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SUPREME COURT
OF NEW JERSEY

SUPREME COURT OF NEW JERSEY
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STATE OF NEW JERSEY,

Criminal Action

Plaintiff-Respondent,

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

v.

TYRELL S. LANSING,

Sat Below:

Defendant-Appellant.

Hon. Greta Gooden Brown, P.J.A.D.

Hon. Patrick DeAlmeida, J.A.D.

Hon. Robert M. Vinci, J.A.D.

SUPPLEMENTAL BRIEF AND APPENDIX ON BEHALF OF THE STATE OF
NEW JERSEY

FILED

JUN 23 2025

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PRELIMINARY STATEMENT

Rule 1:2-1(b) allows remote testimony for “good cause,” not convenience. The parties agree that “good cause” is an amorphous concept. What constitutes “good cause” will depend upon both the legal context of the claim and the factual circumstances of the particular case before a court. In making their decisions, courts must have guideposts¹—typically through judicial precedent—in which to explain whether a particular litigant has shown “good cause” to have a witness testify remotely. Courts routinely look to analogous cases to determine an appropriate outcome in a particular case. This is the very basis of the development of our common law. This is precisely what occurred here and should be affirmed.

Here, the trial court properly looked to the relevant law in determining what “good cause” would justify appellant’s expert witness testifying remotely, and correctly analyzed the facts and circumstances of this particular case. This is evidenced by appellant’s expert testifying in person, without any restrictions or accommodations, and giving no indication that he would not do the same at trial. This also demonstrates why the present case is not the appropriate vehicle

¹ Pending amicus Association of Criminal Defense Lawyers of New Jersey (ACDL) notes the same on pages 9 and 11 in its brief. (“What constitutes good cause obviously will vary with the unique circumstances of each particular case, but *guideposts are needed* to direct the way for our trial courts.”)(emphasis added) (citing D.W. v. R.W., 212 N.J. 232, 251 (2012)).

to decide this legal issue—as it is now completely divorced from the facts and moot.²

The witness’s in-person appearance here further displays how appellant is actually urging this Court to adopt a lower “convenience” standard, rather than “good cause” as the text of the Rule demands. Appellant’s argument that courts should permit remote testimony when there is “a substantial reason” is not supported by the text of Rule 1:2-1(b) and is unworkable in practice—particularly in the context of criminal jury trials.³ “For centuries, courts have observed the traditional requirement that witnesses deliver testimony in person and in open court.” State v. Santos, 210 N.J. 129, 138 (2012) (citing Crawford v. Washington, 541 U.S. 36, 43 (2004)). “[O]pen trials are essential to maintaining public confidence in the judicial system and fostering consistency and integrity in process and outcome.” Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 1:2-1 (2025) (citations omitted).

A litigant’s convenience cannot overcome a “core feature of our adjudicatory system: the factfinder’s all-important function of observing the demeanor and evaluating the credibility of each witness that comes before the

² Respondent primarily relies on its March 28, 2025 letter to this Court as to the issue of mootness.

³ Likewise, ACDL’s standard of a “reasonable need or a logical reason” is similarly improper. (Ab2 Ab11).

court.” Santos, 210 N.J. at 139 (citations omitted). There must be good cause to justify deviating from the standard of in-person testimony for criminal matters. Moreover, this is a paradigm which this Court’s October 27, 2022 Order requires: in the criminal context, in-person testimony is the default. (Da23). Thus, this Court should affirm the Appellate Division in finding the trial court did not abuse its discretion by considering this Court’s Orders, the text of Rule 1:2-1(b), as well as available, relevant caselaw in determining whether “good cause” existed, and affirm the trial court’s proper exercise of its discretion in finding this witness did not show “good cause” to appear remotely--as evidenced by his unrestricted in-person testimony.

COUNTER-STATEMENT OF PROCEDURAL HISTORY

On September 18, 2023, the trial court denied Tyrell Lansing’s (“appellant’s”) motion to have his expert witness testify remotely, which was memorialized in an Order and written decision. (Da1-16).⁴ In its decision, the

⁴ Db refers to Appellant’s Supplemental brief filed on March 31, 2025.

Da refers to Appellant’s Supplemental brief filed on March 31, 2025.

Sa refers to Respondents appendix.

Ab refers to (pending) amicus ACDL’s brief, filed April 21, 2025.

Cb refers to (pending) amici Center for Integrity in Forensic Science, et al.’s (herein after “other amici”) brief, filed April 21, 2025.

1T refers to the transcript of the oral argument before the trial court regarding remote testimony, dated September 12, 2023.

2T refers to the transcript of the status conference before the trial court, dated October 2, 2023.

trial court noted, “Although Santos⁵ and Pathri⁶ were decided prior to the rule amendment permitting testimony in open court by contemporaneous transmission for good cause, guidance as to good cause can be gleaned from both cases. See, Pressler & Verniero, Current N.J. Court Rules, Comment R. 1:2-1.” (Da9). The trial court detailed the context and progression of various Orders from this Court, issued during the COVID-19 emergency, that dealt with virtual proceedings. (Da9-10). In considering whether “good cause” existed in the “purportedly immunocompromised” health of the expert witness’s wife, as well as the expert’s own health issues, the trial court noted “[it] has not been provided with any documentation or medical records regarding the health of the defense expert or his wife apart from defense counsel’s certification.” (Da11 n.2). The trial court then analyzed the seven factors under Pathri and found almost all militated against permitting remote testimony. (Da11-15).

In considering the witness’s difficulty appearing in person because of his caretaking responsibilities, the trial court acknowledged the witness’s concerns and noted they “appear to be valid.” (Da16). The trial court offered:

3T refers to the transcript of the Olenowski hearing where State’s witness testified, dated February 20, 2025.

4T refers to the transcript of the Olenowski hearing where defense’s witness testified, dated February 25, 2025.

⁵ Appellant (the defense) relied on State v. Santos, 210 N.J. 129 (2012) in its motion for remote testimony. (Da5).

⁶ Pathri v. Kakarlamath, 462 N.J. Super. 208 (App. Div. 2020).

“accommodations can be made to lessen the risk of the witness contracting an infection while at court” such as wearing a mask, “[c]lear screens can also be put up around the witness stand,” “the trial can be moved to a larger courtroom for the witness to ensure greater distance between the witness, jurors, and the court. The witness’s testimony can even be scheduled to limit his time at the courthouse.” (Da15-16). Ultimately, the trial court found “the importance of his testimony requires an in-person appearance.” (Da16).

On October 27, 2023, the Appellate Division denied appellant’s motion for leave to appeal the trial court’s Order. (Da28). On January 23, 2024, this Court granted appellant’s motion for leave to appeal, and summarily remanded the matter to the Appellate Division, which issued a published opinion on October 3, 2024, affirming the trial court’s ruling. (Da29); State v. Lansing, 479 N.J. Super. 565, 572 (App. Div. 2024).

The Appellate Division detailed the applicable standard of review and the law impacting remote testimony that was developed in response to the COVID-19 emergency, (including Rule 1:2-1(b) and this Court’s relevant Orders). Id. at 572-74. It noted this Court ordered “1. Criminal jury trials shall continue to proceed in person.” and 2. Criminal evidentiary hearings “will generally proceed in person but may proceed virtually with the consent of all parties; consent of a

party will not be required if that party is absent and unreachable.” Id. at 574 (quoting the October 27, 2022 Order, paragraphs 1-2 (a)).

In affirming the trial court’s ruling, the Appellate Division reasoned:

Issued after Rule 1:2-1(b) was adopted, the 2022 Order does not mention the rule, limit its provisions, or contradict its terms. To the contrary, in its preamble, the 2022 Order recognizes that “*judges also routinely exercise discretion to permit individuals to participate virtually as necessary for health and other reasons.*” This is a reference to the authority that judges exercise under Rule 1:2-1(b). As we understand the 2022 Order, it establishes that criminal jury trials and evidentiary hearings (in the absence of consent by all parties) will proceed in person, but the trial court retains its authority to permit remote testimony by witnesses at those proceedings where “good cause” is shown and “appropriate safeguards” are imposed.

[Id. at 575 (emphasis added)].

The Appellate Division acknowledged that its Pathri decision pre-dated the COVID-19 emergency and “the experience that informed the Court when it adopted Rule 1:2-1(b),” but held “The factors set forth in Pathri, however, were based *in part* on a federal rule of civil procedure which mirrors Rule 1:2-1(b) and are useful *guidelines* for deciding ‘good cause’ and ‘appropriate safeguards’ under the Rule.” Id. at 575-76 (emphasis added). After again noting it relied “in part” on the Federal Rule of Civil Procedure that permitted virtual testimony, (citing Fed. R. Civ. P. 43(a)), the Appellate Division detailed the seven factors Pathri established for courts to consider when deciding whether to permit a

witness to testify remotely. Lansing, 479 N.J. Super. 576 (quoting Pathri, 462 N.J. Super. at 216).

The Appellate Division detailed how each factor is to be considered and ultimately found:

We have carefully reviewed the record and conclude that the trial court properly considered each of the Pathri factors and made findings with respect to each factor that are supported by the record. The technical and complicated nature of the expert's expected testimony, the prevalent role video evidence will play when determining whether the State's expert's opinion is admissible and, if so, credible, the difficulty the State would have in cross-examining defendant's expert, the physical proximity of defendant's expert to the courthouse, defendant's knowledge of the expert's desire to testify remotely when he retained the expert, and the absence of medical evidence requiring remote testimony, all support the conclusion that the trial court did not mistakenly exercise its discretion when denying defendant's motion.

[Lansing, 479 N.J. Super. at 578].

On or about February 18, 2025, appellant moved before this Court for a limited remand to allow the trial court to conduct the Olenowski⁷ hearing. (Da73). This Court granted the remand on February 19, 2025. (Da74). The following day, respondent's experts testified at that hearing. (3T). On February 25, 2025, appellant's expert testified in person, without any limitations or

⁷ State v. Olenowski, 253 N.J. 133 (2023).

precautions. (4T). There was no indication by appellant, or the expert himself, that this expert would not be able to do the same at any future court appearance, including trial.⁸

On March 19, 2025, this Court asked the parties to provide an update on the proceedings and whether Supreme Court jurisdiction was still viable. (Sa1). On March 28, 2025, both parties responded that the issue was moot in this case. (Sa2-9). Appellant nonetheless argued this Court should maintain jurisdiction because this is an issue of public importance “capable of repetition in other cases.” (Sa2-4). Respondent argued jurisdiction is no longer proper, as a more suitable case is likely to arise to appropriately address this legal issue. (Sa5-9).

STATEMENT OF FACTS

Respondent relies on the Appellate Division’s recitation of the relevant underlying facts. Lansing, 479 N.J. Super. at 568-72.

⁸ To the respondent’s knowledge, as of today’s date, there still has been no indication of any limitations on this witness’s future in-person testimony.

LEGAL ARGUMENT

I. THE APPELLATE DIVISION CORRECTLY RECOGNIZED THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LOOKING TO THE PATHRI FACTORS TO DETERMINE WHETHER THE “GOOD CAUSE” STANDARD UNDER RULE 1:2-1(B) WAS MET AND CORRECTLY APPLIED THE SAME IN THIS CASE.

It is undisputed a trial court is vested with discretion under Rule 1:2-1(b) to determine whether “good cause” is met to permit remote testimony. (Db11). The text of the Rule itself provides a court *may* permit such testimony. N.J. Ct. R. 1:2-1(b). Moreover, as the Appellate Division correctly noted, this Court’s October 27, 2022 Order vests trial courts with discretion to permit individuals to participate virtually “where ‘good cause’ is shown and ‘appropriate safeguards’ are imposed.” Lansing, 479 N.J. Super. at 575. However, appellant argues that both the trial court and Appellate Division mistakenly imported an overly restrictive standard into “good cause” and that they should substantively changed Rule 1:2-1(b) through the use of a more permissive “substantial reason” standard. This argument is belied by both the applicable law and the specific facts of this case.

Trial courts are vested with broad discretion in controlling court proceedings. See State v. Pinkston, 233 N.J. 495, 511 (2018). Appellate courts “apply the abuse of discretion standard when examining the trial court’s exercise of that control.” 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)). Here, the Appellate Division properly noted the deference that is due to a trial court’s control of its proceedings, appropriately found the trial court did not abuse its discretion in looking to the Pathri factors to determine whether “good cause” existed under Rule 1:2-1(b) in this case, and correctly employed the same.

Rule 1:2-1(b) provides:

Contemporaneous 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.

Unlike other Rules, that specifically reference what constitutes “good cause,” (see e.g. Rule 1:2-1(c) referencing Rule 1:38-11(b) to define “good cause”), this subsection does not.

Therefore, the lower courts appropriately looked to analogous caselaw. As this Court is well aware, courts do not decide matters *tabula rasa*; they look to analogous cases to determine issues. This is the foundation of legal analysis, and how our common law has developed for centuries. It was not an abuse of discretion to do the same here.

In discussing the Rule, appellant details select portions of the comments that explain “what constitutes good cause under Rule 1:2-1(b) ‘almost certainly will evolve with further experience with contemporaneous proceedings.’” (Db9) (quoting Pressler & Verniero, cmt. 2.6 on R. 1:2-1). However, immediately following this sentence, the comment continues and explicitly references the cases the lower courts employed:

At present guidance as to good cause can be gleaned from State v. Santos, 210 N.J. 129, 140-142 (2012) applying standards developed in Aqua Marine Prod. V. Pathe Computer, 229 N.J. Super. 264, 274-276 (App. Div. 1988) to testimony via telephone. See also Pathri v. Kakarlamath, 462 N.J. Super. 208, 216-221 (App. Div. 2020), **providing a list of factors to be considered for a motion to appear and testify at trial by contemporaneous video transmission**, allowing plaintiff in a matrimonial action to refile his motion to appear and present testimony at trial from India through contemporaneous video conferencing in the unusual circumstance of his inability to obtain a visa.

[Ibid. (emphasis added)].

This comment uses the word “evolve,” not emerge, indicating an acknowledgement of our well-grounded common law tradition. Courts do not discount prior cases that have addressed similar legal issues simply because they are older. See e.g. Luczejko v. City of Hoboken, 207 N.J. 191, 208-09 (2011) (discussing the importance of *stare decisis*).

Comment 2.6 also explicitly directs a reader's attention to Pathri, as "providing a list of factors to be considered for a motion to appear and testify at trial by contemporaneous video transmission." Here, the lower courts properly looked to the applicable law when considering whether appellant's request to have his expert witness testify remotely met the good cause standard under Rule 1:2-1(b). The Appellate Division correctly noted the Pathri factors "provide useful guidelines for deciding 'good cause' and 'appropriate safeguards' under the Rule. Lansing, 479 N.J. Super. at 575.

Appellant presents a false binary choice to this Court: follow Rule 1:2-1's "good cause" standard, or Pathri's factors. The two are not mutually exclusive; instead, the Pathri factors properly inform courts on what constitutes "good cause." This is what occurred here. Appellant argues the Pathri analysis is "outdated and creates unnecessary obstacles to remote testimony." (Db15). Not so.

Appellant's attempts to cast Pathri as antiquated and "fail[ing] to sufficiently account for the advanced capabilities of technology," (Da8), are undercut by the case itself. Pathri was decided only a few months before the COVID-19 emergency shut down our courts. The Appellate Division in Pathri hesitated to rely on "the 37-year-old caselaw" (Db15) of Aqua Marine Products,

Inc. v. Pathe Computer Control Systems Corp., 229 N.J. Super. 264 (App. Div. 1988). It noted:

The fact that the [Aqua Marine] opinion, was written over thirty years ago – decades before Skype, FaceTime, and the like were even dreamt of – should give us pause. The fact that Aqua Marine considered only the presentation of remote testimony heard but not seen is a factor that also greatly distinguishes what was requested here.

[Pathri, 462 N.J. Super. at 213].

The Appellate Division also noted the unique procedural context of Aqua Marine, and distinguished it from the circumstances of Pathri. Id. at 215 (“Those circumstances are a far cry from what is sought here. Moreover, we must look at what plaintiff seeks by understanding both *the extraordinary advancements in technology that have occurred since Aqua Marine*, and by the dramatically different circumstances in which the issue has risen here.”)(emphasis added).

Enhancing the potential for honest testimony is one of the purposes of the Federal Rule of Civil Procedure 43(a); regardless of its reference to compelling circumstances, our New Jersey courts have the same fundamental goal: seeking the truth. In discussing this rule, the Appellate Division noted: “the amended federal rule recognizes the propriety of alternative methods while also holding, as self-evident, that the ‘very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling.’” Pathri, 462 N.J. Super. at 216. Appellant focuses

only on jurors' claimed technological sophistication, rather than the impact in-person testimony may have on the truthfulness of the witness. This impact should not be ignored.

Appellant contends, "implicit in most of the Pathri factors is that court's presumption in favor of live testimony." (Db18). That may be. In fact, the same presumption exists in this Court's October 27, 2022 Order, explicitly delineating "Criminal jury trials shall continue to proceed in person." (Da23). It also specifies: "The following matters will generally proceed in person but may proceed virtually with the consent of all parties; . . . CRIMINAL: . . . evidentiary hearings." (Da23).

Moreover, the courts' use of remote proceedings, even at the height of the pandemic, never included criminal jury trials. For example, appellant cites State v. Vega-Larregui, 246 N.J. 94 (2021) to support his argument for a more lenient "good cause" standard. However, Vega-Larregui involved grand jury proceedings, which are secret, and have only a prima facie standard of proof. They stand in direct contrast to the open court proceedings of motions or trials, largely involve the presentation of hearsay (so credibility determinations are less crucial), and have no cross examination. See id. at 120. "A grand jury presentation, however, is not a trial." Ibid.

Nor is it a highly technical Olenowski hearing, involving a "battle of the experts." (1T28:20). The trial court's use of the Pathri framework to evaluate

“good cause” was proper. Moreover, the Appellate Division correctly determined this was not an abuse of discretion, and its decision should stand.

A. “Good Cause” was not shown to justify remote testimony here.

The lower courts properly determined appellant did not show good cause under Rule 1:2-1(b) to justify his witness’s remote testimony. As discussed above, the lower courts properly looked to the applicable Rule, Court Orders, and employed the Pathri framework as a guide to determine whether there was “good cause” here.

The seven Pathri factors the lower courts considered are:

- (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.”

[Lansing, 479 N.J. Super. 576 (quoting Pathri v. Kakarlamath, 462 N.J. Super. 208, 216 (App. Div. 2020))].

These were all properly analyzed and there is no reason to second-guess the two lower courts' well-grounded decisions.

Respondent primarily relies on the Appellate Division's rationale. Lansing, 479 N.J. Super. at 573-78. However, additional justification under factors (1), (2), (3), (4) and (7) further demand upholding the ruling.

As appellant's Statement of Facts details, this witness is crucial to a primary factual dispute between the parties: the identity of the shooter. This confirms factors (1) and (2) were properly found to favor in-person testimony.

The Pathri case arose in the context of a divorce proceeding, where a Judge was sitting as finder of fact. 462 N.J. Super. at 212. Although the case at bar originally arose in the context of an Olenowski hearing, appellant's present case will ultimately be before a jury, consisting of lay people who are not accustomed to passing on credibility in a judicial proceeding. Id. at 218. In discussing factor (3) appellant and the ACDL do not draw any distinction between when a judge or jury is the factfinder. Respondent agrees with the Pathri court's rationale, (that a judge is generally more accustomed to making credibility determinations and in a better position to accept remote testimony). Nonetheless, Rule 1:2-1 and the October 27, 2022 Order vest a court with discretion in permitting or denying remote testimony.

Here, the trial court was both the gatekeeper of the way evidence would be presented, and (for this hearing), the factfinder for that evidence. It raised legitimate concerns with remote testimony. Given the technical nature of the witness's testimony, as well as the way the exhibits were presented, the court properly exercised its discretion and determined it required in-person testimony from this witness to properly evaluate the same. This should not now be second-guessed.

As to factor (4), appellant argues "the financial impact on taxpayer resources associated with bringing an expert to New Jersey to testify can be prohibitive." (Db23). In some circumstances this may be true, but it is not the case here. No one disputes this witness was a mere hour-and-a-half drive from the courthouse⁹ or that the trial court offered to limit his testimony to one day.

In considering taxpayer costs generally, appellant ignores the costs that go into ensuring the appropriate safeguards on remote testimony, particularly if a more permissive standard is adopted. Will technology need to be further upgraded in courtrooms to allow jurors to perceive details appellant and ACDL

⁹ This relatively close proximity also undercuts appellant's complaint that the Appellate Division did not mention this witness is purportedly "one of only several experts in the country who is qualified to challenge the reliability of the photogrammetry evidence." (Db14). Unlike the potential remote witnesses in Pathri and Santos, who were both unable to re-enter to United States, appellant's witness here is close and able to travel from Poughkeepsie, New York.

claim they may be able to see even better through a screen?¹⁰ (Db4; Ab4, Ab14-15). Who will ensure the witness is in a secure location, without others present or having access to materials that the Judge, parties and jurors cannot see? Will a member of the judiciary or prosecutor's staff be ensuring these protocols are met, as was done with remote grand jury proceedings? See Vega-Larregui, 246 N.J. at 133 (detailing how prosecutors and judiciary staff "patrol and monitor the virtual grand jury proceedings to detect and correct technological issues").¹¹ If so, these will be costly commitments untethered from the party making the decision to call a particular witness, and should not be wholly ignored.

Finally, in examining factor (7), the trial court not only offered accommodations (as noted by both lower courts), but correctly noted why remote testimony might not actually address the witness's purported caretaking issues. (1T9:11 to 10:21).

THE COURT: No. But let's look at what he said. He's the full-time caregiver, right? So, if he testifies virtually, he's

¹⁰ Other amici diverge from this point, and "do not argue that virtual hearings are superior to in-person hearings." (Cb4).

¹¹ Detailing: "Judiciary staff, moreover, ensure that grand jurors comply with the secrecy requirements of virtual grand jury sessions. Before each session, a staff member checks in with the jurors, has them perform with their electronic devices a '360-degree scan of their environment[s]' to confirm the privacy of their locations, and reminds them to turn off their cell phones or other devices." "Whatever digital divide existed has been bridged by the Judiciary's provision of the necessary technology and technological know-how to grand jurors." *Id.* at 110, 125. Moreover, unlike disinterested grand jurors, randomly selected to perform their civic duty, defense witnesses are not neutral parties.

going to be in a room by himself. He's not going to be able to care for his wife when he's undergoing direct and then cross-examination for five hours.

Who is caring for the wife at that point in time? Who is feeding the wife the six times during the day or is he going to require an hourly break for a half an hour to take care of his wife? These are questions that the Court has that I don't have an answer to.

[DEFENSE COUNSEL]: Well, I can certainly pose all of those questions to him and submit a supplemental certification to the Court.

[(1T10:11-24)].

At this hearing, counsel again offered, "if the Court would like a supplemental certification, I will reach out to [the witness] and provide it to answer the questions that the Court has posed." (1T11:11-14). To respondent's knowledge, counsel never provided this. This further demonstrates why appellant is essentially seeking a convenience standard, which is not what the Rule requires.

Having the benefit of hindsight, the remand proceedings also demonstrate that the trial court's ruling was correct. Exhibits in the Olenowski hearing were physical documents, as well as video or digital pictures, displayed on a screen in court. (4T147:2-10). During appellant's witness's testimony, both attorneys repeatedly approached appellant's witness and provided him with exhibits, (approximately 10 times), without any limitations or precautions. (4T35:3-4; 4T46:2-7; 4T95:12-13; 4T98:7-10; 4T99:24-25; 4T105:2-3; 4T105:8-10; 4T116:6-10; 4T117:11-12; 4T126:25 to 127:2; 4T136:1-2). There is no mention

in the record of the witness taking advantage of any of the accommodations offered by the trial court.

Additionally, valuable information, potentially crucial to assessing the witness's credibility, was revealed through his in-person testimony. Twice during his testimony, appellant's witness had to step down from the witness stand to observe the exhibit. (4T50:20 to 51:4; 4T55:10-14). Were he testifying remotely, the witness may have had the settings on his computer screen personalized in a way that he would be able to make these observations without making any adjustments. Similarly, this witness may have been able to adjust the view on his screen during his testimony without the factfinder observing the same. Even if the factfinder did know the witness was adjusting his own screen, the factfinder would not be able to see how or to what degree (e.g. magnifying, amplifying the light/dark contrast, etc.). While this may be more convenient for the witness and the party retaining him, it deprives the factfinder of a crucial piece of information in assessing this witness's ability to perceive what he reviewed. See Model Jury Charges (Criminal) "General Information to Credibility of Witnesses" (rev. Sept. 1, 2022) (listing *inter alia*, "the appearance and demeanor of the witness; the manner in which he or she may have testified; . . . his or her means of obtaining knowledge of the facts; his or her ability to

reason, observe, recollect and relate;" in assessing a witness's credibility) (Sa14).

This witness's in-person movements here, while seemingly inconsequential, serve as an apt example for why in-person testimony is the default under the Court Rules, our caselaw, and this Court's Orders. Being in the same room as the witness allows a factfinder to observe exactly how close the witness must get to the image to properly make observations. Remote testimony would also deprive the opposing party the opportunity to comment on the same -- particularly to jurors in closing argument. These opportunities are especially important in this case, where the parties are essentially disputing whether the State's expert witness could actually observe certain things in the video surveillance upon which he based his opinion. (1T30:9-11).

Additionally, appellant concedes this case never addressed whether appropriate safeguards were available to let the witness testify remotely. (Db20 n. 5). Tellingly, the trial court acknowledged the practical limitations of its own courtroom, and referenced its experience and knowledge gained from regular remote proceedings.

[DEFENSE COUNSEL]: The technology is completely different.

THE COURT: But it's still not perfect and 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 court also considered the nature of its courtroom proceedings during the pandemic. It had direct experience with scanned documents being presented to remote witnesses during the pandemic, and acknowledged its limitations:

Most likely, experts-- most of the time, there are exhibits, multiple exhibits --[. . .] that may be shown and some that he may anticipate and we can scan and have available, but there may be others that aren't available and I had that come up at a trial I did where we had certain issues when the State, during the height of the pandemic, was scanning all the evidence because we didn't want attorneys approaching the witness so, everything was scanned and we ran into issues that, during cross-examination, there was something that needed to be shown to a witness that hadn't been previously scanned.

[(1T56:24 to 57:14)].

The trial court had a rational basis, grounded in its own experience with the specific technology available, to make this decision.

Appellant did not offer any different technological solutions or safeguards to address these concerns. Fundamentally, the trial court properly exercised its

discretion, under Rule 1:2-1 and this Court's Order to require in-person testimony. The trier of fact here determined it required in-person testimony from this witness to properly evaluate the same and that good cause had not been shown to deviate.

Ultimately, this witness's unrestricted, in-person appearance at the Olenowski hearing establishes three things: (1) mootness;¹² (2) there was no abuse of discretion; and (3) the standard appellant and ACDL are looking for is one of convenience, not good cause.

II. ADOPTING DEFENDANT'S UNTETHERED "A SUBSTANTIAL REASON" STANDARD WITHOUT ANY APPROPRIATE LEGAL FRAMEWORK IS NOT THE STATE OF THE LAW FOR CRIMINAL CASES AND IS UNWORKABLE IN PRACTICE.

Appellant's version of "good cause" essentially equates it with the convenience of defense litigants. This standard would eviscerate presumptive in-person proceeding, a crucial component of maintaining the integrity of our criminal justice system. Appellant argues, "Certainly, therefore, an expert's request to testify remotely, when based on a substantial reason, such as personal circumstances, scheduling conflicts, or travel limitations, is an example of good cause to allow virtual testimony under Rule 1:2-1(b)." (Db23). Not so.

¹² Addressed in respondent's March 28, 2025 letter to this Court. (Sa5-9).

Although appellant uses expert testimony as an example for why this amorphous, minimal standard is needed, he does not ask this Court to carve out a specific exception for experts, instead arguing generally, “Rule 1:2-1(b)’s good cause standard must be applied liberally to allow virtual testimony when there is a substantial reason for the request.” (Db24). Therefore, trial courts will potentially be overwhelmed with any witness who may claim a scheduling conflict or “personal circumstance.” Appearing in court is inconvenient, sometimes onerous. This is particularly true in the criminal context, where a witness may have the added risk of facing retribution for testifying against a criminal defendant.¹³ Courts need to have some framework to determine what remote testimony requests meet the “good cause” standard.

As an initial matter, appellant implicitly asks this Court to overrule Pathri and instead look to the two cases it provides for “good cause.”¹⁴ However, the two examples appellant provides to support his argument that good cause should be synonymous with “a substantial reason” are wholly inapposite. The first is a 1959 appeal of an administrative proceeding in front of the Division of Workmen’s Compensation involving an argument about whether “good cause” was shown to

¹³ Trial courts can confirm the identity of anyone entering the courtroom. The same security measures may be more complicated, if not impossible, with remote testimony, (particularly when requested to take place in a witness’s home).

¹⁴ ACDL likewise asks this Court to rule Pathri does not govern motion brought under Rule 1:2-1(b). (Ab8).

waive the statute of limitations. Nemeth v. Otis Elevator Co., 55 N.J. Super. 493 (App. Div. 1959). The second is whether a legal excuse of “good cause” exists for a defendant’s failure to abide by a condition of Parole Supervision for Life. (Db20). Not only are the procedural contexts of these cases dissimilar, each provides its own self-contained context for, and definition of, “good cause.”

Nemeth explains, “Whenever the words ‘good cause’ appear in statutes or rules *relating to the opening of defaults* they mean (in the absence of other modifying or controlling words) a substantial reason that affords legal excuse for the default.” 55 N.J. Super. at 497 (emphasis added). Likewise, the Model Criminal Jury Charge for “Violation of a Condition of Parole Supervision for Life Fourth Degree” defines “good cause” as “a substantial reason that affords a legal excuse for the failure to abide by the condition.” (N.J.S.A. 2C:43-6.4(d))” (rev. Jan. 13, 2014). Rule 1:2-1(b) does not use the term “substantial reason,” nor do the comments to the Rule, evidencing an intent not to adopt the lower standard appellant now seeks. See e.g. State v. Wright, 107 N.J. 488, 495 (1987), abrogated by State v. Cummings, 184 N.J. 84 (2005) (“Absent evidence to the contrary, we are reluctant to presume that the Legislature intended something other than it expressed in its plain language”).

If anything, the “good cause” standard should be higher, not lower in the criminal context: with lay jurors, the State bearing the highest evidentiary burden that exists under our law, and a defendant’s Sixth Amendment Confrontation Clause

right. In Pathri, the Appellate Division implicitly recognized this, and explicitly noted, “We intend that our holding should have no impact on criminal proceedings due to the Sixth Amendment's application.” Pathri, 462 N.J. Super. at 214 n.4. Indeed, invoking the Confrontation Clause, ACDL essentially argues that a defendant’s preference should control whether any remote testimony is permitted - not a court’s weighing of relevant, neutral factors. (Ab12-13). ACDL argues “Witnesses called by the State may not testify remotely over the objection of the defendant, as this would raise serious confrontation issues.” (Ab13). Although there are clearly Sixth Amendment protections, this position goes too far.

ACDL’s position would eliminate previously well-delineated exceptions to in-person testimony, such as the use of closed-circuit TV for child victim’s and *de bene esse* depositions. N.J.S.A. 2A:84A-32.4; N.J. Ct. R. 3:13-2(a). It also would not account for when a defendant may use a witness to advance an affirmative defense, and thus would bear the evidentiary burden. See e.g. N.J.S.A. 2C:1-13b(2) (affirmative defenses may require a defendant to prove the same by the applicable standard). This model would essentially make Rule 1:2-1(b) only available to criminal defendants, which would directly contradict this Court’s October 27, 2022 Order specifying “[c]ourt events will be scheduled and conducted consistent with the principles of procedural fairness.” (Da26). This “asymmetrical” application of Rule 1:2-1 would also belie the general principle that the court Rules “shall be

construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.” N.J. Ct. R. 1:1-2(a).

In dismissing the potential prejudice to the State, ACDL assumes “Any potential impact on credibility is a strategic concern for the defense—not a source of prejudice to the State.” (Ab18). Pre-disclosing exhibits, ACDL argues are not problematic, because cross-examination is planned in advance. (Ab14). This ignores how a litigant must be able to adapt as testimony is taken. Technology may not be able to accommodate this flexibility in every instance - that is why a trial court engages in a context-specific examination of whether there is “good cause” to justify remote testimony in a specific case. This is what the trial court did here. It specifically discussed its experience of how a litigant’s need to be flexible during a cross examination cannot always be accommodated when exhibits are pre-scanned. (1T56:24 to 57:14). Furthermore, as the lower courts correctly noted, disclosing all exhibits may inhibit effective cross examination by altering the witness to the avenue of questioning. This would prejudice the State.

Other amici diverge from what appellant and ACDL’s propose. They urge this Court to add a non-dispositive factor, (whether another forensic science expert is available to testify in person), in the context of Daubert/Olenowski hearings, but agree this is not appropriate for trials. (Cb10). They note the importance of “giving

juries the ability to assess the credibility of the witness, lay or expert,” and exclude trials from their request. (Cb10). However, other amici err in urging this Court to reverse the Appellate Division’s decision. Even if this Court were to formally incorporate other amici’s additional factor under “good cause,” the trial court here already considered the same.

Appellant never indicated he could not retain another expert. At the initial hearing regarding whether remote testimony would be permitted, the State explicitly argued that “this witness is not irreplaceable.” (1T15:22-23). Unlike an eyewitness - who has made unique observations of a specific, relevant event - another expert can be hired here. (1T15:23 to 16-4). Defense counsel did not dispute its ability to hire a different expert, only that it would be time-consuming and (on appeal) costly. (1T8:19 to 9:1; Db14-15).¹⁵

Additionally, other amici’s claim that decisions on the admissibility of expert testimony “do not turn on credibility determinations” (Cb10) is flawed. A credibility determination is inherent in every witness that testifies. See Model Jury Charges (Criminal) “Credibility of Witnesses” (rev. Sept. 1, 2022) (“in determining whether a witness is worthy of belief and therefore credible,”) (Sa14). This is all the more crucial in a case such as this, where defense is not challenging the underlying

¹⁵ This once again demonstrates why this case is not the appropriate vehicle to address this important legal issue.

science, only how the State's expert applied it. (1T49:25 to 50:10). As the trial court aptly noted, "If this case is a battle of experts about this -- the conclusions reached, then certainly their credibility is going to be at issue here." (1T28:20-22).

Again, with the benefit of hindsight, both the trial court and Appellate Division properly noted, this was "highly technical testimony regarding photogrammetry and associated methodologies." (Da13); Lansing, 479 N.J. Super at 570 n. 2. The more technical the testimonial topic, the harder it may be for a factfinder to make a credibility determination. Factfinders are less likely to have reference points in their own lives when testimony involves a highly specialized, technical area. Thus, in-person testimony has enhanced importance in this context.

If remote testimony for defense witnesses becomes the norm, (as appellant and the ACDL arguments seem to invite), this Court must also address how "appropriate safeguards" will be ensured, and the challenges with the same, as was further discussed supra, under Point I. Neither appellant nor ACDL address the foundation in-person testimony provides for a crucial goal of the justice system: that the factfinder should be able to assess the testimony presented to ultimately find the truth. See e.g. Santos, 210 N.J. 138-39 (referencing cases). Despite technological developments, what has not changed is a "core feature of our adjudicatory system: the factfinder's all-important function of observing the demeanor and evaluating the credibility of each witness that comes before the court." Santos, 210 N.J. at 139

(citing State v. Locurto, 157 N.J. 463, 474 (1999); State v. Johnson, 42 N.J. 146, 161 (1964)). This core feature should not be ignored to favor a litigant's convenience.

If this Court redefines what "good cause" means for remote testimony under Rule 1:2-1(b) in the context of criminal matters, the Pathri factors are the logical starting point from which to evolve future guidelines. Regardless of this evolution, the ruling in this case was entirely proper and should be affirmed.

CONCLUSION

For the foregoing reasons, should this Court retain jurisdiction in this matter, respondent respectfully requests this Court affirm the lower court's decision affirming the trial court's well-grounded exercise of its discretion, as it was rooted in the relevant caselaw—explicitly referenced in the comments to Rule 1:2-1, this Court's applicable Orders, and the credible evidence.

Respectfully submitted,

ROBERT J. CARROLL

Prosecutor of Morris County

A handwritten signature in cursive script, appearing to read "Michelle J. Ghali", written in dark ink.

By: MICHELLE J. GHALI

Assistant Prosecutor