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SUPREME COURT OF NEW JERSEY

DOCKET NO.

APP. DIV. DOCKET NO. A-1592-23

CLERK

: CRIMINAL ACTION

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

TYRELL S. LANSING,
Defendant-Movant.

: On Appeal from an Interlocutory Order of
the Superior Court of New Jersey, Law
Division, Morris County.

: Sat Below:

: Hon. Greta Goodenbrown, J.A.D.
: Hon. Patrick Dealmeida, J.A.D.
: Hon. Robert M. Vinci, J.A.D.

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SUPREME COURT
OF NEW JERSEY

**BRIEF ON BEHALF OF DEFENDANT-MOVANT'S
MOTION FOR LEAVE TO APPEAL**

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant was charged in Morris County Indictment Number 21-12-0895 with murder contrary to N.J.S.A. 2C:11-3A(1); second-degree possession of a firearm for an unlawful purpose contrary to N.J.S.A. 2C:39-4A(1); second-degree possession of a handgun without a permit contrary to N.J.S.A. 2C:39-5B(1); second-degree possession of a handgun by a convicted felon contrary to N.J.S.A. 2C:39-7B(1); and fourth degree possession of hollow nose bullets contrary to N.J.S.A. 2C:39-3F(1). This matter is currently pending trial before the Honorable Stephen J. Taylor, J.S.C.

The charges in the indictment stem from the shooting death of Raijah Scott on August 18, 2021 at 1:05 a.m. in the roadway in front of 28 Clyde Potts Drive in Morristown. Police officers retrieved surveillance video footage of the area surrounding the incident, and after reviewing the video, the State developed a theory that defendant was the shooter, notwithstanding that the video does not depict the shooting. Indeed, at the time that the State infers that the victim was shot, neither the victim nor the perpetrator can be observed on the video at all. Rather, the entire event, which occurred at night on a narrow piece of pavement between a white Land Rover and a row of vehicles parked along the front of 28 Clyde Potts Avenue, is entirely

obscured by parked vehicles and a very large leaf covered tree with a thick tree trunk.

As part of its case in chief, the State intends to introduce a reconstruction of the shooting and has therefore retained Angelo Leiloglou, an expert in photogrammetry, which is a field of science involving the use of photography in surveying and mapping to measure the distances between objects. In December 2022, the State submitted an expert report from Leiloglou for the purpose of reconstructing the shooting in order to determine who the shooter was. In May 2023, the defense retained its own expert, Robert Sanderson, who specializes in forensic video analysis, to review the report of the State's expert, issue his own findings, and testify at a Daubert hearing challenging the reliability of this evidence.

Before he was retained, Sanderson indicated that he would need to testify virtually at any hearing or trial due to both his significant health issues and his responsibilities caring for his seriously ill wife. Accordingly, in August 2023, defendant filed a motion for Sanderson to be permitted to testify remotely.

Sanderson, who lives in Poughkeepsie, New York, had been receiving ongoing medical treatment for a heart condition, atrial fibrillation, and had also been recovering from three hernia surgeries. (Da 18) He is also the sole

caregiver for his wife, who has undergone chemotherapy, multiple surgeries, and other treatments for esophageal cancer and is now significantly limited in performing daily life functions. Sanderson assists his wife with all of her daily activities, preparing a six-meal per day regimen to meet her special dietary needs, ensuring her physical safety, and dispensing her medications. (Da 18) Due to his wife's immunocompromised state, Sanderson cannot risk exposure to viruses, including COVID-19. (Da 18)

In moving to allow Sanderson to testify virtually, defendant emphasized the need for Sanderson's testimony, arguing that allowing him to appear virtually would prevent the potential loss of his testimony and would also be in the interest of judicial economy. (Da 19-20) The State opposed defendant's motion, and on September 18, 2023, Judge Taylor entered an order and written opinion denying defendant's motion to permit his expert witness to testify remotely. (Da 1-16)

Defendant filed a motion for leave to appeal, which was denied by the Appellate Division on October 27, 2023. (Da 28) Defendant subsequently filed a motion for leave to appeal in the Supreme Court, and on January 29, 2024, this Court entered an order granting the motion for leave to appeal and remanding the matter to the Appellate Division for consideration on the merits. (Da 29) On remand, defendant filed a motion to expand the record to

include Sanderson's written report (Da 31-70), and the motion was granted on March 14, 2024. (Da 30) On October 3, 2024, the Appellate Division issued a published opinion, affirming the trial court's denial of defendant's motion to permit his expert witness to testify remotely. State v. Lansing, ____ N.J. Super. ____ (2024).

For the past year and a half while this issue has been pending before the trial court, the Appellate Division, and the Supreme Court, Sanderson has been unwavering about his inability to testify in person. However, following the Appellate Division's most recent decision, Sanderson has indicated to trial counsel that he will attempt to testify in this matter in person. As of this date, that has not yet occurred, and therefore, because there is still the possibility that Sanderson's ability to testify will change, this motion for leave to appeal follows.

LEGAL ARGUMENT

POINT I

**THIS COURT SHOULD GRANT
DEFENDANT'S MOTION FOR LEAVE TO
APPEAL AND REVERSE THE TRIAL
COURT'S DECISION DENYING
DEFENDANT'S MOTION TO PERMIT HIS
EXPERT WITNESS TO TESTIFY
REMOTELY.**

A decade before remote appearances became the norm during the pandemic, this Court—considering the admissibility of telephonic testimony—recognized that “[a]s important as live witness testimony is, the New Jersey Court Rules do not expressly require it, or directly prohibit remote testimony by telephone.” State v. Santos, 210 N.J. 129, 139 (2012). The Santos Court ruled that testimony may be taken by telephone where (1) there is a special circumstance compelling the taking of telephonic testimony, and (2) the court is satisfied with the witness’ identity and credentials. Id. at 141.

In January 2020, immediately before the pandemic forced all courts to switch to remote proceedings, the Appellate Division reversed a trial court’s denial of the plaintiff’s motion to testify remotely via contemporaneous video. Pathri v. Kakarlamath, 462 N.J. Super. 208 (App. Div. 2020). In remanding the case, the Appellate Division explained that “[o]ur court rules

do not provide for testimony by way of contemporaneous video transmission, but they don't prevent it either. In fact, trial testimony may be presented in a number of ways that do not require the witness' physical presence." Id. at 212. In determining whether a witness should be allowed to testify remotely via video, even in the absence at the time of a court rule allowing them to do so, the Appellate Division instructed that trial courts should consider the following factors:

- the witness' importance to the proceeding;
- the severity of the factual dispute to which the witness will testify;
- whether the factfinder is a judge or a jury;
- the cost of requiring the witness' physical appearance in court versus the cost of transmitting the witness' testimony in some other form;
- 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;
- whether the witness' inability to be present in court at the time of trial was foreseeable or preventable; and
- the witness' difficulty in appearing in person.

Id. at 216.

Since Pathri, this Court, initially prompted by the exigencies of the pandemic, has issued several orders regarding remote proceedings,

repeatedly upholding novel uses of technology “to preserve, not to undermine, the constitutional right of defendants.” State v. Vega-Larregui, 246 N.J. 94, 102 (2021) (upholding validity of virtual grand jury presentations where all testimony was given remotely). In its most recent order from October 27, 2022, the Court continued to allow remote proceedings, stating in relevant part:

7. Court events will be scheduled and conducted consistent with the principles of procedural fairness.

For all types of matters:

a. Courts at all levels will continue to maintain reasonable calendar sizes, including through use of staggered schedules when appropriate to ensure that court users are not made to wait an unreasonably long time for their matter to be heard; and

b. In 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.

Notice to the Bar and Public, “Future of Court Operations—Remote and In-Person Proceedings,” October 27, 2022.

In addition, effective September 1, 2021, our court rules were amended

to provide for the virtual transmission of testimony: “Upon 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.” Rule 1:2-1(b). page 2.

Notwithstanding the clear authorization for virtual testimony, the State in this case opposed defendant’s motion, arguing that the Supreme Court’s October 27, 2022 Order requires the State’s consent for an evidentiary hearing in a criminal case to be conducted virtually. As the trial judge correctly recognized, however, the defense is not requesting a remote hearing; rather, the defense requests only that one witness be permitted to testify virtually. (Da 9) As such, the request is governed not by the process set forth in the Court’s order regarding virtual hearings, but by the court rule governing virtual testimony of a witness. In other words, as the trial court in this case recognized, while the Supreme Court’s temporary orders governing court proceedings during the pandemic required consent, the amendment to R. 1:2-1 is permanent and governs the analysis of this case. And, significantly, “the requirement of consent is not linked to the September 2021 amendment to R. 1:2-1, as suggested by the State.” (Da 9-10) Rather, R. 1:2-1 “does not require the consent of all parties to have a witness provide

testimony by contemporaneous transmission from a different location, but only ‘good cause’ and ‘adequate safeguards.’” (Da 10) Because defendant is not seeking to have the entire evidentiary hearing conducted remotely, but only the remote testimony of one witness, R. 1:2-1(b) governs.

Here, defendant has satisfied both requirements of the rule. Good cause exists based upon Sanderson’s concerns regarding his wife’s health. And, adequate safeguards can be employed that will ensure that the Court, the prosecutor (and, if necessary, the jury) will be able to fully observe Sanderson and assess his credibility as he testifies. Sanderson will be placed under oath and will confirm that no one is with him off camera while he is testifying. Given the quality and availability of high- definition screens which can be placed as close to the fact finders as needed, the court and the jurors will be able to see Sanderson as clearly as they would if he were testifying in person. Further, test runs of the audio-visual capabilities in advance of the court hearing can be conducted, and the share screen function can be utilized to show exhibits to Sanderson, if necessary.

Nevertheless, the trial court ultimately denied defendant’s motion, wrongly applying the Pathri factors and concluding that Sanderson’s need to provide care for his ailing wife, and concerns about exposing his immunocompromised wife to COVID-19 or other viruses do not establish

good cause for his virtual testimony. This was an abuse of discretion, requiring this Court's intervention.

Notably, Pathri was decided prior to the adoption of R. 1:2-1(b), which as discussed above, requires only "good cause," a standard that is clearly met here by Sanderson's medical limitations and concerns, both for himself and his wife. Defendant submits therefore that the factors set forth in Pathri are not applicable. Indeed, Rule 1:2-1(b) was adopted after the Court had developed significant experience and success with remote technology and proceedings as a result of the pandemic.

Moreover, to the extent the court were to consider the Pathri factors in determining good cause, these factors inure in favor of virtual testimony. With respect to the first factor - the witness' importance to the proceeding - the defense expert's anticipated testimony is critical to the defense case as he will dispute the methods used by the State's photogrammetry expert in determining the shooter. The next two factors - the severity of the factual dispute to which the witness will testify and whether the determination will be made by a judge or a jury - similarly justify virtual testimony. Sanderson will not be giving highly technical scientific testimony concerning 2D and 3D modeling software in the creation of a virtual world or the like. Rather, he will be explaining that the very basis for Leiloglou's opinions are his lay

observations from the video, not photogrammetry or 2D and 3D modeling. In other words, although much of Leiloglou's report does involve what could be considered as highly technical 2D and 3D Matching and Modeling, Crime Scene Imaging and Photogrammetry, these processes relate only to his creation of a virtual world. The heart of the matter, i.e., the identity of the shooter and the location of the subjects within that virtual world, are not based upon any expert scientific analysis, but rather upon Leiloglou's lay opinion of what he believes the video depicts at the time the shooting occurred. Sanderson's testimony relates to the issue of true video forensic analysis and how that analysis is completely missing from Leiloglou's report. It addresses the threshold foundation (or lack thereof) of Leiloglou's analysis. As such, it does not delve into the highly technical aspects of the creation of Leiloglou's virtual world and the unreliable conclusions that they generate. In addition, with respect to credibility determinations, remote proceedings have become much more prevalent in the years since Pathri was decided, meaning that both courts and jurors are likely to be more comfortable making these credibility determinations where a witness appears virtually.

The fourth factor, which involves weighing the relative costs of physical presence versus remote testimony and the fifth factor, delay, both

also weigh strongly in support of virtual testimony because denial of the defense motion could require the defense to retain a new expert – an outcome that would cause delay, as well as unnecessary financial expenditures. Regarding the sixth factor, while the witness's inability to be present in court was foreseeable, it was not preventable. In that regard, it is important to stress that defendant has a constitutional right to present a complete defense which includes calling witnesses whose testimony is material and favorable to his defense. Sanderson has decades of experience and training in the field of forensic video analysis. He has been retained by both prosecutors and defense attorneys and has been qualified to testify as an expert witness over 25 times in both civil and criminal trials in multiple jurisdictions including, but not limited to: New Jersey, New York, Connecticut, Pennsylvania, Maryland, District of Columbia, Illinois, Florida, Wisconsin, Arkansas and West Virginia. Thus, defendant maintains that Sanderson is the professional that is the most qualified to challenge the "scientific" expert testimony sought to be admitted by the State. And, the final factor, the witness' difficulty in appearing in person, overwhelmingly weighs in favor of virtual testimony. In fact, the court in Pathri specifically recognized that a "witness' health may also cause the type of difficulty that would inure in favor of testimony by

contemporaneous video transmission.” Pathri, 462 N.J. Super. at 219-20, n. 7.

Moreover, the trial court's decision denying defendant's motion to permit Sanderson to testify virtually was, in large part, based on the fact that Sanderson had not yet tendered his expert report. As a result, the severity of the factual dispute to which Sanderson would testify was not readily apparent. Specifically, the trial court was concerned that the expert testimony would be "highly technical" since the State's expert report involves "photogrammetric analysis" "utilizing 3D laser technology, 3D aerial mapping and 3D modeling software". Sanderson's report is now complete and alleviates concerns that the testimony might be too highly technical to be conducted virtually. In the report, Sanderson clearly explains that Leiloglou's opinions and conclusions are not based on "photogrammetric analysis," 3D laser technology, 3D aerial mapping or 3D modeling software. Though these technologies were used to create Leiloglou's virtual 3D environment (or "visualizations" which the State improperly suggests is a "reconstruction"), his ultimate opinion that, "Subject #2 was the shooter who fired his handgun fatally wounding subject #1" is based, "first, foremost and fundamentally" on Leiloglou's subjective interpretation of the surveillance video. (Da 35-54) It is not based on any scientific expertise. Indeed, Leiloglou's report does not

identify any professional forensic video analysis methodology, nor does it reflect that any established professional forensic video techniques were utilized in his examination of the surveillance videos. As a result, it is Sanderson's professional opinion based upon forensic video analysis that Leiloglou's conclusion that Subject #2 was the shooter is unsubstantiated and unreliable. As Sanderson concludes in his report:

The conclusion in Mr. Leiloglou's report which identifies Subject 2 as the shooter is first, foremost, and fundamentally based on his subjective interpretation of the video evidence, not on photogrammetry or any other "science" or specific forensic video technique. He did not apply any type of accepted scientific technology method which gives him special insight as to what the video shows.

Incorrectly representing photogrammetry as a basis for his conclusions without having first acknowledged this direct relationship clouds the fact finders understanding of the fundamental basis for his opinions.

Mr. Leiloglou has misled fact finders by authoring a report in which he purports to be qualified to wear all the professional hats and combines all the disciplines involved into the category of photogrammetric analysis.

Leiloglou's fundamental reliance on poor quality video in which there is no gun, muzzle flash or recoil effect visible, no vigorous forensic video analysis and no corroborating eyewitness accounts and gaps in the video record has led to a conclusion which should have remained as investigative guidance. The reconstruction video and opinions are not reliable.

(Da 48-49)

Nevertheless, the Appellate Division, on remand from this Court, affirmed the trial court's decision denying defendant's motion to permit his expert witness to testify remotely. Overemphasizing what it characterized as the "technical and complicated nature" of the expert's testimony, the Appellate Division ignored the realities that our courtrooms are equipped with the technology necessary for remote testimony and that judges and jurors are accustomed to and comfortable with remote proceedings. Alternatives to physical presence in the courtroom have become commonplace over the past several years.

CONCLUSION

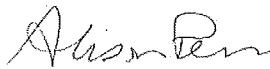
Without this Court's intervention, the published opinion in this case will impose an undue and unnecessary hardship on litigants attempting to secure expert testimony. This Court should, therefore, grant defendant's motion for leave to appeal to address this important issue of statewide importance.

Respectfully submitted,

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BY: 

ALISON PERRONE

Deputy Public Defender

DATE: November 13, 2024