NACJ

Nevada Attorneys for Criminal Justice

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Chief Justice Michael Douglas
Nevada Supreme Court
201 South Carson Street
Carson City, NV 89701-4702

RE: ADKT 424

Dear Chief Justice Douglas :

On behalf of Nevada Attorneys for Criminal Justice (NACJ), I am writing to express the grave concerns our members have with the changes ADKT 424 threatens to bring to the courtroom, particularly to jury trials. Technology is a wonderful thing if used appropriately, but it also has the potential to cause devastating harm if it is not wisely implemented. While allowing for the "virtual" attendance of wit nesses might initially seem like a good idea, we the members of NACJ are firmly convinced that in a criminal trial setting video feeds are not a viable substitute for live testimony.

NACJ concurs with the analysis of the letter authored by Federal Public Defender Rene Valladares concerning the various potential legal problems with ADTK 424. Simply put, ADKT 424 presents a litigation minefield in relation to the Sixth Amendment Confrontation Clause.

In 1895 the United States Supreme Court opined that one of the fundamental principles of the right to confrontation is to ensure that "... the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of *compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.*"[1] This concept has been embraced in our state time after time, in decision after decision. One need only look as far as the recent decisions in Crawford[2] and Melinda-Diaz[3] to see that this is a concept which the United

[1] Matttox v. U.S., 156 U.S. 237, 242 (1895).
[2] Crawford v. Washington, 541 U.S. 36 (2004).
[3] Melinda-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009)

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States Supreme Court still embraces. In the view of NACJ, any departure from this time honored and time tested necessity for live—face to face—trial testimony represents an unwarranted encroachment upon the rights due the people of the state of Nevada.

Experience has shown that the Sixth Amendment is more than some archaic tome which must give way to new technology. Due process entails the right to face to face confrontation because it is face to face confrontation that has proven to be the most effective method of getting to the truth. It is easy to be less than truthful behind a person's back, but not so easy when you have to confront them face to face before the inquiring eyes of a jury. Stage fright can be a stern mistress for those who are less than forthright, but the same pressures simply don't exist w hen witnesses are allowed to escape to the comfort of an antiseptic video feed. Live testimony is different.

Anyone who suggests that a video feed could be an adequate substitute for live confrontation is blind to the fundamental truths which play themselves out in daily life. It's the principle wh ich allows the promoters of concerts to charge hundreds of dollars for one time tickets while reusable CDs and DVDs are sold at a tenth the price; it's the reason people fill football stadiums rather than watching the game on TV and why Las Vegas showrooms always have a band and stage: Live is different. This is particularly true when it comes to testimony.

I have read the safeguard provisions of ADKT 424, including proposed Rule 4(1)(a)(1) which requires "a c ase-specific finding that the denial of physical, face-to-face confrontation is necessary to further an important state interest." With all due respect this safeguard is likely to be meaningless in practice because the state always has an important interest in the ability to pursue prosecution.[4] The safeguard proposed is, in essence, not a safeguard at all but rather in invitation to find excuses for not putting live witnesses before a jury. Surely the Confrontation Clause requires more.

At least with respect to the right to trial by jury, ADKT 424 has the potential to create a sea change for the worse---a potentially dangerous departure from the historic principles embodied by the Sixth Amendment. It is based upon the untested premise that a video feed can provide an adequate substitute for live testimony, an untested premise which likely will lead to a substantial amount of Confrontation Clause litigation. Even worse, ADKT 424 as it applies to criminal trials seemingly ignores the very foundation of the Sixth Amendment, to wit: live testimony is

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[4] See, e.g., Juidice v. Vail, 430 U.S. 327, 335, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977) recognizing an important state "inter est in the enforcement of its criminal laws."

fundamentally unique in nature and not subject to simple replacement by anemic substitutes such as ex parte affidavits, hearsay, or video feeds. Any change of this magnitude needs to be fully considered at the onset and implemented slowly—even if ADKT 424 were adopted in other regards, NACJ would ask that it not invade the sanctity of criminal trials until it is proven successful elsewhere.

In closing NACJ would note that the Sixth Amendment is a necessity rather than a luxury and surely there is a better testing ground for "virtual" witness t estimony than at a trial before a jury.

Sincerely,

Scott Coffee, Esq.
President, NACJ

cc: Associate Chief Justice Michael A. Cherry
Associate Chief Justice Nancy M. Saitta
Justice Mark Gibbons
Justice Kristina Pickering
Justice James W. Hardesty
Justice Ron D. Parraguirre