (quoting State v. Williams, 113 N.J. 393, 447 (1998) (quoting ABA Standards Relating to the Administration of Justice, Standard 3.1-1(c) (2d Ed. 1980)).[3]

[3] For the same reason, defendant's claim that judges should view skeptically a prosecutor's written rejection submitted after a defendant challenges that waiver denial in court, as a "mere post-hoc justification," is as offensive as it is contrary to law. So long as the prosecutor adheres to the Directive, explains his or her reasons that comport with its methodology to allow for judicial review, it must be presumed the prosecutor acted to seek justice. See United States v. Armstrong, 517 U.S. 456, 464 (1996) (a "presumption of regularity" supports prosecutorial decisions and "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties").

POINT III

ANY CHANGE IN THE LAW IN THIS AREA SHOULD BE PROSPECTIVE ONLY.

Finally, should defendant overcome the high bar of stare decisis, this Court should make any such ruling prospective in nature, as any change in the law would have nothing whatever to do with improving the truth-seeking function. It would only concern the review of a prosecutor's decision that affects the length of a period of parole ineligibility. Moreover, the bench and bar have been bound by the relevant Supreme Court and Appellate Division precedent and thus by definition operated with a great degree of compulsory reliance on the standard of review for 30-plus years.

"The threshold retroactivity question is always the same – whether a new rule of law has been announced." State v. Feal, 194 N.J. 293, 307 (2008). "A case announces a new rule of law for retroactivity purposes if there is a "'sudden and generally unanticipated repudiation of a long-standing practice.'" Ibid. (quoting State v. Purnell, 161 N.J. 44, 53 (1999) (quoting State v. Afanador, 151 N.J. 41, 58 (1997)). "A new rule exists if 'it breaks new ground or imposes a new obligation on the States or the Federal Government . . . [or] if the result was not dictated by precedent existing at the time the defendant's conviction became final.'" Feal, 194 N.J. at 308 (quoting State v. Lark, 117 N.J. 331, 339 (1989) (quoting Teague v. Lane, 489 U.S. 288, 301 (1989))

(emphasis in original). Here, we would certainly be facing a new rule as it would run contrary to Benjamin, Alvarez, Watson, Andrews and Rodriguez.

> If a new rule is implicated, [the Court] has four options: (1) make the new rule of law purely prospective, applying it only to cases whose operative facts arise after the new rule is announced; (2) apply the new rule to future cases and to the parties in the case announcing the new rule, while applying the old rule to all other pending and past litigation; (3) grant the new rule . . . [pipeline] retroactivity, applying it to cases in (1) and (2) as well as to pending cases where the parties have not yet exhausted all avenues of direct review; and, finally, (4) give the new rule complete retroactive effect. [Feal, 194 N.J. at 308 (quoting State v. Burstein, 85 N.J. 394, 402-03 (1981)).]

In deciding which option to adopt, this Court considers "the purpose of the rule and whether it would be furthered by retroactive application, (2) the degree of reliance placed on the old rule by those who administered it, and (3) the effect a retroactive application would have on the administration of justice." State v. Knight, 145 N.J. 233, 251 (1996).

The first factor (the purpose factor) is "often the pivotal consideration." Ibid. "[W]here the purpose of the new rule 'is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and raises serious questions about the accuracy of guilty verdicts in past trials the first factor points to a complete retroactive application." Burstein, 85 N.J. at 406-07. "On the contrary, in cases where the new rule is designed to enhance the reliability of the fact-finding process, but the old rule did not 'substantially

impair' the accuracy of that process, a court will balance the first prong against the second and third." Feal, 194 N.J. at 309 (quoting Burstein, 85 N.J. at 410). Conversely, "[t]he second and third factors come to the forefront of the retroactivity analysis when the inquiry into the purpose of the new rule does not, by itself, reveal whether retroactive application of the new rule would be appropriate." Knight, 145 N.J. at 252 (emphasis added).

Here, there can be no dispute that use of the "patent and gross abuse of discretion" standard in reviewing prosecutor's refusals to consent to a Graves Act waiver, as opposed to the abuse-of-discretion standard, has nothing at all to do with the fact-finding process at trials, nor would the new rule enhance the reliability of that process at all. This is all totally unrelated to any of that. Accordingly, the "pivotal consideration" "by itself" weighs decisively in favor of prospective application and does not even require a balancing of the first prong against the second and third.

For the sake of completeness, we merely add that the parties certainly relied on the existing standard of review, and indeed had little choice but to do so, given this Court's holding in Benjamin, as well as all the Appellate Division holdings that pre- and post-dated Benjamin, all of which bound trial judges facing this issue.

As far as the impact of retroactive application on the administration of

justice, we would note the obvious – there are a great many prosecutions for crimes falling under the Graves Act. But the only relevant subset among those cases that might be affected by a change in the standard of review would be those whose outcome hinged on the difference between the "patent and gross" standard of review and the abuse-of-discretion standard; in other words, those defendants who failed to meet their burden due to the higher standard but could have met the lower bar. As noted above, the higher standard relies on the exact same manner of establishing an abuse of discretion as the lesser standard, but merely adds that "for such an abuse of discretion to rise to the level of 'patent and gross,' it must also be shown that the prosecutorial error complained of clearly subverts the goals underlying [the Graves Act waiver provision]," Bender, 80 N.J. at 93, or was a decision "so wide of the mark sought to be accomplished . . . that fundamental fairness and justice require judicial intervention." Flagg, 171 N.J. at 572.

In other words, only a defendant who has (1) not exhausted his direct appeals, and (2) had challenged a prosecutor's refusal to accede to a waiver under the existing framework, and (3) had established that an abuse of discretion had, in fact, occurred, but was nevertheless unable to satisfy that last component that separates the "patent and gross" abuses from a regular abuse of

discretion would be entitled to avail themselves of any new rule.[4] But again, since this rule has nothing at all to do with the truth-seeking function, any claim of retroactivity fails under the first prong and there is no need to evaluate this issue.

[4] As not every past decision denying a challenge to a prosecutor's refusal to assent to a Graves Act waiver might specify in its reasoning that an abuse of discretion had been found, just not a patent and gross abuse, we would agree that defendants whose cases are on direct appeal and whose claims have failed in the Law Division may ask the decisionmaker (whether assignment judge or designee) to revisit the ruling, and it would be up to that judge who rendered the ruling to determine whether a hearing on that issue is warranted.

CONCLUSION

The Attorney General urges this Court to affirm the long-standing patent and gross abuse-of-discretion standard as defendant has failed to meet his burden of showing a substantial justification for jettisoning precedent. Alternatively, should this Court change the standard of review, we ask that it expressly pronounce that the abuse-of-discretion standard is highly deferential to prosecutorial decisions in this context, that defendants face a clear-and-convincing burden, and judges are not to substitute their views on relevant criteria for those of the prosecutor. Finally, any change should be prospective.

Respectfully submitted,

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