



Fox Rothschild Podcast

The Presumption of Innocence

Episode 49: Perspectives From the Bench: Anatomy of a Criminal Trial With Retired Judge Margaret Foti

Featuring Matt Adams of Fox Rothschild and The Honorable Margaret Foti, Former Presiding Judge of the Criminal Division of the Superior Court of New Jersey

Adams: Hi, everyone, and welcome back to "The Presumption of Innocence," the podcast brought to you by the White-Collar Criminal Defense and Regulatory Compliance Practice at Fox Rothschild. On "The Presumption of Innocence" we often take a look at the criminal justice system from an array of unique vantage points. We've spoken with investigative journalists, formerly incarcerated people, public interest attorneys, subject matter experts and a whole host of other individuals that have provided us these unique angles into the criminal justice system.

And today, we have a rare opportunity to look at it from an angle that is seldomly explored, and that is the angle of a trial-level judge.

Today's guest on our program is the Honorable Margaret Foti, a retired presiding criminal judge of the Superior Court of New Jersey in the Court's Bergen County vicinage. Judge Foti, welcome to the program. I'm so glad that you could join us.

Margaret Foti: Matt, thank you so much. I am so thrilled to be here and I thank you and your venerable firm for having me as a guest on this podcast.

I have to tell you, I've listened to many of your podcasts and they're fascinating. They're interesting. And truly an honor to be on this one today.

Matt Adams: Well, hey, you're going to make me blush, Judge. Get us started by telling us exactly what a presiding criminal court judge does in the system. Because, you know, we have listeners from all over the country and every state has a little bit of a different state court criminal system. But in New Jersey's system, tell us precisely what the presiding judge of a particular vicinage does.

Margaret Foti: I will be happy to do that. Matt. I'm going to talk about being the criminal presiding judge, but we have several divisions within our state courthouse. We have the Family Division, the Civil Division, Chancery and then Criminal. And all of the presiding judges work for the assignment judge. But within the vicinage, each division has a Chief Judge, if you will, in that vicinage. As the criminal presiding judge, I was responsible for supervising all of the other judges within the division.

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And that would include, obviously, monitoring caseloads, making sure caseloads are evenly distributed. And very unique to the presiding judge, the presiding judge has to know what the duty of every single judge is, because there are times when we have to fill in.

So for example, we have in New Jersey, we have the Drug Court. If the Drug Court judge were on vacation or otherwise unavailable, the presiding judge would have to step in and preside over that court for that particular day. So the presiding judge really has to know what each one of the judges do, and be willing and able to step in to be, as it were, a backup for that judge.

Matt Adams: So, you have administrative responsibilities that exceed sort of the day-to-day caseload. And with those administrative responsibilities, I think, unless you're really in the system on a day-to-day basis, you seldomly actually can understand the stresses that are on the system and the impact that, for example, monumental public health emergencies, like the COVID-19 pandemic had on the court system. But talk to us --

Margaret Foti: It's very interesting that you say that because, and again, let me just supplement what I said by saying the presiding judge also handles trials and their own caseload as well as, I know in my case, I handled the final extreme risk protective order or "red flag laws," and we can talk about those in a moment.

But you also mentioned COVID-19. And I had the distinct honor and pleasure of being the presiding judge during the pandemic. And that had presented its own unique set of challenges, as I know you experienced as a practitioner going into federal and state court.

And at a time when judges were extremely concerned about incarcerated defendants and getting trials for those incarcerated defendants, and of course, having our courthouses closed for a period of time, it became a very difficult time to be a criminal court judge.

Now, I'm sorry, your question.

Matt Adams: Yeah, no, and you pretty much hit right on it, Judge. But the administrative responsibilities are in addition to the sort of everyday trial load, calendar of motions and things of that variety. And I'm really fascinated to explore how the court system handles what, at times, must feel like an overwhelming deluge of cases that are coming in. And give each one of those cases, the individualized attention they need to preserve, defend and protect that particular individual's due process rights, the presumption of innocence and not take away their liberty without that due process being carried out in a fulsome manner. And when we have these taxes on the system, whether it's because of judicial shortages or public health emergencies, or, you know, building construction, whatever the case may be, how do you prioritize?

What cases get what attention from that role?

Margaret Foti: Very good question. We have, within our court system, the Administrative Office of the Courts, which, of course, works under our Chief Justice. And the Criminal Division was given the highest priority during the pandemic. And incarcerated defendants were given the highest priority



during the pandemic. Because we were very, very well aware of the burdens that were imposed upon the system and imposed upon individual defendants who were incarcerated and awaiting trial.

So, those cases were given the highest priority. We needed to address those cases where we had incarcerated defendants first. And then, of course, we went from there. The older cases, the more severe crimes, et cetera. But the incarcerated defendant cases were always our top priority, and continue to be. I mean, I've been retired for a little over a year now. But I am aware that they continue to be the highest priority in our court system. And, that there are additional judges being assigned to the Criminal Divisions to address the backlog caused by the pandemic. We are still addressing these issues caused by the pandemic.

And I'll tell you, the other interesting thing about that period in our history was that for the very first time in New Jersey, we started to pick juries at least partially remotely. That is the first cut of jurors, before we brought people into the courthouse to, you know, question them further. The initial cut of jurors were done by Zoom.

I believe we continue to choose grand jurors remotely. And that was unique to the pandemic. We tried very hard to, obviously, keep our trials going forward, but also protect the safety of the jurors as best we could. Not bringing large numbers of people in at one time. At one point in the pandemic, we were actually putting our jurors, not in the jury box, but outside in the benches of the courtroom to keep them separated, the six-foot rules, so to speak. So, we really came up with some very unique methods to get people back into the courthouse, to get people back into doing jury service.

And of course, as you know, we can't conduct criminal trials remotely because that would be a violation of a defendant's due process rights. So those trials, those jury trials, had to be conducted in person, as well as any evidentiary hearings where the judge had to sit and listen to, for example, motions to suppress: motions to suppress statements, motions to suppress evidence. Those motions had to be heard in person because of the, obviously, of the due process rights of the defendant.

Now, there were certain civil trials that could be conducted remotely, but never, never a criminal motion and never a criminal trial. So these were some of the challenges that we were facing during that period of time.

Matt Adams: So let's bring it one level below that, right? So we have the broad administrative responsibilities of the presiding criminal court judge. And let's come one step beneath that to sort of the anatomy of a criminal case once it's kicked off by way of indictment or complaint. And now we have a pending state court, which, in a lot of respects, has some strong parallels to the federal system, but also some unique differences as well. But from your vantage point as a former state court judge, talk us through a little bit about the anatomy of the criminal case at the trial level.

And then I want to dig into some specific issues, which I think is really going to be a fascinating discussion to get your viewpoint on, because I think there's quite a bit of discreet issues that are, in my view, happening, perhaps at alarming levels at trial courts these days. And I want to get your take



on how those issues get adjudicated and the overall impact it has on the fairness and equity of the system.

So, talk us through, again, first that sort of anatomy of the trial-level state court matter.

Margaret Foti: Well, it's a very detailed, and procedurally complex process. And, it really begins when the defendant is arrested. And I would be remiss if I didn't speak about bail reform in New Jersey and the enormous success that we've had with bail reform in New Jersey. So, a defendant is arrested, for example, on a third-degree crime and has never committed a crime before. Before bail reform, that defendant would come into court, and be arrested, come into court and there'd be an application for bail. Let's say it was a very low bail number. On a third-degree crime, if that defendant was indigent and couldn't pay that bail, they'd be in jail.

Under our bail reform system, which I think has been highly successful in New Jersey-- I hear criticisms about the New York bail reform, but I've heard no criticisms about the New Jersey bail reform laws, and I think they've been quite effective.

So, under New Jersey's laws, only those defendants who either present a danger to the community or are a flight risk will be detained. And, that is after a hearing. And after both sides have had a chance to present information to the judge. So the very first step in the criminal justice process, especially if it's a violent crime, is appearing before that judge for that, motion to detain.

And that is only if the prosecutor's office makes the motion for detention. Normally, I would say the majority of the defendants, certainly that I saw in Bergen County, were released on conditions and --

Matt Adams: Can I interrupt you on one with respect to bail reform?

Margaret Foti: Sure.

Matt Adams: Because you raise it, and as we work through the anatomy of the state court criminal proceeding, it's such a critical piece of it.

Margaret Foti: It is.

Matt Adams: But you raised a couple things there. You talked about how this has really become a political talking point, right? Bail reform as the reason. I often hear it called catch-and-release. Um, but in my experience, right, as a defense lawyer, I've actually seen the reverse. I've actually seen more defendants that would otherwise be able to make a cash bail-- and maybe it's the nature of my practice being pretty exclusive to white-collar matters-- but I've seen more defendants that would have otherwise been able to make bail be held for extended periods of time, perhaps not an entire pretrial detention, but certainly well beyond that they would have under the prior system, because of the way that the law, the reform statute, allows for prosecutors, for example, to simply request for an extension and get one as a matter of right. And--

Margaret Foti: I don't think those extensions are extensive periods of time.



I don't know if you're talking about the federal system, but in the state system, certainly --

Matt Adams: Four days!

Margaret Foti: Well, I mean, I understand your point, that, you know, even one more day in jail is too many days. And I agree. But it has been my experience that many times it's the defense counsel that asks, for more time. And they do that very appropriately because they want to review information, they want to review evidence, etc.

But you know, Matt, these types of questions really rise or fall on particular or individual cases. I can tell you in my experience, normally the prosecutors were ready to go forward. It was a very unusual situation when they asked ... I think the defendant was given three days or five days and the prosecutor was given three if they needed additional time. And it was my experience that normally it was the defense counsel who wanted to look at that video or wanted to review that evidence or wanted more time to speak with their client.

And of course, we would do that. But we were always very, very cognizant that one day in jail is too many if you shouldn't be in jail. And that was always the judges' view on this.

But you're right, as a matter of right, each side gets a period of time if they need to.

Matt Adams: And on the bail reform issue, as a sitting judge, how do you enforce things like the idea that discovery, certain level of discovery, is required at that early juncture? Whereas previously, right, you may have had time to compile it, put it in a nice box with a beautiful bow and presented to the defense. At this point, you're talking about on-the-fly determinations where initial discovery is necessary because it's relevant to that determination, that bail determination of a danger to the community and risk of flight. And so how as a judge did you experience that notion that sometimes discovery, by virtue of the early phase of which the proceeding is in, just wasn't entirely available?

Margaret Foti: You raise a very good point. And not only is this point appropriate in detention hearing matters, but also in Early Disposition Court, where many times defense counsel were offered a plea and told "well we haven't," --and you're very, I know you're very familiar with this phrase-- "escalating plea policy."

Matt Adams: It's the bane of my existence.

Margaret Foti: Can I tell you something? I have such feelings about this escalating plea policy. I never liked it. My view was always, I didn't understand how you could really get a feel for the case as a defense attorney until you had motion practice.

Matt Adams: So, we're jumping around quite a bit, Judge. But let's tell our audience what these escalating plea policies are. Because in talking with colleagues from around the country, I think they are somewhat of a unique New Jersey issue. That these prosecutors' offices say that they're going to, at the earliest phases of a proceeding, give you their best offer at that. And that as a matter of prosecutorial discretion and office policy, their offer will get worse the longer that the case goes on.

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And frankly, to me that is contrary to the interest of justice. How as a judge do you push back on something that seems so ridiculous? It seems to me it's a pedantic exercise in essentially trying to use resource allocation as a basis to disperse justice. And to me, that is just completely wrong.

Margaret Foti: Yeah, I have to agree with you, Matt. And that has always been my belief. You know, you get a limited amount of discovery at the early stages and as you know, as a case progresses, sometimes you learn more and more and more. And, uh, this Early Disposition Court is something that we have here in New Jersey-- I'm sure they're in other jurisdictions as well-- where essentially, it's kind of a pre-indictment measure where the defendant has been arrested and charged, but not yet indicted, and they are able to come into court.

And these are people who are generally, they're not incarcerated defense, although they can be, but they come into Early Disposition Court and the prosecutor and the defendant and defense counsel will appear before a judge. And the prosecutor will extend a plea offer. And they will say to the defendant and defense counsel-- and this is before the judge-- this is going to be your best offer. From this point on, there'll be an indictment, most likely. If the grand jury decides to indict, there will be an indictment. And, after that, the plea offer will only go up.

And you know, I would preside over these early disposition cases and I would listen to the prosecutor. And I have the utmost respect not only for defense counsel, but for prosecutors, but I never understood how defendants could make a truly informed decision until motion practice. Because it's only after motion practice that you can really understand the merits of your case. And truly understand-- and I'm going to use a word, the value of the case. And when I say the value of the case, what the case should settle at. What an appropriate plea would be. What a fair plea would be to both sides.

And --

Matt Adams: And as a judge, you're sitting here with these personal beliefs, right? But you can't necessarily change the policy of the office from a co-equal branch of government.

Margaret Foti: No, I cannot. And you know--

Matt Adams: How do you deal with that? How do you deal with that?

Margaret Foti: I usually make my views known, but I understand that I can't change the policy.

I think it comes from the Attorney General and filters on down. I hope I'm not getting myself into trouble, but I am a retired judge. But you know, my view has been, I've always been very open about this, that I think that after motion practice, that's when you really start to understand the merits of the case and what happened in the particular case.

But --



Matt Adams: So we're walking through the bail process. Then we're into this pre-indictment conference process where we're talking and weighing the strengths and the weaknesses of what due process is provided to the defendant.

What would you say the biggest value of that pre-indictment conference is? Because of, we've really done a good job of highlighting the sort of limitations because it's still an early phase of the case. We still have a limit on the facts available to us. And putting that aside, you then have these policies that are creeping in about, well, despite all that, we're going to give you our best offer and it's only gonna get worse from here.

What are the advantages, then, of having these kind of conferences?

Margaret Foti: Well, sometimes the pre-indictment conference is actually very valuable because the parties can assess. These are in less complex cases. The parties can assess where we go from here. And many times a defendant understands, you know, what has occurred and knows the facts, and says yes. Especially if it's an offer of you know, PTI, pre-trial intervention or if it's an offer of probation--

Matt Adams: The diversionary program, for example.

Margaret Foti: A diversionary program where, if you comply with the diversionary program-- which is generally I think a year to two years-- if you comply with the terms of the diversionary program, the arrest is expunged. It's like it never happened.

But generally the compliance involves reporting to your probation officer, things of that nature. Not terribly difficult things to comply with. Although, obviously, it's a drain on the defendant's time, but it's something that they feel is worthwhile so that they can enter a diversionary program.

So there's a real value there. And Matt, my view and the reason the pandemic was also so problematic was you had lawyers appearing via Zoom. And they never really got together face to face. And I think whenever you have a prosecutor and a defense attorney in the room, there's always a potential for progress in the case.

So, uh, the Early Disposition Court, I think, is very valuable. There are many cases disposed of that both sides feel should be disposed of. And then, that does lessen the burden on the system. So, we really do need our EDC Court. It's very, very important.

But for those cases where defense counsel gets frustrated and says, look, I can't really recommend this plea to my client, they can't enter that plea. But there is a true value to Early Disposition Court. And I have seen it in my years as a presiding judge. And I think, again, an overriding value is to get the lawyers together to talk about the case. That is never a waste of time. Never.

Matt Adams: Yeah. And then as we move down the process in terms of the anatomy of the criminal case at the trial level, what comes next? We've sort of had the bail. We've had the arrest, we've had



some of this early disposition case management that affords parties an opportunity in most instances for an exit ramp. But the defendant can choose to go the distance.

Margaret Foti: That's right.

Matt Adams: And how is the system set up at the state level, from your experience, to afford that party the opportunity, the right, to go the distance? Would you say that the vast majority of cases are resolved in that early disposition phase? So they don't get past there. Or would you say that the majority of cases do continue on and the due process that is afforded to an accused continues?

Margaret Foti: I would say that the more serious cases cannot be resolved in Early Disposition Court. And by serious cases, I mean vehicular homicides, murder cases, you know, sexual assault cases. Cases like that are generally not going to be resolved in early disposition.

Matt Adams: How about theft? How about more of what we would commonly refer to as white-collar matters? The cases that involve misappropriation of funds and things of that variety?

Margaret Foti: They have a better chance of being resolved in Early Disposition Court.

Matt Adams: Why so? From your experience.

Margaret Foti: Well, I think if you have a defendant who's maybe going to make restitution, I think that that goes a long way to settling those types of cases. Now, if you're talking about a, you know, a burglary ring, you know, then I don't think those types of cases are going to be resolved as easily in Early Disposition Court. But when you move on then to the post-indictment phase, this now becomes very critical. Because now you appear before the judge who's going to be assigned the case and you have to enter a plea. Uh, and you have your arraignment. And the defendant has to enter a plea.

The prosecutor is required by court rule to extend a written offer to the defendant. And then the defendant can make a counteroffer. But here, I think the arraignment is a really critical time in the case. And I think that because that's the time a defendant really has to be told. They have the court, defense counsel, the prosecutor, the whole group. They have to explain to the defendant what this charge is all about. What are you being charged with? What is your exposure? Where do we go from here? What is --and I, in my experience, I've seen too many defendants who don't understand the process at all. I mean, I've had defendants, post-conviction, lean over to their lawyer and say, can I take the plea deal now?

Matt Adams: Wow.

Margaret Foti: And it's shocking. You know, I'm actually thinking of a specific case. It was a manslaughter case. And the defendant was offered a very favorable plea deal. The plea was rejected. And the defendant went through trial, and there was a conviction. And he leaned over to his attorney and said, can I take the deal now?



And I think defendants have to be aware of what the exposure is, what the charges, what the merits of the case are. Lawyers have got to sit down with their clients and explain the discovery. Because this is the stage, the arraignment stage, is the stage when you start to exchange discovery. The prosecutor turns over the discovery to defendant. Defendant may have exculpatory information that he wants to turn over, he or she wants to turn over, to the prosecutor. This is the time to do that.

And it's also the time to start to think about motions and motion practice. And in my experience, too many times, those issues are kind of put to a later proceeding before the court. I, as a criminal court judge, I wanted to know as soon as possible, what motions we looking at? What's the plea offer? Is there a counter offer?

And I know that motion practice is something, as I've said, that really highlights the issues and the facts. But you need to start thinking as soon as possible as a defense counsel, what motions am I going to file here? And the other thing is another really important thing is am I going to hire an expert? You know, when you have a case where there's an issue of causation, did the alleged criminal act cause the death? Will I need an expert for that. You've got to make a decision as soon as possible as to whether or not you're going to.

And I'll give you another one that comes up all the time: Was my client of sound mind and body when this act was committed? I'm going to need a psychological evaluation, a psychiatric evaluation. If it's a vehicular homicide, what's the cause of the accident? I'm going to need an accident reconstructionist. There are a variety of experts. Are there digital issues? Maybe I need a digital forensic expert.

So, there's a lot riding on these questions. And defense counsel has got to be aware and alert. And start to work as soon as possible to get some of these issues addressed.

Matt Adams: And I want to address a particular issue with you that comes up in around this phase as the parties begin to exchange discovery. And I would say, it may not necessarily be revealed at this time. It may come up down the road a lot more. But it's the question of Brady evidence. And the state in your instance, or the government obligation to turn over exculpatory evidence.

I have in my personal experience, seen a rash, dare I say epidemic, of Brady violations by prosecutors. Some intentional. Some unintentional, just perhaps negligent. How does the trial judge, and in this instance, you, how do you set guard-rails in motion that adequately enforce the obligations under Brady? And at the same time protect defendants from trial by ambush, where these things come out only during the first days of trial, because a witness begins to get examined by this?

My own personal experience with this is a recent case that I've handled, where during the beginning of a trial, it comes out that prosecutors had a secret eleventh hour-- literally at 11 o'clock at night -- conversation with a particular witness where a number of facts came out during that conversation. And it did not get revealed until the trial was well underway and that witness had taken the stand. Let alone the fact that there wasn't production of a report that should have been created when that conversation occurred. And in that instance, the judge, I believe properly, declared a mistrial.



Margaret Foti: Yeah. Yeah. I was--

Matt Adams: How as the court do you get your hands around that?

Margaret Foti: Yeah, I was going to ask you, did you immediately make a motion for a mistrial when that occurred? There's nothing that makes a judge crazier, infuriates a judge, is when something like this happens. So Brady material is derived from the United States Supreme Court case *Brady v. Maryland*, and it established a rule that the prosecution has a constitutional duty of due process to disclose material evidence favorable to a defendant. Now, the evidence must be material to the issue and not merely cumulative or impeaching or contradictory. Discovered since the trial and not discoverable by reasonable diligence beforehand, and the sort that would probably change the jury's verdict.

So that's, that's essentially the black-letter definition of Brady material.

Matt Adams: Is that the only way you can do it though? Is there guard-rails you can put into this process, the anatomy, as the case builds up to say, all right, here's your opportunity for *Brady*. Is there ways that you can influence this process before the end where you have to make some sort of dramatic pronouncement?

Margaret Foti: Absolutely, absolutely. Because first of all, prosecutors know this rule. They're very well aware of the rule. And from the moment of arraignment, a judge is talking about discovery. Have you turned over the discovery? A lot of times the prosecutor's office says, you know, our file is in our office. Defense counsel is welcome to come in and look at every piece of paper in that file.

Now, if the file is voluminous, then obviously there are some things in that file that neither side is ever going to use or look at because it's not relevant evidence. But the issue of discovery is tantamount. It's from the very beginning of the case. And prosecutors know that they have a constitutional obligation to turn over exculpatory information.

They know that they have an ongoing duty to turn over discovery, relevant discovery. And the judge can emphasize that at every step in the proceeding. And if they don't, then we're going to have a mistrial or we're going to have a dismissal. But the answer to your question, Matt, is other than the judge knowing every piece of paper that's in that file, or every piece of evidence, which we can't, we can emphasize the importance of a good, thorough discovery process. Discovery is the whole key to these cases. And if people don't take, if the prosecutor does not take discovery seriously, they're going to meet with very difficult ramifications throughout the case. And I know every one of our criminal judges in Bergen County is very attuned to this issue.

Matt Adams: And if you don't comply, there should be a sanction that is capable of having a deterrent effect, right?

Margaret Foti: I absolutely agree. very important issue.



Matt Adams: So, as we work down the continuum, this anatomy of a criminal case that we're chatting about, and I'm certainly trying to challenge you on some of the issues in terms of that that I've seen come up.

What happens next? There's a period at which this motion practice either happens or it doesn't. And the stage is then really set for trial. And I've always thought in terms of the trial as being, like, the Super Bowl of the criminal justice process. And talk to me from the judge's vantage point. Because a lot of the work of the judge is done before the trial. In my view, the lawyers are really putting on the show at the trial. That's their Super Bowl. But the judge has critical roles in making determinations as it as issues come up.

But more importantly, the judge is responsible for that jury. Talk about some issues that have come up with juries that you've had to appreciate on the fly and to take steps to remedy in the course of your time on the bench.

Margaret Foti: Well, first of all, Matt, you are absolutely correct. And by the way, we never want to minimize the importance of motion practice. It is extraordinarily important and it can make or break a criminal trial. Because if that statement by the defendant is suppressed, if that piece of evidence is suppressed, that can be the difference between having a trial and having a dismissal.

So, the motion practice is extraordinarily important. I mean, one example that comes to mind is-- and this happens, this has happened in some of my cases-- where a defendant is a Spanish-speaking defendant. And, an English-speaking law enforcement officer Mirandizes the defendant, and then starts to interview the defendant. And the defendant maybe understands half of what they're hearing. And then, of course, the prosecutor's office then tries to introduce the statement. And that has to be thrown out.

Or the defendant who, for one reason or another, had to go to the hospital. There was an altercation. They had to go to the hospital. And then the defendant needed to have stitches or some sort of operation and is anesthetized. And then the police come and they Mirandize the defendant, and they interview the defendant, but the defendant was half asleep at the time. Those statements get thrown out. So, you know, the motion practice is extraordinarily important.

But now, getting past the motion practice and now we're ready for trial. Of course, there are many evidentiary issues that come up even at the eve of trial. So, you know a judge is always on edge, so to speak, waiting for that next motion filed by the defendant or the prosecutor on a particular issue that's going to come up at trial. So we have to be aware of those.

Sometimes they happen in the middle of trial. And we have to send the jury home, do some research, have the attorneys file briefs, perhaps. And then make those decisions during the trial.

But let's talk about the jury for a minute, because that's an extraordinarily important stage in the proceedings.

Matt Adams: One of the key protections on the presumption of innocence is the right to that jury.

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Margaret Foti: Yeah, that's correct. That is an absolute constitutional right. You have a right to a jury trial. And the thing about the jury trial: New Jersey is very meticulous about jury questionnaires and supplemental voir dire questions. So the jury questionnaires are very detailed. And they emphasize that a defendant is presumed innocent until proven guilty, that the state has the burden to prove beyond a reasonable doubt each and every element of the offense charged. And then the judge defines beyond a reasonable doubt to the jury.

The defendant does not have to testify, and in fact, if the defendant elects not to testify, that fact cannot be used against him or her at trial. The jury cannot consider the fact that the defendant did not testify.

There are detailed instructions that New Jersey provides with regard to implicit bias. We ask this question of the jurors: Just because a defendant has been arrested and is indicted, do you believe that the defendant must have done something wrong? And if the answer to that is yes, where there's smoke, there's fire, that juror does not make our jury. They're gone. I don't even think the defense counsel objects faster than the judge does. That juror is gone.

So there are a variety of questions in the questionnaire. Now, interesting, I've had lawyers submit supplemental jury questions that are, I think, excellent. There was one, we had a defendant who had a particular hairstyle. And the defense counsel wanted to ask the jurors, if you wear your hair in a particular way that may be different from most people, is that going to concern you? Is that going to prejudice you in any way? We want fair and impartial jurors. And we work very, very hard, the attorneys and the court, we work very hard.

And my own personal procedure or practice during jury selections, I would let defense counsel, if they wanted to, I would let defense counsel ask questions. And there were some lawyers who asked many questions. Now, there's some lawyers who don't want to. There's some defense counsel who don't want to. They want the judge to ask the question because they don't want the jury to think that they're being challenged by the defense counsel. I should also mention to you that --

Matt Adams: You are ahead of your time, Judge, because that's really, that's something that's --

Margaret Foti: Well, now --

Matt Adams: Come into the focus now that you've left the bench.

Margaret Foti: Well, now we have to talk about attorney control of voir dire. And we do have attorney control of voir dire in New Jersey. When I was leaving it was a pilot program. I think that at some point if it's not already been made mandatory it will be made mandatory. And I think the lawyers, for the most part, both sides, both the prosecutors and defense counsel, really like it because they get to ask directly, ask the jurors the direct questions. And they get a feel for the jury, and a feel for what each juror is all about.



So I know when I was the presiding judge on the more complex cases, the defense counsel were a little reluctant to go with the attorney control of voir dire. But I know they have it in New York. And I know that in New Jersey, we will grow into that system, I think.

So the picking of the jury, one of the most important, if not the most important aspect of the criminal trial. And sometimes very tedious, but always very, very important. And I, and it was my personal practice to allow defense counsel, if they wanted, to ask questions, to go ahead and do it directly, or else ask me. We put the juror to the side. And defense counsel would say, Judge, can you ask the juror whatever it would happen to be? And then of course we would bring them back and ask that question. Because the choosing of the jury is an extraordinary measure. And it's extraordinarily important.

Now, you know in New Jersey, and this is kind of an interesting fact, if you go to North Carolina or South Carolina, some of the Southern states, they pick a jury like in a day. We in New Jersey sometimes, if it's a complex case or a murder trial, it might take two to three weeks to pick a jury. But that's okay because the defendant is facing very serious charges, and everyone has to be comfortable. Both sides have to be comfortable with that jury.

Matt Adams: Would you say that the selection of an impartial and fair jury is the most significant responsibility of a trial-level judge?

Margaret Foti: Yes. That and sentencings. I've had many defense counsel--

Matt Adams: That's where we're going next.

Margaret Foti: I know. I've had many defense counsel say to me, that's the trickiest part of any job that the judge does, the sentencing. But the picking of the jury... these jurors have to be fair and impartial. And if they're not, the defendant is not going to get a fair trial.

You know, I've often heard, the defendant is not entitled to a perfect trial, but a defendant is entitled to a fair trial. And those jurors have got to be fair and impartial. So, it is extraordinarily important. And I mean, look, you see it in some of the major cases, you see, you know, juror experts. People sitting next defense counsel and counseling on selection of the jury.

That's how important it is really. So--

Matt Adams: And we've actually taken a dive into that jury selection expert with one of our episodes here on "The Presumption of Innocence" past episodes.

So let's move on to sentencing. The trial is complete, or there has been a disposition by plea. And then the focus turns back on the judge to root out the appropriate punishment.

What's your feelings on general deterrence versus specific deterrence?



Margaret Foti: Well, that's that's a very complex question you've just asked me. You know, we have factors that we use in New Jersey, as you know, when we are weighing-- they're called aggravating and mitigating factors. And, the judge has got to weigh the aggravating and mitigating factors, and then has got to sentence the defendant accordingly.

You can, I mean, I know you've had guests on who have actually served prison sentences. Have you asked them that question? You know, there certainly is, there has to be an element of deterrence. And I think that's aggravating factor nine. That's the one of the most important factors that we consider. That if serious crimes are committed, there has to be a message sent that these crimes can't be tolerated in our society, in a civil society. And that is certainly a factor that judges must weigh. That's the general deterrence.

The specific deterrence, you've got to get a feel for the defendant. And this is where defense counsel can be very helpful as well. If defense counsel has the defendant evaluated, or defense counsel has people coming and speaking on behalf of the defendant so that the judge gets a feel for the defendant and a feel for the defendant's life, and where he or she is, and where he or she wants to go. That's important for a judge to know.

So, you know, we have a certain amount of leeway with sentencing. But there are certain serious crimes where a judge has no leeway. And if the conviction comes in on a felony murder, for example, it's 30 years minimum. And that's where the judge has no real flexibility. But where a judge has flexibility, the more we know about that defendant -- and the crime, because you have to look at the crime as well. The more we know, the better we'll be able to make a just sentence.

I have to tell you, I have never sentenced a defendant to state prison where I have not felt. My feeling is always what could this person have done in their life that might have changed the direction and not had him or her in this position at this time before me. I have never ever felt anything but, you know, real concern. Believe me, it's never something a judge wants to do, send somebody to state prison.

Matt Adams: Let me put you on the spot for a second.

Margaret Foti: Sure.

Matt Adams: Can you think of the most influential piece of mitigation evidence that was ever presented to you at sentence that had a real determining factor on the way that you ultimately sentenced that particular defendant?

Margaret Foti: You know, it's, going to sound like a little bit of a cliché, but remorse is really important. You know, remorse, where the person really has an appreciation for what occurred, has an appreciation for the impact on the victim and or the victim's family.

I can tell you, I had a case once where, it was a domestic violence case and it was a third-degree crime. And the defendant was convicted of third-degree crime and now it was time for me to sentence him. I'm not going with a heavy sex assault or murder case here. I'm going with a domestic



violence, third-degree. It was an assault. And the defendant, I could have either sentenced him to probation or 364 days in the Bergen County jail.

And he stood up before me and I was expecting him to say, you know, I feel terrible for what occurred. This woman was you know, love of my life and I just flew off the handle and I 'm terribly sorry and I've apologized to her. He basically stood up and said to me, I didn't do anything wrong. Anything she got, she deserved. And he went on and on. And while I really wanted to sentence him to probation, I sentenced him to 364 in the Bergen County jail because there was no remorse. So, I mean, remorse is important.

I also think there are times when you can present a psychological evaluation that gives a court an understanding of the defendant and what the defendant is struggling with. And I think that's obviously not an insanity case. That's just a, you know, troubled life, this type of thing. Although the courts, the Appellate Division, tells us we have to focus on the crime, more than the personality, of the defendant. But, you know, sometimes you have statutory mitigating factors. And you can also find mitigating factors that are not statutory. Like, for example, the person worked, you know, in community service all their life. They gave of their time. This was an anomaly. There are so many ways to present it. But there are many, many things defense counsel can do to try to get the least severe sentence that they can.

Matt Adams: Well, we've been walking through the anatomy of a criminal case at the trial level in state court with retired New Jersey Superior Court Presiding Criminal Judge Margaret Foti. And I would be remiss if I never went down the path of a little bit of a case study, Judge. And that is a case where, in my opinion, the judge's role in preserving, defending, protecting that presumption of innocence was on full display. And that was a matter I was involved in with you.

Margaret Foti: Yes.

Matt Adams: And the basic facts were as follows. In the course of a criminal investigation, a subpoena was issued by a prosecutor to essentially pierce the attorney-client privilege, the constitutionally protected privilege that exists between attorney and client communications.

And it was certainly an aggressive move. It was certainly a move that would have had reaching implications. But you are tasked with determining the extent to which, if at all, those communications would be pierced based on the facts at hand. And I'll let you tell the story, because I think you could do it justice. I lived it from the other side, behind counsel table in a capacity representing the interests of the defense bar.

But this was truly, in my view, a monumental decision and an exercise in the checking forces that the court must sometimes exercise to ensure the presumption of innocence.

So tell us about the way that you viewed that case.



Margaret Foti: Well, you know, Matt, I knew that the motion that you made was very important. And I'll, I'll go through the parties because I think it's worth mentioning. But I knew that the motion was extraordinarily important.

But I don't think I had the fullest appreciation of how important it was until I started to read the papers. And also, now we're going a little bit beyond where I've made the decision, when I heard your podcast with Joe Hayden, very prominent defense attorney with Pashman Stein, that your association was actually formed on the principle of the importance of the attorney-client privilege.

And listening to that podcast, I realized that it was the moment when they were seeking testimony from an attorney against their client that the giants of your profession decided, hey, it's time to get together and form an association. That was a very fascinating podcast. And I enjoyed listening to Joe Hayden. I thought he did an excellent job, as did you, in asking the questions.

But our case, which was entitled *In Re Belizaire*, involved, uh, Prosecutor's Office, Brian Neary for the defendant, Roydell Cameron. Ray Brown and, uh, Rachel Simon for the respondent, Landry Belizaire, yourself and, uh, Ms. Koblitz Kingman for the Association of Criminal Defense Lawyers of New Jersey. Alan Silber and Dylan McGuire for the National Association of Criminal Defense Lawyers. So the amici in that case were significant players in the defense bar.

And I remember, we were at some sort of convention and you walked up to me and said, I'm going to file a motion before you. And I said, go ahead. That was basically, yeah, I said, go ahead, file your motion. But I received, I think the motion was initially filed before our assignment judge, Bonnie Mizdol. And she sent it over to me and said, I think you need to hear this motion.

And, the motion was really an interesting motion. I mean, you highlighted the issue. The defendant had allegedly committed a crime, like, back in 2007, I believe. And so there was this outstanding warrant, and he happened to come into New Jersey. And, Mr. Belizaire was his attorney and had communicated with the prosecutor's office that he was going to surrender his client particular date and time. And there were many exchanges of phone calls and emails. Some of which the prosecutor's office was copied on some of them. And those, of course, the prosecutor's office had. But there were some that were not. And the prosecutor asked multiple detailed questions, but was seeking to have Mr. Belizaire testify before the grand jury. And I should also say that the defendant was supposed to surrender, but was actually apprehended at JFK airport, boarding a plane to Jamaica. So he, there was a warrant for his arrest and the Port Authority police picked him up on the plane going to Jamaica. He never made it to Jamaica.

But he came back and then the prosecutor's office wanted Mr. Belizaire to testify in the grand jury about some of the communications, with Mr. Cameron, the defendant who was taken off the plane.

Matt Adams: Against his own client.

Margaret Foti: Yes, of course. Landry Belizaire represented Mr. Cameron at that point, until this motion was filed. And then Brian Neary stepped in. So, yes, Belizaire was the attorney for Mr. Cameron.

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So, of course, there was this extensive motion practice. Lots and lots of briefs filed, lots of replies, lots for me to read. And, I should mention as well, and I think you mentioned it in the speech when you accepted your presidency to your organization, that the courtroom was filled with defense counsel. I mean, my courtroom, which was fairly large, in Bergen County. I think every seat in the house was filled and it was a defense bar. And that really put the exclamation point on how important this issue was and is. It goes right to the heart of the Sixth Amendment. So, I did make a determination, because there is a fraud exception there's a crime fraud exception. And I did make a finding that the communications between Belizaire and Cameron did fall within the crime fraud exception. But there was an RPC rule, which provided that the prosecutor had to find alternative means of obtaining that information before an attorney could be called to testify against his or her client. And I found that the prosecutor's office had not done its job in trying to find those alternative means of discovering the same information as Mr. Belizaire could have given before the grand jury. So I quashed the subpoena.

And then, of course, the ultimate result, I believe the defendant pled guilty. There was never any other litigation involving this question. But it was probably the most interesting motion that I had while presiding judge, and extraordinarily important.

Matt Adams: Well, I can tell you from the defense bar's perspective of somebody that was involved in that case and has since celebrated the decision. You know, at the end of the day, a lot of us defense lawyers think that sometimes we're held to a different standard than prosecutors. And that was a reassurance from the bench that the standards apply to all of us. And that, in fact the prosecutors, in some instance, have even a higher standard.

Margaret Foti: And I might add, Matt, that the prosecutor did appeal my decision and the Appellate Division let Judge Foti's decision stand. And then I think it all went away. But my recollection at the time was this issue was pending in a couple of counties in New Jersey. I think Essex and maybe Monmouth. I don't know what happened in those cases. But I felt very comfortable with my decision in that case.

Matt Adams: Yeah, ironically enough, it is an issue that is litigated more than you'd think. When the privilege is, there's attempts on piercing it. And as you said, you aptly pointed out that we had Joe Hayden on this program about the formation of the ACDL New Jersey as the local affiliate of the National Association of Criminal Defense lawyers. Somebody from the NACDL's Fourth Amendment Center. These organizations were formed for purposes of ensuring that the protections that exist under the Constitution to protect that presumption of innocence are playing out every day in courtrooms across the country the way they're supposed to.

And that case was really, in my mind, a prime example of what happens when things go the way they're supposed to. It doesn't always happen that way. And sometimes it takes more than a trial-level decision to find it in the favor of what I believe is the right side of things. But, in that instance, you were the judge sitting in and responsible for that decision. And I think it reinforces the workhorse nature of the trial court. Because over the course of the last hour or so, we've been talking about the various things from bail, from arrest to sentencing. Arrest, bail and everything else in



between, all the way to sentencing. And I, think there's really never a dull moment in the life of a trial judge.

You are consistently called upon to rule in ways that protect the presumption of innocence, protect the way that our system is supposed to operate. And for that, I think, the role of the trial judge can't be appreciated enough. Because yeah, sure we have appellate courts that can make these issues right. But our system, when it's operating at true efficiency and the way it's supposed to, with constitutional norms being defended, it's these trial court decisions that reinforce it. And I don't think that can be understated enough.

In our waning moments, Judge Foti, I want to let you take an opportunity to talk about what you're doing these days. Because, you've left the bench and you've taken a pivot in what you're up to. So tell us about it.

Margaret Foti: Well, yes, Matt, after I retired, I did spend quite a bit of time thinking about what I really wanted to do next. And I didn't go the traditional route of the law firm. I actually decided, to go with a accounting and consulting firm, Withum Smith+Brown. And I know you're familiar with that firm because you use some of our really excellent professionals on some of your cases.

And, I think it was a good decision. A wise decision. I am there to assist our professionals at Withum Smith+Brown with providing services for our clients. I certainly am very active in speaking with all of our accountants. I recently did a lecture on expert testimony and the principles of expert testimony in the courtroom setting.

And I'm working with our sports and entertainment group on a program where we can address domestic violence issues among professional athletes to try to educate them and perhaps prevent crises from occurring. We also are very focused on financial literacy among professional athletes. So, these are just some of the things.

And of course, we have a very robust investigations and digital forensic accounting group. And I've been helping the digital forensic people get their good word out for all of the services they can provide. As well as, of course, our very well-known accounting and investigations group who have done outstanding work throughout the state for many, many years.

So, I'm excited about being at Withum. Couldn't be a finer group of people. And of course, I get to do things like this, which I couldn't have done as a sitting judge. So, it's been a great experience so far. I'm enjoying it.

Matt Adams: Well, Judge Foit, thank you so much for your perspectives today. I hope our listeners share my view that we've truly gotten an opportunity to sort of look behind the bench a bit into judicial decision making. That's all the time we have on this episode of "The Presumption of Innocence." But until next time, I'm Matt Adams. We'll see you then. Take care.