

Garden State CLE presents:

This makes me sick!



The impact of COVID-19 on the N.J. criminal justice system.

Instructors:

Joseph P. Rem, Jr. Certified Criminal Trial Attorney

Robert Ramsey

I. Grand jury

A Supreme Court its 9th omnibus order signed October 8, 2020 which provides a plan for the statewide return of grand juries, ending a delay that has affected thousands of defendants held in custody since the start of the Covid-19 health crisis.

- a.) The order also allows defendants detained more than 90 days to promptly receive discovery material from prosecutors and it ends pre-indictment excludable time in phases, prioritizing those defendants who have been detained the longest. The first phase ends excludable time on Jan. 15 for cases involving nearly 600 defendants who were detained prior to March 16. While prosecutors typically have 90 days to bring a case to a grand jury, certain delays stop the clock and qualify as “excludable time.” Defendants have accrued more than 200 days of excludable time since in-person grand jury selections were suspended in March due to Covid-19. There are currently more than 2,700 defendants in county jails whose matters have not been brought to a grand jury. “The number of unindicted detained defendants will continue to grow unless grand juries are established in all counties and enabled to perform their critical function effectively, efficiently, and consistent with public health requirements,” the Court wrote in its order. Jurors in all counties have now been summoned for new grand jury selections .**

- b.) The Supreme Court’s order provides options for prosecutors to seek indictment through both virtual and in-person sessions. Virtual grand juries have been operating in Mercer and Bergen counties since June. Under the order, each county must equip new panels with the technology and training needed to convene in a virtual format by Dec. 1. Prosecutors may then choose to present cases before grand juries.**

- c.) Alternatively, counties may convene in-person grand juries in Judiciary locations in a manner consistent with public health recommendations. As an additional option, county prosecutors may submit a proposal to conduct grand jury sessions in an outside facility if a Judiciary location is not available.**

- d.) Also under the order, the Court is provisionally adopting a new rule, modeled after the federal court system that allows for hearings that would afford eligible defendants the right to cross-examine witnesses and present evidence while requiring the state to demonstrate probable cause and present witness testimony. The hearings would not be held if an indictment is returned.**
- e.) The plan protects the rights of the thousands of defendants who are detained and awaiting appearance before a grand jury and provides the state the opportunity to prepare and present cases. It also enables the criminal justice system to move forward in a way that protects the health of jurors, attorneys, witnesses and court staff.**
- f.) The 9th omnibus order can be found at this link:**

<https://njcourts.gov/notices/2020/n201008a.pdf?c=hJS>

II. Resumption of civil and criminal jury trials:

As of September 23, 2020, the Supreme Court has authorized the incremental resumption of new Civil and Criminal jury trials, which have been suspended for more than four months because of the ongoing COVID-19 pandemic.

1.) Atlantic/Cape May, Bergen, and Cumberland/Gloucester/Salem will be the first Vicinages to resume certain jury trials, beginning with Criminal trials involving a single detained defendant.

2.) Over the coming months, trials will gradually resume in all counties and will expand to include Civil as well as Criminal cases. Overview The Court-approved plan for resuming jury trials replicates to the greatest extent possible standard pre-COVID-19 processes, including as to the issuance of summonses to prospective jurors; availability of online and hard copy options for qualification; resolution by staff of certain statutory pre-reporting excuses (e.g., disqualification of jurors who have relocated outside of the summoning county); and general prescreening of qualified jurors for availability for the trial schedule.

3.) Virtual *Voir Dire* – All case-specific questioning of jurors will be conducted by a judge in the presence of the attorneys and parties, with the difference being that most *voir dire* will be conducted virtually rather than in physical courtrooms. As with the ongoing virtual grand jury pilot program, the Judiciary will in all cases provide technology to jurors where it is necessary to support their participation in virtual proceedings.

4.) In-Person Reporting - Following virtual questioning and for-cause excusals, a small group of jurors will be directed to report in person to the courthouse for the final phase of

selection, including the exercise of peremptory challenges. That in-person phase of the selection process will be conducted observing social distancing requirements and with jurors and others generally required to wear masks. Once that phase of the selection process has been completed, selected jurors will be empanelled for a socially distanced in-person trial, which will be conducted in accordance with public health guidance issued by the Centers for Disease Control and Prevention (CDC) and the New Jersey Department of Health (NJ DOH).

5.) Empanelled jurors will be required to wear masks, which the Judiciary can provide, as needed. Throughout the trial the Judiciary will enforce social distancing to avoid close contact between trial participants. We will provide designated restrooms and break areas, and, in coordination with building owners, we will arrange for additional cleaning and sanitizing.

6.) Selection of Cases for Trial - During this beginning phase of the resumption of jury trials, total trial activity will be substantially less than during normal pre-COVID-19 operations, with the goal being to be conducting at least one Civil trial and one Criminal trial at any particular moment in each county in the coming months. Assignment Judges and Presiding Judges will work closely with attorneys to identify the cases that will proceed, taking into account standard factors (e.g., the length of time a criminal defendant has been detained) as well as factors relevant to social distancing (e.g., the occupancy challenges associated with cases involving multiple parties).

7.) Attorneys and parties will be invited to walk through the physical layout of courtrooms in advance and to review any proposed technological supports (e.g., large-screen monitors to display evidence) or health precautions (e.g., Plexiglas barriers for witnesses).

8.) Critical Areas of Focus - Preventing and Responding to COVID-19 Risks - The Court's plan for resuming jury

trials depends on strict adherence to public health guidelines for all persons in court facilities, especially trial participants. Judges will exercise primary responsibility for ensuring that courtroom occupants avoid close contact, which the CDC defines as being closer than 6 feet for more than 10-15 minutes or coming into direct contact with bodily fluids (e.g., being coughed or spat upon). If a juror or other trial participant during any portion of the in-person proceedings is diagnosed with COVID-19 or develops symptoms consistent with the virus, the Judiciary will notify those persons who are or maybe at risk.

9.) Safeguarding Constitutionality - The processes authorized by the Court in support of the incremental resumption of jury trials upholds the constitutional rights of parties, including criminal defendants. As in standard in-person operations, attorneys and parties will participate during all case-specific questioning of jurors. By reconfiguring courtrooms and making effective use of technology, trial participants will be able to see jurors both during the virtual selection process and during socially distanced in-person trials.

10.) Attorneys will be supported in communicating with their clients during the virtual jury selection and the socially distanced in-person trial. Options for supporting safe direct attorney-client communications include installation of partial Plexiglas dividers, exchange of private notes, and/or use of ear buds similar to those used by interpreters.

11.) Appropriate measures also will be implemented to ensure that witnesses are visible when testifying, whether protected by a Plexiglas barrier or wearing a transparent face shield.

12.) Supporting Representative Juries - The Judiciary will enable all qualified and available jurors to participate in virtual jury selection, whether by using their individual personal technology (e.g., laptop or smart phone with camera functionality) or by using devices supplied by the Judiciary (e.g., tablet with broadband capability). In addition to ensuring inclusive jury panels, the Judiciary will support juror service for in-person trials by enforcing public health precautions, including wearing masks; maintaining social distancing; and frequently cleaning and disinfecting shared areas.

III. Issues related to criminal and municipal court trials:

As a result of the Supreme Court's First Omnibus Order dated March 27, 2020, municipal court proceedings were suspended. That suspension was lifted under the Second Omnibus Order, effective April 27, 2020.

As it relates to municipal courts, the Second Order held that Municipal Court sessions may be conducted with the consent of all parties. Effective May 11, 2020, with appropriate notice to the parties, Municipal Court sessions can resume in individual Municipal Courts. All sessions may only proceed in a virtual (video or phone) format. The resumption of sessions shall be to the extent possible, based on facilities, technology, and other resources, and shall be consistent with the provisions of the April 20, 2020 Order regarding remote proceedings.

Beginning June 22, some municipal court bench trials and hearings could be handled in person if they are too complex to be handled online. This raises the following issues:

1.) Public trial – The right to a public trial is guaranteed under the 6th and 14th Amendments as well as Article I, paragraph 20 of the New Jersey Constitution of 1947. (“In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury”) There is an open question as to whether this right extends to petty offenses in New Jersey's municipal courts.

The right to a public trial is vested in the defendant and not the public. That is to say, the defendant may insist on a public trial as opposed to a member of the public seeking to attend. Gannett v. DePasquale, 443 U.S. 368 (1979). The right to a public trial extends to pretrial proceedings such as jury selection. If a defendant's right to a public trial has been denied, the error is considered to be structural and therefore requires a reversal of a conviction without a

showing that the defendant was prejudiced by the denial. *State v. Venable*, 411 N.J.Super. 458, 463 (App. Div. 2010); *State v. Cuccio*, 350 N.J.Super. 248 (App. Div. 2002).

The question is whether the public trial right of the defendant can be satisfied by online access to the trial or does the defendant have the right to insist that members of the public personally attend the trial.

2.) **Confrontation issues – Article I, paragraph 10** guarantees the right of the defendant to confront witnesses against him. Generally speaking, this means personal confrontation in the court room. The use of remote, online testimony is limited to child sex abuse cases. *Maryland v. Craig*, 497 U.S. 836 (1990); *State v. Crandall*, 120 N.J. 649 (1990); N.J.S.A. 2A:84A–32.4. Furthermore, although it is authorized by the Rule 7:7-6, the use of *de bene esse* depositions at trial has been strongly disapproved by the Appellate Division. See *State v. Benitez*, 360 N.J.Super. 101, 119 (App. Div. 2003) (“The use of deposition testimony in criminal cases is highly disfavored, mainly because such use tends to diminish a defendant's Sixth Amendment confrontation rights.”)

The issue for all trials is whether witnesses will be permitted to wear masks during their testimony. The need for the finder of fact to gauge credibility is intimately tied to facial expressions of the witness. Clear, plastic face coverings may be a solution to this issue.

3.) **Attorney and defendant health – Older members of the bar and those at risk for COVID complications may express objections to being compelled to represent a client at trial. Of special consideration is that a defendant has the right to have the privately retained defense lawyer of his choice. *State v. Miller*, 216 N.J. 40 (2013).**

4.) **Municipal Court Jail Sentences - COVID-19 has brought about the need for social distancing. Judges have been asked to weigh this fact when they hear municipal court cases that might include a jail sentence. They also need to**

think about public safety. Judges might decide to put off a sentencing hearing because of COVID-19. Judges also might delay the start of a jail or prison sentence as a result of the COVID-19 crisis. Also, the victim will be given the chance to respond to the proposed delay. Other parts of the sentence, such as license suspensions or payment of fines, might not be stayed.

5.) Speedy trial – At this point, no DWI trials are being held. This has created an enormous and growing backlog of pending DWI cases. These matters may not be resolved by way of plea agreements and have resulted in an unofficial and implicit relaxation of Directive 1-84 which mandates all DWI cases be resolved within 60-days of the issuance of a complaint.

Speedy trial applications will have to address the COVID emergency as well as the extension of excludable time for Superior Court criminal matters as justifications for allowing extended time for DWI trials.

6.) Non-trial matters – As of July 28, 2020, the public can now ask a prosecutor to review their matters and may be able to resolve their case without having to appear in person, under a recent change to municipal court operations in New Jersey. The Judiciary's Online Dispute Resolution (ODR) program, which started in mid-May in approximately 30 municipal courts, allows court users to dispute a charge and provide information or evidence to municipal prosecutors online.

The ODR program applies to 37 traffic offenses, such as speeding, failure to have an insurance card, or failure to yield, where defendants commonly provide additional documentation and seek a reduced charge before pleading guilty. Court users can make their requests for review to the municipal prosecutor through NJMC Direct.

After reviewing the case, the prosecutor can offer a lesser charge or decline to change the charge. If a lesser charge is

accepted, the matter will be reviewed by a judge for approval. If approved, the defendant does not need to go to court. If the prosecutor declines to offer a lesser charge, or the judge does not approve the new charge, a hearing date is scheduled for the defendant to appear remotely.

Additional courts will offer the program over the next several weeks as the program expands statewide.

Under a second change that went into effect on April 27, 400 minor offenses were added to the Statewide Violations Bureau Schedule. The new offenses include some minor traffic and parking matters as well as state Fish and Game and Weights and Measures violations. For these, defendants can plead guilty and pay online without having to go to court. In one of the Judiciary's first actions to reduce municipal court appearances to reduce the spread of COVID-19, the Supreme Court on March 16 relaxed court rules that had required only those with "undue hardship" to plead guilty by mail to certain offenses in municipal court. Plea-by-mail does not apply to serious offenses, including those resulting in the likelihood of a driver's license suspension, jail time or community service.

IV. Four steps phased reopening of the judiciary

The Court's Post-Pandemic Plan summarizes the phases of the gradual return to court facilities and in-person services as follows:

Phase 1: (March 18-June 21, 2020) Status Quo / Remote Operations – less than 5% of judges and staff onsite; buildings closed to attorneys and the public•

Phase 2: (June 22, 2020) Gradual and Limited Return – starting with up to 10-15% of judges and staff onsite; certain matters that cannot proceed remotely may be conducted onsite. The intent during Phase 2 was to start with up to 10-15% of judges and staff on-site. As intended, that percentile range already has supported the resumption of certain matters than could not proceed remotely. In addition to matters that require consent to proceed remotely; judges may determine to schedule an in-person event based on the individual facts and circumstances of a case. Second, the percentages outlined in the Plan are a framework that may be adjusted based on the fluid nature of the evolving COVID-19 crisis. This means, for example, that during Phase 2 there may be a particular day when more than 10-15% of judges and staff could be on-site. On other dates, less than 10% of judges and staff may work on-site. Consistent with public health recommendations, court operations that can be performed remotely should be conducted remotely, subject to ongoing adjustment.

Still Pending for future implementation

Phase 3: New Operations –ongoing remote operations with gradually increasing onsite events, eventually including new jury trials; up to 50-75% of judges and staff onsite (with staggered schedules)•

Phase 4: Ongoing Model –once a vaccine is available and/or herd immunity is established; up to 75-80% of judges and staff onsite.