



Gloucester County Prosecutor

CHRISTINE A. HOFFMAN
Acting Prosecutor

P.O. Box 623
Woodbury, NJ 08096
(856) 384-5500
FAX (856) 384-8624
E-Mail: gcprosecutor@co.gloucester.nj.us

THOMAS R. GILBERT
Acting Chief of Detectives

PAUL D. COLANGELO
Acting Deputy First Assistant Prosecutor
Certified Criminal Trial Attorney

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Honorable George Gangloff, J.S.C.
Gloucester County Justice Complex
70 Hunter Street
Woodbury, New Jersey 08096

RE: Virtual Domestic Violence Contempt Trials

Dear Judge Gangloff:

Please accept this letter as notice of the State's objection to the handling of domestic violence contempt trials by video conferencing. While these are unprecedented circumstances and the State certainly understands the need to conduct as much court business as possible, these proposed virtual trials implicate serious concerns related to the constitutional rights of defendants and victims.

The State is aware of the Supreme Court's Order of March 27, 2020, which states that matters should be conducted

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virtually, *as appropriate*. Certainly, there are matters that fall into this category; however, in criminal trials there are a number of additional constitutional protections for defendants, as their liberty is often at stake. While many non-testimonial matters could be easily handled through video conferencing, criminal trials require heightened consideration, particularly in the domestic violence context. Criminal trials implicate important constitutional rights which cannot be properly safeguarded in a virtual proceeding. As outlined below, the handling of criminal trials this way not only poses a threat to defendants' constitutional rights, but to the other party in the case - the abused victim. This undermines confidence of the public not only in the trial process, but the public's interest in protecting victims of domestic violence.

Put simply, proceeding with virtual domestic violence trials is unfair to both defendants and victims. And, doing so could create not only potential appellate issues, but potential PCR issues, for years to come.

DUE PROCESS

Due Process is guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and dictates that no person should be deprived of life, liberty, or property without due process of law. Due process requires that a defendant be

granted a fair adjudicative process, including a formal and open hearing. This includes the unfettered access to witnesses.

State v. Feaster, 184 N.J. 235, 250 (2005).

In New Jersey, "[a]ll trials, hearings of motions and other applications, pretrial conferences, arraignments, sentencing conferences . . . and appeals shall be conducted in open court unless otherwise provided by rule or statute." R. 1:2-1. The requirement of in-court, in-person testimony arises from the common sense need to observe the witness and see him/her testify, as well as serves a number of important purposes. Courts have identified the following reasons why physical appearance of witnesses is so important:

1. it assists the trier of fact in evaluating the witness' credibility by allowing his or her demeanor to be observed firsthand;
2. it helps establish the identity of the witness;
3. it impresses upon the witness the seriousness of the occasion;
4. it assures that the witness is not being coached or influenced during testimony;
5. it assures that the witness is not referring to documents improperly; and
6. in cases where required, it provides for the right of confrontation of witnesses.

[In re C.M., 744 N.E.2d 916, 924 (Ill. App. Ct. 2001) (quoting Bonamarte v. Bonamarte, 866 P.2d 1132, 1134 (Mont. 1994))]

Taking a closer look at each of these reasons in the context of a criminal matter, the need for in-person proceedings is even more clear.

To adequately judge the credibility of a witness, in-person observation is crucial. Credibility cannot be judged on facial expressions alone; body language is a vital tool in judging someone's credibility. In various studies, the importance of body language is heavily emphasized as a tool in assessing truthfulness. Factors such as eye contact, body positioning, and movement can significantly assist the trier of fact in judging credibility. In a virtual proceeding where often just the face is displayed, these important factors can be missed. Similarly, the volume and inflection of voice may also be affected by this technology.

The seriousness of the occasion is also lost in the virtual context. The difference in swearing on a bible in open court and giving trial testimony while on a witness stand from appearing while in one's own home is stark. Giving testimony from the comfort of one's own home does not have the same feel of formality or weight to it. And, this difference can be anecdotally observed in other virtual proceedings, where

reminders to even attorneys have been made that it is a court proceeding so appropriate attire and demeanor are expected.

Significantly, virtual trials remove the ability to ensure that a party or witness is not being coached or influenced in any way. In a trial conducted in-person inside a courtroom, a sequestration order is typically entered and monitored, thereby protecting the integrity of the process by preventing witnesses from comparing or mirroring each other's testimony. There would be no ability to enforce the sequestering of witnesses in a virtual trial, where someone could be off screen and out of view of the court and attorneys. Rather, the witnesses could very easily be sitting in the same room as each other, particularly in a domestic violence context where witnesses are often friends or family. They could be communicating with each other, or worse, influencing or pressuring each other.

Just as importantly, a party or witness testifying in a virtual trial may be referring improperly to documents off camera in order to tailor their testimony to match a previous statement. They also could be receiving communications from others viewing the matter as it streams. It would be nearly impossible to monitor who is viewing the virtual trial and potentially communicating with the parties or witnesses before or during the trial.

And, addressed in detail below, the defendant has a constitutional right to face his accuser in person. Due process overlaps here with the Right of Confrontation and requires this to be face-to-face, physical confrontation of the witnesses against a defendant. Any less than granting the defendant full access to the witnesses and evidence against him would be a violation of his/her due process rights.

RIGHT TO CONFRONTATION

The Confrontation Clause of the Sixth Amendment to the United States Constitution grants upon all criminal defendants the right to be confronted with the witnesses against him.

In Maryland v. Craig, the United States Supreme Court recognized that "the basic elements of confrontation are physical presence, oath, cross-examination and observation of demeanor by the trier of fact." Maryland v. Craig, 497 U.S. 836, 846 (1990); see also, State v. Smith, 158 N.J. 376 (1999). Certainly, there are times when this right has given way to important public policy considerations such as the prevention of further trauma to a child victim. However, in those cases, the trial is still conducted in open court with only one witness appearing by closed circuit television. The New Jersey Supreme Court has held that this is permissible because the trauma caused by requiring a child to testify in person may actually

interfere with the truth finding process. State v. Smith, 158 N.J. at 386.

"[A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." Maryland v. Craig, 497 U.S. at 850 (emphasis added).

The State recognizes the need for a policy of swiftly adjudicating cases; however, this public health crisis is temporary and court business will resume. And, this crisis cannot undermine a defendant's constitution right. If a defendant does not wish to proceed via video conferencing, it would be a violation of his rights to compel him to do so. Even if the defendant fails to object to having criminal domestic violence contempt trials heard virtually, the State expresses concern that this could be challenged after a conviction and be reversed upon appellate or post-conviction review.

RIGHT TO COUNSEL

Criminal defendants also have the Right to Counsel guaranteed by the Sixth Amendment. In Chapman v. California, 386 U.S. 18 (1967), the United States Supreme Court held that the assistance of counsel is a fundamental right and so basic to

a fair trial that an infraction could never be deemed harmless. Chapman, Id. at 23; see also, State v. McCloskey, 90 N.J. 18 (1982).

Under current social distancing and stay at home orders, it is a significant challenge for counsel to meet with their clients and adequately prepare for trial. During the trial itself, it would be impossible for counsel to be physically present with their client. Counsel and defendant could not consult with each other or discuss trial strategy as the trial progressed over video. They could not explore together questions for witnesses or verify accuracy of witnesses' testimony. The ability to interact swiftly is removed.

Yet another concern arises in the context of evidence. Counsel may not be able to review the discovery, particularly real evidence, in advance with defendant. At trial, counsel will not be able to easily introduce and admit real evidence that often is relevant in domestic violence contempt trials, such as cell phones containing communications or surveillance videos. Counsel will not be able to persuasively display and utilize photographs of alleged injuries or other types of documents which similarly can be highly relevant in these types of trials. And, even the copies that are scanned and emailed may lose detail or be distorted. Complicating the admission of certain documents, the Best Evidence Rule requires production of

an original. N.J.R.E. 1002. Even if the court were to permit a reproduction, there will be no way to verify that the document is the original or, if received electronically, that it is an accurate, unedited reproduction of the original. These limitations on evidence may all have an effect on counsel's efficacy at trial.

These virtual restrictions pose many issues in a testimonial proceeding, especially a criminal contempt trial. Such issues may present a basis for appeal. Even more concerning is the idea that years down the road, when the current public health crisis is over and society is removed from these alternate, sometimes extreme interim measures, the PCR motions claiming ineffective assistance of counsel will come. Many of these claims would require information outside the scope of the record and result in evidentiary hearings.

RIGHT OF VICTIMS AND PUBLIC TO BE PRESENT

Victims have the right to attend all proceedings under the Victim's Rights Amendment to the New Jersey Constitution. The Crime Victim's Bill of Rights grants them the right to be present at all court hearings and with as minimal inconvenience as possible to the victim. N.J.S.A. 52:4B-36.

Also, the Sixth Amendment to the United States Constitution also provides that a defendant has the right to a public trial.

That right, however, is also the right of the public, in order to insure confidence in our courts. See Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 508 (1984). That right may only be overcome by an overriding interest based on findings that closure [of the proceeding] is essential to preserve higher values and is narrowly tailored to serve that interest. Press-Enterprise Co., 464 U.S. at 510. Furthermore, the denial of a public trial to a criminal defendant is a "structural" error and thus subject to automatic reversal since it affects the "framework within which the trial proceeds." Neder v. United States, 527 U.S. 1, 8 (1999); State v. Cuccio, 350 N.J. Super. 248 (App. Div. 2002).

Not all victims may have the access or knowledge to participate in video conferencing. Many people are out of work and may not be able to afford electronic devices or reliable internet access. This is particularly true in the domestic violence context. Victims may be seeking shelter in a safe house or with a loved one and may not have any ability to view or, worse, participate, in the virtual trial. Even more concerning is the possibility that a virtual trial may reveal clues about a victim's location. The background in the video could be revealing. And finally, there is no way to ensure that, if a victim is uncooperative or testifies inconsistently

with a prior statement, that the defendant or another individual is not at that location influencing or pressuring the victim.

The State recognizes that the court may have the ability to stream the proceedings in an attempt to make them public. This is not adequate assurance of a public trial. Similar to the victims, many members of the general public may not have access to the internet at this time.

Furthermore, this is a time of crisis. Our state is devastated by the ravages of a virus, and we have been declared a major national disaster area because of how hard hit our state has become. Defendants, victims, and the public are encountering day-to-day challenges from obtaining medical care for themselves or loved ones, child care, and other needed services that could impact on their ability to participate in this trial process. It is also an emotional and stressful time. The seriousness of a trial demands that such challenges be considered. At a time when most of society has come to a halt and the constitutionally required access to the courts may not realistically exist, proceeding with virtual trials undermines the confidence of the public. And, domestic violence has a high public interest.

OTHER PROCEDURAL CONSIDERATIONS

In addition to the myriad of Constitutional violations that could occur with video conferencing a domestic violence contempt trial, there are also many procedural problems. One particular issue is the admission of documents into evidence. Another concern is the possibility of technical difficulties. Most people would not know how to handle such issues if they arise. A witness could even fake a technical difficulty to get out of answering a difficult question. Finally, it would be difficult for the State to prove that equipment was working in subsequent appeal or PCR motion claim that there was an audio/visual problem. Domestic violence contempt trials, if done virtually, will entail too many moving parts outside of the court's control to allow a fair process.

CONCLUSION

All of these issues make criminal domestic violence contempt trials inappropriate for video conferencing. In domestic violence contempt trials, where there are issues of a constitutional dimension and liberty may be at stake AND a victim may have been subjected to continued abuse, anything less than an in-person proceeding undermines the public confidence in those proceedings. Also, the potential violations of a

April 15, 2020

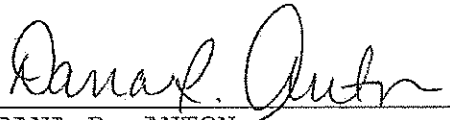
defendant's constitutional rights would expose any conviction to legal challenge.

For all of the reasons cited above, the State respectfully requests that all criminal domestic violence contempt trials be postponed until such time that permits in-person trials.

Very truly yours,



CHRISTINE A. HOFFMAN
ACTING COUNTY PROSECUTOR



DANA R. ANTON
ACTING SR. ASSISTANT PROSECUTOR

cc: Honorable Harold U. Johnson, Jr., P.J.F.P.