
Supreme Court of New Jersey

DOCKET NO. 090121

CRIMINAL ACTION

STATE OF NEW JERSEY,	:	
	:	On Leave Granted from an Interlocutory
Plaintiff-Respondent,	:	Order of the Superior Court of New
	:	Jersey, Appellate Division.
v.	:	
	:	Sat Below:
TYRELL S. LANSING,	:	Hon. Greta Gooden Brown, J.A.D.,
	:	Hon. Patrick DeAlmeida, J.A.D.,
Defendant-Appellant.	:	Hon. Robert M. Vinci, J.A.D.

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

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR AMICUS CURIAE
STATE OF NEW JERSEY
RICHARD J. HUGHES JUSTICE COMPLEX
TRENTON, NEW JERSEY 08625

LAURA E. WOJCIK – ATTORNEY NO. 396222022
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE BUREAU
P.O. BOX 086
TRENTON, NEW JERSEY 08625
(609) 376-2400
WojcikL@njdcj.org

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OF NEW JERSEY

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OF COUNSEL AND ON THE BRIEF

May 21, 2025

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- “AGa” – Attorney General’s appendix
- “Dmb” – Defendant’s motion for leave to appeal brief
- “Db” – Defendant’s supplemental brief
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- “1T” – Motion Transcript, September 12, 2023
- “2T” – Motion Transcript, October 2, 2023
- “3T” – Motion Transcript, February 20, 2025
- “4T” – Motion Transcript, February 25, 2025

PRELIMINARY STATEMENT

This case presents this Court with the opportunity to establish standards for what constitutes “good cause” in allowing for the contemporaneous transmission of off-site testimony (“remote” or “virtual” testimony) by a witness in criminal proceedings under Rule 1:2-1(b), as well as what safeguards should be employed if such testimony is permitted. Below, defendant sought to have an expert witness testify at both a pretrial hearing and at trial over the State’s objection. The trial court exercised its discretion to deny that request, finding that the technological challenges inherent in such testimony would unduly disadvantage the State. Though the dispute itself is now moot, this Court should clarify that the Rule establishes a high bar for such testimony over the opposing party’s objection, particularly at trial.

While this Court has provided significant guidance on remote testimony since the COVID-19 emergency, the precise contours of when remote testimony can be permitted in criminal proceedings remain undefined. This Court’s Rules and guidance, however, make clear that there remains a strong presumption in favor of in-court live testimony, particularly in the criminal context, along with a need for significant safeguards if remote testimony is to be permitted. While decisions outside the criminal process can shed light, the unique burden of proof

and interests at stake in criminal proceedings counsels in favor of a higher bar for permitting such testimony, particularly at trial.

The Attorney General thus urges this Court to hold that the good-cause standard for permitting remote testimony under Rule 1:2-1(b) is to be narrowly construed in criminal proceedings, particularly in trials, and analyzed using criminal-specific factors. More specifically, remote testimony at criminal trials should be permitted only with the consent of all parties or for exceptional circumstances, subject to the carefully circumscribed discretion of the trial judge. At the pretrial stage, by contrast, remote testimony can be more liberally permitted as a defendant's trial rights do not apply in full, the State's burdens are similarly less strict, and evidentiary standards are lowered. The Attorney General also recommends specific considerations, drawn from statutory and judicial frameworks adopted by other jurisdictions, for applying Rule 1:2-1(b) in the criminal context. In the alternative, the Attorney General recommends referring to the Criminal Practice Committee the questions of what factors trial courts should consider when evaluating whether good cause has been demonstrated under the Rule and what safeguards are appropriate in criminal proceedings.

QUESTION PRESENTED

Did defendant establish good cause under Rule 1:2-1(b) to permit his expert witness to testify remotely over the prosecutor's objection at (1) a pre-trial Olenowski¹ hearing and (2) at his criminal trial?

¹ State v. Olenowski, 253 N.J. 133 (2023).

COUNTERSTATEMENT OF PROCEDURAL HISTORY AND FACTS²

The Attorney General adopts the procedural history and statement of facts set forth in the State's Appellate Division and Supreme Court briefs and the published Appellate Division opinion, State v. Lansing, 479 N.J. Super. 565 (App. Div. 2024), with the following additions.

On November 13, 2024, defendant moved before this Court for leave to appeal from the Appellate Division's order affirming the denial of defendant's motion to permit his expert witness to testify remotely. (AGa1). In defendant's supporting brief, his counsel raised the possibility that, following the Appellate Division's decision, defendant's expert witness, Robert Sanderson, had indicated that he would attempt to testify in person. (Dmb4). At some point, Sanderson indicated that he was indeed available to testify in person. (Da73). On January 30, 2025, the trial court scheduled a pretrial Olenowski hearing for February 20. (AGa2).

On January 31, this Court granted defendant's motion for leave to appeal from the Appellate Division's order. (Sa1). On February 16, the trial court adjourned the matter for lack of jurisdiction and ordered that the Olenowski hearing would not proceed absent an order from this Court granting a limited

² The Statements of Procedural History and Facts have been combined to avoid repetition.

remand or dismissing defendant's appeal. (Da71-72). Defendant filed an application for emergent relief in this Court, seeking either an order confirming the trial court's jurisdiction to conduct the Olenowski hearing or a temporary remand for the trial court to conduct that hearing. (Da73; Sa1). In the alternative, defendant moved to dismiss the appeal. (Da73).

On February 19, this Court confirmed the trial court's jurisdiction to conduct the Olenowski hearing. (Da74; Sa1). The Olenowski hearing occurred over multiple dates between February and March 2025. (3T; 4T). On February 20, the State's expert witness, Angelos Leiloglou, testified as an expert in photogrammetry. (3T32-17 to 19). On February 25, Sanderson testified as an expert in forensic video analysis. (4T12-12 to 14, 43-4 to 45-3).

On March 19, this Court requested an update as to the status of the trial-court proceedings and requested that each party submit a letter stating their positions as to mootness. (Sa1). Both defendant and the State filed responses on March 28, 2025. (Sa2-9). Defendant agreed that the question itself is moot but urged this Court nonetheless to hear and decide the appeal, arguing that the question is of public importance and has the potential to recur. (Sa2-3). The State argued that the appeal is no longer viable and that the issue should be resolved through the administrative and rulemaking powers of this Court. (Sa5-9).

On April 21, the Attorney General filed a motion to participate as amicus curiae. (AGa3-19). On April 30, defense counsel submitted a letter seeking clarification whether the trial court retains jurisdiction following the Olenowski hearing to proceed with defendant's trial while his appeal is still pending before this Court. (AGa20-21). Defense counsel confirmed that "there is no longer a need for remote testimony in this particular case." (AGa21).

On the same date, the State responded that once "the trial court renders its Olenowski decision, Rule 2:12-11 again divests it of jurisdiction." (AGa23). It thus asserted that for defendant's trial to proceed, this Court would need to "issue a subsequent Order, should it want to expand the trial court's jurisdiction to encompass what defendant now seeks." (AGa23).

On May 6, 2025, the trial court granted in part and denied in part defendant's motion to exclude the testimony of the State's expert witness. (AGa24-83). As a result of the trial court's ruling, the defense expert is anticipated to testify at trial. There has been no further indication that he will be unable to appear in person.

On May 14, this Court granted the trial court jurisdiction to conduct defendant's trial and any sentencing proceedings while this appeal remains pending before the Court. (AGa84-85).

LEGAL ARGUMENT

POINT I

THE RULE'S "GOOD CAUSE" STANDARD SHOULD OPERATE DIFFERENTLY IN CRIMINAL AND CIVIL CASES.

Though Rule 1:2-1(b) itself refers simply to "good cause and . . . appropriate safeguards," what may amount to good cause and appropriate safeguards in the civil context may not do the same in the criminal context. Further, the appropriate standard will vary based on whether a criminal case is at trial or pretrial. Put simply, given the unique interests and burdens at stake in the criminal context, "good cause" should be at its strictest for unconsented-to witness testimony in a criminal trial, and still rigorous for pretrial criminal proceedings.³ And in cases where remote testimony is permitted, appropriate safeguards are still necessary to ensure the reliability of testimony submitted.

A. Pre-Existing Authority Centers on Non-Criminal Proceedings But Accords With the Need for Safeguards in This Context.

Though this question does not arise from a blank slate, this Court's pre-existing Rules and guidance do not resolve how courts should apply the good-cause standard in criminal trial proceedings. This Court has the authority to

³ This brief discusses only the testimony of third-party witnesses, as presented in the facts underlying this case. It does not address whether any other considerations might apply to a defendant who seeks to testify remotely.

“make rules governing the administration of all courts in the State, and, subject to the law, the practice and procedure in all such courts,” N.J. Const. art. VI, § 2, ¶ 3, which it may do by promulgating formal Court Rules, or through “general directives or specific orders,” In re Yaccarino, 101 N.J. 342, 351 (1985). This Court also has “the exclusive power to establish or modify Court Rules through judicial decisions.” State v. Clark, 162 N.J. 201, 205 (2000). With respect to remote testimony, this Court has most recently exercised that authority through its 2021 amendment to Rule 1:2-1(b) and in its series of orders concerning court operations during the COVID-19 emergency and its aftermath.

Those authorities reflect a flexible application of the longstanding recognition that in-court live testimony is preferable to the alternative. Rule 1:2-1(b), effective September 1, 2021, thus establishes such testimony as the default, while acknowledging that “[u]pon application in advance of appearance, unless otherwise provided by statute, the court may permit testimony in open court by contemporaneous transmission from a different location for good cause and with appropriate safeguards.” Similarly, as the COVID-19 emergency abated, this Court “authorized a framework for court events to continue to be conducted in person and virtually.” Sup. Ct. of N.J., Notice to the Bar and Public: Future of Court Operations – Continuation of Both In-Person and Virtual Court Events (Nov. 18, 2021) [hereinafter November 2021 Order]. For

instance, the order in effect at the time of the relevant defense motion for remote expert testimony provided that “[i]n individual cases, all judges will continue to have discretion to grant an attorney or party’s reasonable request to participate in person in a virtual proceeding or to participate virtually in a matter being conducted in person,” Sup. Ct. of N.J., Notice to the Bar and Public: The Future of Court Operations – Updates to In-Person and Virtual Court Events ¶ 7(b) (Oct. 27, 2022) [hereinafter October 2022 Order], while specifying that “[c]riminal jury trials shall continue to proceed in person,” and that criminal evidentiary hearings “will generally proceed in person but may proceed virtually with the consent of all parties,” id. at ¶¶ 1-2(a).⁴

This context-sensitive approach is consistent with pre-COVID-19 authority as well. Prior to the pandemic and the 2021 amendment, the Court Rules did not “expressly require” in-court live testimony, nor did they “directly prohibit” remote testimony. Pathri v. Kakarlamath, 462 N.J. Super. 208, 213 (App. Div. 2020) (quoting State v. Santos, 210 N.J. 129, 139 (2012)). But this Court recognized in-court live testimony as a “traditional requirement” and noted that preference for such testimony could be inferred from “rules that

⁴ Here, the State did not consent to proceeding virtually at the evidentiary hearing in question, (1T7-23 to 8-1), bringing this case outside the scope of that order.

specifically permit remote testimony distinct and carefully defined situations.”

Santos, 210 N.J. at 138, 139.

Santos is the closest comparator, arising out of the post-conviction context, and reinforces the need for a careful approach—and substantial safeguards—where criminal testimony is concerned. In Santos, this Court adopted a two-part test, distilled from a prior Appellate Division opinion, in considering whether a defendant should be permitted to testify telephonically in a post-conviction relief hearing after he had been deported following conviction. Id. at 141 (citing Aqua Marine Prods., Inc. v. Pathe Comput. Control Sys. Corp., 229 N.J. Super. 264, 275 (App. Div. 1988)).

First, that test requires a court to assess whether there has either been (a) consent by the opposing party or (b) “a ‘special circumstance,’ also referred to as an ‘exigency,’ ‘compelling the taking of telephone testimony.’” Id. at 141 (quoting Aqua Marine, 229 N.J. Super. at 275). “Second, the court must be satisfied that ‘the witness’ identity and credentials are known quantities’ and that there is some ‘circumstantial voucher of the integrity of the testimony.’” Ibid. (quoting Aqua Marine, 229 N.J. Super. at 275). This second prong “poses substantial practical and logistical hurdles that an applicant seeking to present telephonic testimony must satisfy.” Id. at 142. This Court further expressed its concern “that there should not be a grant of telephonic testimony, or even a

superior form of video-communication testimony, until and unless there is a satisfactory demonstration that the means to be used will ensure the essential integrity of the testimony for factfinding purposes,” id. at 142, squarely placing the burden on the proponent while requiring the trial court to likewise “explain how the essential integrity of the testimony will be preserved for factfinding purposes,” id. at 143.⁵

Further from the criminal context, in January 2020, the Appellate Division considered “how a judge should assess a party’s request to appear at [a matrimonial] trial and present testimony by way of contemporaneous video transmission.” Pathri, 462 N.J. Super. at 212.⁶ The panel relied in part on Federal Rule of Civil Procedure 43, which permits virtual testimony “[f]or good cause in compelling circumstances and with appropriate safeguards[.]” Id. at 215 (citing Fed. R. Civ. P. 43(a)). The panel also adopted seven factors to be

⁵ The Santos Court thus remanded the matter to the trial court for it to determine whether Santos was entitled to an evidentiary hearing, and, if so, to determine “whether, and how, valid testimony, if required, could be properly obtained from Santos” despite his presence in another country. 210 N.J. at 143. The Attorney General’s understanding is that the question was not ultimately resolved on remand.

⁶ Given the timing, of course, the panel did not have the benefit of Rule 1:2-1(b) or the experience with videoconferencing technology gained during the COVID-19 emergency. The panel also made clear that its holding “should have no impact on criminal proceedings due to the Sixth Amendment’s application.” Pathri, 462 N.J. Super. at 214 n.4.

considered by a trial court when deciding whether to permit a witness to testify remotely: (1) “the witness’ importance to the proceeding;” (2) “the severity of the factual dispute to which the witness will testify;” (3) “whether the factfinder is a judge or a jury;” (4) “the cost of requiring the witness’ physical appearance in court versus the cost of transmitting the witness’ testimony in some other form;” (5) “the delay caused by insisting on the witness’ physical appearance in court versus the speed and convenience of allowing the transmission in some other manner;” (6) “whether the witness’ inability to be present in court at the time of trial was foreseeable or preventable;” and (7) “the witness’ difficulty in appearing in person.” *Id.* at 216. In this matter, while there was no abuse of discretion in denying defendant’s motion for his expert to testify remotely based on the relevant Pathri factors,⁷ the Attorney General urges that specific guidance for judges applying Rule 1:2-1(b) in the criminal context is warranted.

B. The Unique Concerns of Criminal Proceedings Justify Stronger Protections.

While Rule 1:2-1(b) governs defendant’s motion, what constitutes good cause in this context remains undefined and “almost certainly will evolve with further experience with contemporaneous proceedings.” Pressler & Verniero,

⁷ The Pathri court’s express limitation of its holding to non-criminal proceedings, 462 N.J. Super. at 214 n.4, explains its reliance on some factors—such as cost and convenience—of lesser significance in this context.

Current N.J. Court Rules 32 (2025). Further guidance should recognize the unique considerations that apply to criminal proceedings—and particularly to trial proceedings themselves.

Relaxing the standard for witness testimony at trial implicates several important legal principles. On the State’s side of the ledger, of course, it must persuade all twelve jurors of every element of each crime by proof beyond a reasonable doubt—“the most rigorous burden of persuasion imposed by law,” State v. Campbell, 436 N.J. Super. 264, 269 (App. Div. 2014)—with any ability to retry the defendant sharply circumscribed by the Double Jeopardy Clause, see U.S. Const. amend. V; N.J. Const. art. I, ¶ 11.

On the defendant’s side, meanwhile, there is the confrontation right. U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10; cf. Pathri, 462 N.J. Super. at 214 n.4 (acknowledging that its holding “should have no impact on criminal proceedings due to the Sixth Amendment’s application”). The Federal Confrontation Clause generally “guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact,” Coy v. Iowa 487 U.S. 1012, 1016 (1988), subject only to exceptions when necessary to further an important public policy, provided that the testimony’s reliability is otherwise assured, Maryland v. Craig, 497 U.S. 836, 850, 857-59 (1990) (holding confrontation right not violated where child witness in child-abuse trial was permitted to testify via closed-

circuit television to avoid the potential trauma caused by defendant's courtroom presence); see also id. at 851-52 (discussing importance of preserving other basic elements of confrontation, including oath, cross-examination, and observation of demeanor by the trier of fact).⁸ In short, given the principles on both sides of the ledger, virtual testimony in criminal trials is rare. Compare, e.g., United States v. Gigante, 166 F.3d 75, 80 (2d Cir. 1999) (permitting two-way video testimony where former mafia associate in Federal Witness Protection Program was in final stages of cancer and physically unable to travel), with United States v. Yates, 438 F.3d 1307, 1309 (11th Cir. 2006) (holding defendants' confrontation rights violated when witnesses in Australia unwilling to travel to the United States and outside of subpoena power presented testimony via two-way videoconference).

Here, the challenges of presenting highly technical testimony and the need for effective cross-examination underscore why an opposing party (here, the State) could reasonably object to remote testimony by an opposing expert witness. See In re Hinds, 90 N.J. 604, 615 (1982) (explaining that both the State and defendant have "a substantial interest in ensuring the fairness of judicial

⁸ As the use of closed-circuit television testimony in a child-abuse case is authorized by N.J.S.A. 2A:84A-32.4, it is thus not subject to Rule 1:2-1(b)'s good-cause standard. The constitutionality of that procedure was upheld by this Court in State v. Crandall, 120 N.J. 649, 657 (1990) (applying Craig).

proceedings”). As to the technical nature of the proposed testimony, asking “a jury of laypersons not accustomed to weighing testimony in any form” to “determine the credibility of an expert witness providing highly technical testimony via contemporaneous video transmission makes a difficult task considerably problematic.” (Da13-14). Here, the trial court properly exercised its discretion in protecting against such risks. See (Da16).

Further, as the courts below noted, cross-examination of a remote expert would likewise place the other side at a disadvantage by undermining its ability to “zealously cross-examine the witness” and expose any credibility problems. (Da13); see Lansing, 479 N.J. Super. at 571. The problem is inherent in current technology. For instance, an opposing party (here, the State) will not know precisely what a testifying expert will say on the stand and may wish to be prepared to cross-examine that expert along several different potential avenues, using a range of hard-copy or multimedia materials. In the courtroom, the State could easily have each of those materials available and could show them to the expert during cross-examination. But that will not always be easily accomplished if the witness is testifying remotely, and simply uploading everything “in advance” would “serve to alert the witness of potential areas of cross-examination and place the State at a disadvantage.” (Da13). That explains why a prosecutor (or defense attorney) might often decline to consent to remote

testimony by an opposing witness—particularly where the State is facing the burden of proof beyond a reasonable doubt.

State and federal practice regarding videotaped deposition testimony is consistent with this approach. For example, Federal Rule of Criminal Procedure 15 permits videotaped depositions in lieu of trial testimony where there are “exceptional circumstances” and “in the interest of justice” provided defendant had the opportunity to be present at the deposition. Fed. R. Crim. P. 15(a)(1), (e)(2). And such depositions can be taken outside of the United States without the defendant’s presence if (1) “the witness’s testimony could provide substantial proof of a material fact in a felony prosecution”; (2) “there is a substantial likelihood that the witness’s attendance at trial cannot be obtained”; (3) “the witness’s presence for a deposition in the United States cannot be obtained”; (4) “the defendant cannot be present because” of one of the enumerated reasons; and (5) “the defendant can meaningfully participate in the deposition through reasonable means.” Fed. R. Crim. P. 15(c)(3). Federal Rule of Evidence 804 further allows for the admission of videotaped depositions during trial where defendant had the opportunity to cross-examine the witness and the declarant is unavailable to testify at trial. And in New Jersey, Rule 3:13-2(c) provides for a videotaped deposition to be played at trial in lieu of live

testimony when the “witness is unable to testify because of death or physical or mental incapacity.”

Given that these rules apply even where there has been in-person adversarial testing through a deposition, it stands to reason that the requirements for admitting remote testimony over the State’s (or a criminal defendant’s) objection should be no more lenient. Compare also State v. Rodriguez, 264 N.J. Super. 261, 270-74 (App. Div. 1993), aff’d o.b., 135 N.J. 3 (1994) (affirming use of deposition videotaped in hospital room for material witness who suffered heart attack and mild stroke after his direct examination in court and medical reports confirmed he was unable to testify in person), and State v. Washington, 202 N.J. Super. 187, 191-93 (App. Div. 1985) (affirming use of videotaped deposition where witness suffered heart attack prior to trial and medical documentation confirmed he was unable to attend trial), with State v. Benitez, 360 N.J. Super. 101, 117-20 (App. Div. 2003) (holding trial court erred in allowing 94-year-old victim-witness who used walker to testify through videotaped deposition). Indeed, even throughout the COVID-19 emergency, this Court retained the presumption of in-person proceedings, subject (starting in November 2021) to the agreement of both parties to proceed virtually. See November 2021 Order at ¶¶ 2(a), (b)(iii); October 2022 Order at ¶¶ 1-2(a), 7(b).

Though cross-examination remains crucial at pretrial hearings as well, see Lansing, 479 N.J. Super. at 578, such proceedings merit a somewhat less stringent standard, but still a rigorous one. Pretrial proceedings, after all, are often subject to more relaxed standards—judges are not fully bound by evidentiary rules for instance, see N.J.R.E. 104(a)(1), and the State is not bound by the exclusionary rule, see Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 358 (1998). Thus, remote testimony of a witness at trial over an opposing party’s objection should virtually never be permitted, whereas remote testimony by a witness at pretrial proceedings should simply be rare and subject to a criminal-law-specific good-cause standard, including appropriate safeguards to protect the right to full and effective cross-examination. Cf. Santos, 210 N.J. at 142-43 (holding, in context of post-conviction evidentiary hearing, that the petitioner must establish “that the means to be used will ensure the essential integrity of the testimony for factfinding purposes” and requiring trial court to “explain” how it would do so).

Federal practice is also consistent. The Federal Rules of Criminal Procedure do not themselves provide for witnesses to testify remotely during criminal proceedings, Fed. R. Crim. P. 26, and while the Advisory Committee on Criminal Rules in 2002 recommended, and the Judicial Conference proposed, a change that would permit remote testimony of an unavailable witness for

“exceptional circumstances” and with appropriate safeguards, see Alisson Sandoval, “It’s the End of the World as We Know It”—Redrafting Amendment to Federal Rule of Criminal Procedure 26 to Allow Remote Testimony, 39 Touro L. Rev. 605, 610-11 (2024), the U.S. Supreme Court declined to send the change to Congress. Even after the COVID-19 emergency, an amendment to the federal rule has yet to be revisited.

Scholarly research confirms the sound policy considerations underlying a preference for in-court live testimony. To start, the use of videoconferencing technology has been shown to affect a viewer’s findings concerning a witness’s credibility and favorability. And several studies of remote criminal proceedings suggest that the method of viewing witnesses and taking testimony impacts outcomes. See, e.g., Mary Margaret Chalk, Zoom-ing Around the Rules: Courts’ Treatment of Remote Trial Testimony in a Virtual World, 27 Stan. Tech. L. Rev. 180, 202-03 (2023) [hereinafter Chalk, Zoom-ing Around the Rules]; Zoe Given-Wilson & Amina Memon, Seeing is Believing? A Systemic Review of Credibility Perceptions of Live and Remote Video-Mediated Communication in Legal Settings, 36 Applied Cognitive Psych. 1168, 1174-75 (2022).⁹ For instance, a meta-analysis of published peer-reviewed research articles examining the effect of video-mediated communication on credibility in legal

⁹ Available at: <https://onlinelibrary.wiley.com/doi/10.1002/acp.4001>.

settings revealed the following: (1) “[m]ost reviewed papers reported that interviewees were viewed more negatively when they appeared remotely compared with in-person”; (2) “decision-makers benefit from face-to-face communication as it fosters more interactive interviews, whereas interviewees seeking to deceive may benefit from video-link interviews as it is easier to hide deception”; and (3) “[c]amera focus was reported to influence perceptions of interviewees’ credibility depending on what else was seen in the frame.” *Id.* at 1174; see also Chalk, Zoom-ing Around the Rules at 202-03 (noting that “defendants whose bail hearings occurred over video may result in ‘substantially higher bond amounts set than their in-person counterparts,’ while studies of online testimony given by minors demonstrate that minors may be ‘perceived as less accurate, believable, consistent and confident when appearing over video.’” (quoting Alicia Bannon & Janna Adelstein, The Impact of Video Proceedings on Fairness and Access to Justice in Court, Brennan Ct. for Just. at 2 (Sept. 10, 2020))); Taylor Benninger et al., Virtual Justice? A National Study Analyzing the Transition to Remote Criminal Court, Stan. Crim. Just. Ctr. at 169 (2021) [hereinafter Benninger et al., Virtual Justice] (study of National Association of Criminal Defense Lawyers members finding that “nonverbal cues were reduced

or removed in virtual proceedings,” with “respondents emphasiz[ing] the negative consequences of those lost cues for witness testimony”).¹⁰

To be sure, there will inevitably be witnesses that the State (or, presumably, a defendant) would be willing to cross-examine remotely in the interests of expediting a given matter—for instance if the witness is expected to give short, non-controversial testimony. But where an opposing party objects (as the State did here) and continues to prefer the default of in-court live testimony, the opposing party’s request for remote testimony should typically be denied—especially when the proceeding at issue is a criminal trial.

C. The Attorney General’s Recommendations.

While several of the Pathri factors are a useful starting point for evaluating whether good cause exists under Rule 1:2-1(b), see Lansing, 479 N.J. Super. at 576, the Attorney General proposes a more robust test in the criminal context. For the reasons discussed above, the standard for allowing remote witness testimony at a criminal trial should be substantially higher than for other proceedings. More specifically, remote testimony at criminal trials should be permitted only with the consent of all parties or for exceptional circumstances,

¹⁰ Available at: <https://law.stanford.edu/publications/virtual-justice-a-national-study-analyzing-the-transition-to-remote-criminal-court/>. Although some of these studies have focused on the defense perspective, the overriding concerns on the impact of judging witness credibility apply across the board, regardless of the party calling the witness.

subject to the carefully circumscribed discretion of the trial judge. At the pretrial stage, by contrast, remote testimony can be more liberally permitted as a defendant's trial rights do not apply in full, the State's burdens are similarly less strict, and evidentiary standards are lowered.

Begin with the Pathri factors, three of which—the first, second, and seventh—have greater relevance in the criminal context. See generally Pathri, 462 N.J. Super. at 216. Under the first factor (the witness's importance to the hearing), trial courts should consider the type of testimony to be offered. For example, even in a criminal proceeding, remote testimony by an irreplaceable eyewitness should be less readily permitted than remote testimony by an expert, given the likely heightened need for credibility determinations. Under the second factor (the severity of the factual dispute), trial courts should take into account whether the testimony bears on a material fact of the case and whether the testimony itself is contested. For instance, the concerns supporting live in-court testimony may be diminished with respect to a chain-of-custody witness than they are to a crucial alibi witness. Finally, the seventh factor (the witness's difficulty in appearing in person) remains a necessary focus of the analysis—a witness who is truly incapacitated will naturally support a stronger showing than one who would simply be inconvenienced by attending. Cf. supra Point I.B. (discussing rules for videotaped deposition testimony).

Consistent with these three Pathri factors, the Attorney General recommends that trial courts consider the following factors derived from statutes, court rules, and judicial orders in other jurisdictions:

- Whether the proceeding will involve contested evidence or issues. See Sup. Ct. of Colo., Chief Justice Directive 23-03, Virtual Proceedings Policy 4-5 (June 20, 2023) [hereinafter Colo. Directive 23-03].
- Whether the finder of fact will need to assess the witness's credibility. See Sup. Ct. of Mass., Standing Order 1-22, Videoconferencing of Court Events 2 (eff. Sept. 1, 2022).
- The nature, complexity, and length of testimony. See Iowa R. Remote P. 15.302(4)(f), (h).
- "Whether the procedure would allow for full and effective cross-examination, especially where such cross-examination would involve documents or other exhibits." Mich. Ct. R. 2.407(C)(4); Okla. Stat. tit. 12, Ch. 2, App'x, R. 34(C)(4); Wis. Stat. § 885.56(d).
- "Whether the proponent of the use of videoconferencing technology has been unable, after diligent effort, to procure the physical presence of a witness." Mich. Ct. R. 2.407(C)(4); Okla. Stat. tit. 12, Ch. 2, App'x, R. 34(C)(2); Wis. Stat. § 885.56(b).
- "Whether the use of videoconferencing technology presents the person at a remote location in a diminished or distorted sense that negatively reflects upon the individual at the remote location to persons present in the courtroom." Mich. Ct. R. 2.407(C)(8); Okla. Stat. tit. 12, Ch. 2, App'x, R. 34(C)(8); Wis. Stat. § 885.56(h).

- The impact remote testimony would have on the judiciary's ability to provide an interpreter, public access, and victim access. See Colo. Directive 23-03 at 5; Iowa R. Remote P. 15.302(4)(j); (m); Wis. Stat. § 885.54(h); see also State v. Juracan-Juracan, 255 N.J. 241, 245-46 (2023) (recognizing presumption that foreign language interpretation services will be provided in-person for criminal jury trials).
- Whether remote participation will cause undue surprise or prejudice to a party or affect the fairness of the proceedings. See Colo. Directive 23-03 at 5; Iowa R. Remote P. 15.302(4)(k); Okla. Stat. tit. 12, Ch. 2, App'x, R. 34(C)(1), (9); Wis. Stat. § 885.56(a), (i).
- "Whether appearing virtually would allow for effective examination of witnesses and maintain the solemnity and integrity of the proceedings and thereby impress upon the witness the duty to testify truthfully." Colo. Directive 23-03 at 5; see also Okla. Stat. tit. 12, Ch. 2, App'x, R. 34(C)(5); Wis. Stat. § 885.56(e).
- "Technological barriers for the parties and the court (e.g., speed and quality of internet . . .)." Colo. Directive 23-03 at 5.
- Whether the oath can be administered, and whether the witness remains subject to prosecution for perjury and extradition. See Harrell v. State, 709 So. 2d 1364, 1369-71 (Fla. 1998).
- The timeliness of the request and any objection. See Mich. Ct. R. 2.407(C)(11).
- Any other factors, "based upon the specific facts and circumstances of the case," that a court "determines to be relevant." Colo. Directive 23-03 at 5; see also Iowa R. Remote P. 15.302(4)(n).

Naturally, consent to proceed remotely by all parties, or waiver of any applicable statutory or constitutional rights, should weigh heavily in favor of permitting remote testimony, particularly in the pretrial context. See October 2022 Order at ¶¶ 1-2(a); November 2021 Order at ¶ 2(b)(iii); Mich. Comp. Laws Ann. § 600.2164a(1); Okla. Stat. tit. 12, Ch. 2, App’x, R. 34(C)(11); Wis. Stat. §885.56(k). Nevertheless, even where all parties consent, a court should be permitted in its discretion to require in-court live testimony—particularly at trial—if necessary for “the fair and efficient administration of justice.” State v. Smith, 224 N.J. 36, 48 (2016) (quoting Taylor v. Illinois, 484 U.S. 400, 414-15 (1988)).

While recognizing that no form of remote testimony can fully replicate all verbal and nonverbal cues that are detectable with in-person testimony, see, e.g., State v. Elders, 192 N.J. 224, 243 (2007) (deferring to trial court’s opportunity to hear and see witnesses), where a compelling good-cause showing is made, certain safeguards may mitigate the negative effects of remote testimony. The attempt to replicate the courtroom setting necessitates safeguards on both ends of the transmission—all parties in the courtroom must be able to see the witness, but the witness must also be able to see the parties in the courtroom. Imposing appropriate safeguards in a consistent manner can help mitigate any undue benefit or disadvantage to either side and enable the jurors to fulfill their

factfinding duties. To that end, the Attorney General recommends that the following measures be imposed as “appropriate safeguards” under Rule 1:2-1(b).

First, trial courts considering remote testimony must have a large-enough screen to ensure that the entire jury will have a similar ability to view the witness’s body for signs of nervousness or discomfort. There is a good reason why the witness box is placed right next to the jury in the courtroom: so the jurors can fully evaluate “the appearance and demeanor of the witness” as they are instructed to do by the judge. See Model Jury Charges (Criminal), “Criminal Final Charge” (rev. Sept. 1, 2022) (addressing the credibility of witnesses).

Second, the court should be allowed to arrange for some means of monitoring the witness to ensure that the witness is not being coached or unduly aided in any way, such as having an agreed-upon third-party neutral present for the remote testimony. See, e.g., David Abernathy & Victoria Calhoon, Witness Coaching by Whisper Leads to Sanctions for Defense Witness and Attorney, JD Supra (Dec. 21, 2020) (sanctions imposed on attorney after coaching witness during remote deposition);¹¹ see also State v. Vega-Larregui, 246 N.J. 94, 126-27 (2021) (recounting efforts by Judiciary staff to ensure secrecy of virtual grand

¹¹ Available at: <https://www.jdsupra.com/legalnews/witnesscoaching-by-whisper-leads-to-40825/>.

jury proceedings, “such as requiring jurors to perform a 360-degree scan of their location with their electronic devices”). To that end, only in extraordinary circumstances should a witness be allowed to testify from home; instead, courts should typically direct the witness to testify from some other designated, secure location. New Jersey already has a specific procedure for videotaping depositions to be used at trial in lieu of live testimony: depositions must be taken before a judge “at such location as will be convenient to all parties” and videotaped “by a person independent of both prosecution and defense and chosen by the judge.” R. 3:13-2(b). And when a deposition is taken outside of the State, and the judge is unable to preside, the deposition must be taken “before a person designated by the judge to perform that function.” R. 3:13-2(b). An analogous procedure is appropriate in this context.¹²

Third, the videoconferencing platform, the technological devices, and the internet service in use by both the court and the witness must be secure, reliable,

¹² Maryland’s Court Rule 21-301 is illustrative, requiring, for remote electronic participation by a witness in a criminal proceeding, that the witness (1) “is alone in a secure room when testifying, and, upon request, shares the surroundings to demonstrate compliance”; (2) “is not being coached in any way”; (3) “is not referring to any documents, notes, or other materials while testifying, unless permitted by the court;” (4) “is not exchanging text messages, e-mail, or in any way communicating with any third parties while testifying;” (5) “is not recording the proceeding;” and (6) “is not using any electronic devices other than a device necessary to facilitate the remote electronic participation.” Md. Ct. R. 21-301(e)(1) to (6).

and not subject to delays or breaks in transmission. High-definition video settings should be enabled so that a witness's face can be seen clearly enough to detect a quivering lip or bead of sweat that might betray a dishonest witness. See, e.g., Benninger et al., *Virtual Justice* at 17-18 (discussing inability of videoconferencing to fully capture nonverbal cues). Audio settings should likewise be configured so the jury can detect subtle changes in the witness's tone of voice that might betray doubt or lack of confidence. See, e.g., *id.* at 18-19 (recognizing distortions in audio frequencies of a person's voice and potential impact on credibility findings). Moreover, the technological devices and internet connection must be able to support high-quality settings while allowing for uninterrupted audio and visual transmission. See, e.g., *id.* at 19 (acknowledging the limitations imposed by high-quality settings).

Fourth, the videoconferencing setup on the witness's end must ensure that not only can the witness be viewed by the jury and defendant, but also that the witness be able to see the jury and the defendant. Efforts must be made through camera positioning to replicate eye contact to the extent possible, for "[w]hen a videoconferencing setup employs a monitor on which the judge is displayed and a camera that is not co-located with the monitor, it becomes impossible to look at the court and at the camera simultaneously." *Id.* at 17. A witness should have to experience some semblance of eye contact with the jurors, judge, prosecutor,

and courtroom audience while testifying to feel the solemnity and gravity of the trial setting.

Further, judging credibility is a two-way street: it requires an evaluation of the witness's conduct but also the witness's reactions to being viewed by the jury and the defendant. And the jury's specific ability to view a witness's eye contact (or lack thereof) with other parties in the courtroom can have a significant impact on their perceptions of truthfulness. See, e.g., Molly Treadway Johnson & Elizabeth C. Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28 L. & Pol'y 211, 213-14 (2006) (finding that camera location of witnesses testifying remotely produced appearance of gaze aversion and deception);¹³ Helene Kreysa et al., *Direct Speaker Gaze Promotes Trust in Truth-Ambiguous Statements*, 11 PLoS ONE 1, 9 (2016) (finding that listeners were substantially more likely to believe a statement made with direct gaze as compared to a statement made with an averted gaze).¹⁴

Given the concerns regarding the use of remote video testimony in a criminal trial, good cause alone cannot be dispositive of a request to permit remote testimony, particularly when the opposing party has not consented.

¹³ Available at: <https://doi.org/10.1111/j.1467-9930.2006.00224.x>.

¹⁴ Available at: <https://doi.org/10.1371/journal.pone.0162291>.

Appropriate safeguards, like the ones outlined above, are essential for mitigating the potential negative effects of remote testimony. This Court might also consider a jury instruction in the event that remote testimony is permitted at trial. See Model Jury Charges (Civil), 1.25, “Optional Charge Concerning Video Recorded Testimony” (rev. Apr. 2016).

Finally, to better and more fairly enforce Rule 1:2-1(b), the Attorney General suggests imposing a notice-and-demand procedure similar to Rule 3:10-3 (notice required by State when calling expert witness who did not conduct underlying test). This requirement—“by which a defendant must inform the court and the State of a demand to have the State produce an appropriate witness”—protects a defendant’s confrontation right. State v. Carrion, 249 N.J. 253, 273-74 (2021). This Court “has adopted such useful practices before and have seen their benefits in other settings that include [Confrontation Clause] considerations.” Id. at 274 (requiring notice-and-demand procedure for testimony concerning search of firearms database); see also State v. Williams, 219 N.J. 89, 102 (2014) (creating notice-and-demand procedure for testimony of State’s expert witness who did not conduct, supervise, or participate in scientific test about which expert will testify). Such a notice-and-demand component would require the State to give notice, at which points defendants would have a corresponding obligation to object in a timely fashion.

POINT II

THE APPELLATE DIVISION PROPERLY AFFIRMED THE TRIAL COURT'S EXERCISE OF ITS DISCRETION HERE.

The trial court appropriately exercised its discretion in denying defendant's request for his expert witness to testify remotely at the evidentiary hearing and at trial. The court correctly determined that the request was governed by Rule 1:2-1(b) and relied on the most analogous precedential authority available. The Appellate Division's affirmance should therefore, in turn, be affirmed.

Trial judges have broad discretion in controlling the courtroom and court proceedings. State v. Pinkston, 233 N.J. 495, 511 (2018). A trial court's ruling on courtroom procedure is subject to review for abuse of discretion. State v. Jones, 232 N.J. 308, 311 (2018). "A court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. Chavies, 247 N.J. 245, 257 (2021) (quoting State v. R.Y., 242 N.J. 48, 65 (2020)). A trial court's exercise of discretion should be reversed "only when the exercise of discretion was 'manifestly unjust' under the circumstances." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App.

Div. 2011) (quoting Union Cnty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 (App. Div. 2007)).

Here, the trial court properly denied defendant's in limine motion to permit his expert witness to testify remotely at an Olenowski hearing and at trial. (Da1-16). After determining that defendant's request was governed by Rule 1:2-1(b)'s good-cause standard, the trial court engaged in a thorough and well-reasoned analysis. (Da10-16). While recognizing Santos and Pathri were decided prior to the Rule's amendment, the trial court took guidance from those cases in the absence of any other instruction as to what constitutes good cause to permit remote testimony in a criminal evidentiary hearing or trial. (Da6-9) (citing Pressler & Verniero, Current N.J. Court Rules 32 (2025)). Given that the testimony was anticipated to be "extensive, highly technical, and significantly disputed," the trial court determined that contemporaneous video transmission would make it even more difficult for the State to effectively cross-examine the expert and for the court and the jury to assess the witness's credibility. (Da12 to 13). Indeed, the trial judge acknowledged the technical limitations of its own courtroom in the motion record, explaining his own past experience with issues caused by remote testimony:

I experience that almost every Monday when I have virtual proceedings, whether it's the Public Defenders, whether it's people appearing, other attorneys, depending on the bandwidth they have. Sometimes,

their comments go in and out, they have to repeat things, and that's going to be difficult if it's an expert witness for the jury to listen if it's not entirely clear and that's part of—that's part of my concern.

[(1T27-21 to 28-6).]

The trial judge also referenced his experience presiding over trials where exhibits needed to be scanned in advance of cross-examination. (1T56-23 to 57-24).

Further, the trial court was within its discretion in finding that these concerns outweighed defendant's statement that his expert could not testify in person because of the expert's wife's immunocompromised state and caretaking needs, as well as the expert's own health issues. (Da15-16). While these are legitimate considerations, defendant did not provide the trial court with "any documentation or medical records regarding the health of the defense expert or his wife apart from defense counsel's certification." (Da11). Further, at oral argument, defense counsel could not explain why reasonable accommodations such as masking, clear screens, a larger courtroom, scheduled time limits, and caretaking assistance would not suffice to ensure the expert's presence in person, other than the expert's refusal. (1T9-11 to 11-14; Da15-16). And defendant did not argue that Sanderson was "one of only several [qualified] experts in the country," contra (Db14), but rather focused on the potential loss of Sanderson and the delay that retaining another expert would cause without

addressing whether other qualified experts were in fact limited in number, see (Da14-15, 17-20). In short, the trial court had a sound, rational basis in denying defendant's motion, and the Appellate Division properly concluded that the trial court's findings were supported by the record and did not constitute an abuse of discretion. Lansing, 479 N.J. Super. at 578.

CONCLUSION

The ruling below should be affirmed, and Rule 1:2-1(b)'s good-cause standard should be clarified as imposing a high bar on unconsented-to remote testimony by opposing witnesses in criminal proceedings, particularly at trial. In the alternative, the Attorney General recommends referring the question to the Criminal Practice Committee.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR AMICUS CURIAE

BY: 

Laura E. Wojcik (No. 396222022)
Deputy Attorney General
WojcikL@njdcj.org

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