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TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

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

RE: ADKT No. 424

Dear Mr. Chief Justice Douglas:

I am writing in response to this Court's invitation to submit written comments on the proposed amendment of Part IX of the Nevada Supreme Court Rules governing telephonic and audiovisual participation in the Nevada courts. After careful review, I write to express my concern that the proposed amendments do not comport with the Confrontation Clause of the Sixth Amendment.

As you know, our office has a significant habeas practice. Our attorneys handle both capital and non-capital cases originating from the Nevada courts, and see Confrontation Clause issues on a frequent basis. Moreover, our office has extensive experience litigating Confrontation Clause issues before the Ninth Circuit.

This letter outlines the legal and practical issues I believe will arise if this Court passes the amendments as currently drafted. I appreciate the opportunity to present the Court with these concerns, and hope that you will consider them prior to the adoption of any amendments to Part IX.

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TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

11-27069

A. Introduction

This Court is proposing to amend Part IX of the Supreme Court Rules governing appearance by communication equipment. Under ADKT 424, Part IX would be split into two parts. The first, Part IX(A), governs appearances by telephonic transmission equipment. The second, Part IX(B), governs appearances by simultaneous audiovisual transmission equipment.[1]

Under the current version of the Rule, appearance by communication is permitted only in civil cases, and even then, only in certain proceedings. See Part IX, Rule 4(1)(a–g) (listing circumstances in which appearance by communication equipment is allowed) and Rule 4(2) (listing required personal appearances). Personal appearances are always required in "[t]rials and hearings at which witnesses are expected to testify." Id. at (a)(1).

The Court now proposes allowing telephonic and video appearances in criminal cases. Of particular concern to the defense bar is the Court's proposal, under Part IX(B), that witnesses be permitted to make video appearances in virtually every stage of a criminal case, including trials. This proposal will have constitutional and practical consequences the Court should consider before implementing any such changes.

This letter is intended to provide input to this Court regarding the legal and practical complexities inherent in attempting to craft rules governing video appearances in criminal cases which would comport with the Confrontation Clause of the Sixth Amendment. As described below, the rules as envisioned in ADKT 424 are not consistent with the rights guaranteed by the Confrontation Clause. Moreover, the rules create a number of practical questions this Court should consider before adopting ADKT 424.

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[1] For the sake of brevity, this letter will refer to simultaneous audiovisual transmission appearances as "video appearances."

B. The Confrontation Clause and Video Testimony

1. *Maryland v. Craig*

The Sixth Amendment's Confrontation Clause provides a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. This clause "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." Coy v. Iowa, 487 U.S. 1012, 1016 (1988); accord Smith v. State, 111 Nev. 499, 502 (1995). "The central concern of the confrontation clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Maryland v. Craig, 497 U.S. 836, 845 (1990).

Confrontation gives a criminal defendant "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 make look upon him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v. United States, 156 U.S. 237, 242-43 (1895).

Although the Supreme Court has cautioned that the right to face-to-face confrontation is not absolute, see, e.g., Craig, 497 U.S. at 844, its "precedents establish that the Confrontation Clause reflects a *preference* for face-to-face confrontation." Id. at 849 (quotation omitted) (emphasis in original). This preference for face-to-face confrontation gives way only where "considerations of public policy and necessities of the case" so dictate. Id. at 848.

In Craig, the Supreme Court upheld, over a defendant's Sixth Amendment challenge, a Maryland rule of criminal procedure that allowed child victims of abuse to testify by one-way closed circuit television from outside the courtroom. Id. at 858. The Supreme Court approved Maryland's rule, stating: "though we reaffirm the importance of face-to-face confrontation with witnesses appearing at

trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers." The Court held that "[t]he Confrontation Clause reflects a preference for face-to-face confrontation at trial, a preference that must occasionally give way to considerations of public policy and the necessities of the case." Id. at 849. "[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." Id.

Craig introduced a two-prong test for courts to apply in determining whether to encroach on the right to confrontation: (1) necessity: the court must make a case-specific finding that two-way video testimony is necessary to further an important public policy. Id. at 849; see also id. at 855-56; and (2) reliability: the reliability prong is fulfilled when a witness gives his or her statements under oath, is subject to cross-examination, and the jury is able to observe the witness' demeanor. Id. at 851.

2. *Subsequent Interpretations of Craig*

Since Craig, most courts have only modestly expanded the category of "important public policies" which trump a defendant's confrontation right. The mine run of cases simply affirm Craig's pronouncement that a state has an important interest in protecting child witnesses from the trauma of testifying, provided the state makes an adequate showing of necessity in an individual case. See, e.g., Danner v. Motley, 448 F.3d 372, 379-80 (6th Cir. 2006); United States v. Bordeaux, 400 F.3d 548, 553 (8th Cir. 2004); United States v. Moses, 137 F.3d 894, 897-98 (6th Cir. 1998); United States v. Quintero, 21 F.3d 885, 893-94 (9th Cir. 1994); United States v. Carrier, 9 F.3d 867 (10th Cir. 1993).

Other courts have expanded the reach of Craig to cases not involving child witnesses. See United States v. Abu Ali, 528 F.3d 210, 241 (4th Cir. 2008) (district court properly found necessity existed to perform depositions of two witnesses in Saudi Arabia via a live, two-way video link where

the Saudi government would not permit the witnesses to travel and defendant could not travel to Saudi Arabia for reasons of national security); see also Horn v. Quarterman, 508 F.3d 306, 320 (5th Cir. 2007) (two-way video testimony did not violate Confrontation Clause where witness had terminal liver cancer and was medically unable to travel); United States v. Gigante, 166 F.3d 75, 79 (2d Cir. 1999) (permitting two-way video testimony of a key prosecution witness too sick to travel); People v. Wrotten, 923 N.E.2d 1099, 1103 (2009) (same); but see United States v. Turning Bear, 357 F.3d 730, 736 (8th Cir. 2004) (child witness's fear of trial participants and being in a large courtroom was inadequate to support a finding of necessity for two-way video testimony); and United States v. Jacobs, 97 F.3d 275, 281-82 (8th Cir. 1996) (district court committed error by permitting cross-examination of a pregnant witness via telephone without identifying the important state interest and hearing evidence to determine specific necessities that justified abridgement of the defendant's right to confrontation).

3. *The Limitations of Simultaneous Audiovisual Testimony*

Notwithstanding the above-mentioned cases, many courts—including the Supreme Court—have expressed a strong reluctance to allow more widespread use of video testimony than is currently permitted under Craig. In 2002, the Advisory Committee on the Criminal Rules suggested a revision to Federal Rule of Criminal Procedure 26 that would have allowed testimony by two-way video conference.[2] The Supreme Court rejected this proposed rule change. Justice Scalia filed a statement

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[2] The proposed amendment to F. R. Crim. P. 26 would have permitted video testimony with little restriction:

> *b) Transmitting Testimony from a Different Location.* In the interest of justice, the court may authorize contemporaneous, two-way video presentation in open court of testimony from a witness who is at a different location if:
>
> (1) the requesting party establishes exceptional circumstances for such transmission;
> (2) appropriate safeguards for the transmission are used; and
> (3) the witness is unavailable within the meaning of Federal Rule of Evidence

explaining that he believed the proposed revision to Fed. R. Crim. P. 26 was "of dubious validity under the Confrontation Clause." Order of the Supreme Court, 207 F.R.D. 89, 93 (2002).

Although Justice Scalia acknowledged that Craig permits testimony via video transmission"where there has been a 'case-specific finding' that it is 'necessary to further an important public policy,'" he noted that video testimony could never supplant live, in-person testimony:

> As we made clear in Craig, a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations *in the defendant's presence*—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image. Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.

Id. at 93-94 (citing Craig, 497 U.S. at 846-47, 850, 857-58) (emphasis in original).

The Eighth Circuit has echoed the concerns of Justice Scalia, holding that "'confrontation' via a two-way closed circuit television is not constitutionally equivalent to a face-to-face confrontation." United States v. Bordeaux, 400 F.3d 548, 554 (8th Cir. 2005). "The virtual 'confrontations' offered by closed-circuit televisions fall short of the face-to-face standard because they do not provide the same truth-inducing effect." Id.

More recently, an en banc panel of the Eleventh circuit in United States v. Yates, 438 F.3d 1307 (11th Cir. 2006) (en banc), rejected the proposal that helping a prosecutor make a case or promoting judicial efficiency are the sort of important public policies contemplated by Craig. There, the government moved for an order allowing for the introduction of testimony from two witnesses in Australia through a two-way video conference. Id. at 1310. In support of its motion, the government proffered that the two witnesses were essential to its case-in-chief, but were unwilling to travel to the

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804(a)(4)–(5).
Order of the Supreme Court, 207 F.R.D. at 99.

United States. The district court granted the motion, noting that the government asserted an "important public policy of providing the fact-finder with crucial evidence," and also had an interest in quickly resolving a case. Id.

The Eleventh Circuit reversed, holding that "the prosecutor's need for...video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh [defendants'] rights to confront their accusers face-to-face." Id. at 1316. "The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation....The Sixth Amendment's guarantee of the right to confront one's accuser is most certainly compromised when the confrontation occurs through an electronic medium." Id. At 1315. Accordingly, "the use of remote, closed-circuit television testimony must be carefully circumscribed." Id. (quoting United States v. Gigante, 166 F.3d 75, 80 (2d Cir. 1999)).

4. ***The Law Surrounding the Confrontation Clause is in a State of Flux***

It is also worth noting that the continued viability of the rule established in Craig is questionable given the recent flurry of cases from the Supreme Court which have changed the legal landscape surrounding the Confrontation Clause. Starting with Crawford v. Washington, 541 U.S. 36 (2004), the Court has issued several opinions which have significantly redefined our understanding of a defendant's right to confront his accusers. See, e.g., Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011); Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009); Giles v. California, 554 U.S. 353 (2008); Davis v. Washington, 547 U.S. 813 (2006).

Justice Scalia, who has led the Court in its revision of law surrounding the Confrontation Clause, wrote a dissent in Craig which was highly critical of the Court's rationale that a child witness's unwillingness to testify in the presence of the defendant is a justifiable ground for denying a defendant the right to face-to-face confrontation:

> That unwillingness cannot be a valid excuse under the Confrontation Clause, whose very object is to place the witness under the sometimes hostile glare of the defendant. "That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult." To say that a defendant loses his right to confront a witness when that would cause the witness not to testify is rather like saying that the defendant loses his right to counsel when counsel would save him, or his right to subpoena witnesses when they would exculpate him, or his right not to give testimony against himself when that would prove him guilty.

Craig, 497 U.S. at 866-67 (quoting Coy v. Iowa, 487 U.S. 1012, 1020 (1988)) (Scalia, J., dissenting).

More recently, Justice Sotomayor, in a statement respecting the denial of a petition for writ of certiorari in Wrotten v. New York, 130 S.Ct. 2520 (2010), gave us some indication that the Court is uncertain whether Craig controls in cases which do not arise in the same factual context:

> This case presents the question whether petitioner's rights under the Confrontation Clause of the Sixth Amendment, as applied to the States through the Fourteenth Amendment, were violated when the State introduced testimony at his trial via a two-way video that enabled the testifying witness to see and respond to those in the courtroom, and vice versa. The question is an important one, and it is not obviously answered by Maryland v. Craig, 497 U.S. 836 (1990). We recognized in that case that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial," but "only where denial of such confrontation is necessary to further an important public policy." Id. at 850. In so holding, we emphasized that "[t]he requisite finding of necessity must of course be a case-specific one." Id. at 855. Because the use of video testimony in this case arose in a strikingly different context than in Craig, it is not clear that the latter is controlling.

Wrotten, 130 S.Ct. at 2520.

Although the Court ultimately denied certiorari in Wrotten, Justice Sotomayor's statement, when combined with the recent shifts in confrontation law, indicates the Court is ready to revisit its holding in Craig. Given this backdrop, it seems ill-advised for this Court to now attempt to drastically revise its rules regulating video appearance.

C. The Constitutional and Practical Issues Posed by ADKT 424

1. *Rule 2 – policy favoring simultaneous audiovisual appearances*

The first constitutional issue arises with Part IX(B)'s stated policy interest. Under the current version of Part IX, Rule 2 states that the intent of the rule is to "promote uniformity in the practices and procedures relating to communication equipment appearances in civil cases," and to "improve access" and "reduce litigation costs." The proposed version of Rule 2 simply redacts the words "in civil cases."

In the civil context, a policy of permitting video appearances to promote access and reduce costs is probably constitutionally permissible. When this same policy rationale is applied to criminal trials, however, the Court risks violating the Confrontation Clause of the Sixth Amendment. As the Supreme Court of the United States has consistently stated, face-to-face confrontation is an essential feature of criminal trials. See, e.g., Coy v. Iowa, 487 U.S. 1012, 1016; see also Chavez v. State, 213 P.3d 476, 483 (2009) ("Face-to-face confrontation is the foundation upon which the United States Supreme Court's Confrontation Clause jurisprudence evolved."). The requirement for face-to-face confrontations may give way only when it is necessary to promote an important public policy.

Promoting judicial efficiency at the cost of a defendant's right to confront his accusers is not the sort of important public policy contemplated in Craig. As the Eleventh Circuit noted in Yates, the need for video conference testimony to expeditiously resolve a criminal case is "not the type of public polic[y] that [is] important enough to outweigh [defendants'] rights to confront their accusers face-to-face." Yates, 438 F.3d at 1316. Instead, as the post-Craig cases cited above illustrate, the sort of public policy contemplated in Craig involves a state or government's interest in protecting, on a case-by-case basis, the well-being of a particularly vulnerable witness, such as a child witness in a child abuse case who would be subjected to an identifiable, particularized harm if forced to testify in the same room as a criminal defendant.

In order to survive constitutional scrutiny, Rule 2's policy statement would need to be completely revised to reflect that video appearances are the exception rather than the norm, and should be permitted only after a court has made case specific findings that video testimony is necessary.

Another issue with Rule 2 is the lack of guidance provided to courts regarding how to make specific findings that a video appearance is necessary. A helpful comparison is the Child Victims' and Child Witnesses' Rights Act, 18 U.S.C. § 3509. This Act, which was adopted in direct response to Craig, sets forth specific procedures forth specific findings a court must make in determining whether a child witness may be permitted to make a video appearance. See generally 18 U.S.C. § 3509(b)(1). For the sake of uniformity, Rule 4 should be amended to include similar procedural requirements.

2. *Rule 4 – when personal or video appearances are required*

The next obvious problem is in Rule 4(1), which dictates when personal appearances or video appearances are required. Under ADKT 424's proposed Rule 4(1)(a)(1), video appearances would be permissible in "criminal trials, criminal penalty phases and criminal preliminary hearings providing the court makes a case-specific finding that the denial of physical, face-to-face confrontation is necessary to further an important state interest." The Rule further provides that "in these cases the attorney for the criminal defendant must be present with the defendant in the courtroom." Although the proposed rule parrots half of the two prong test introduced in Craig that video appearances are permitted only when there has been a case-specific finding of an important state interest, it fails to incorporate the required finding of reliability. Under Craig, the reliability of a witness's testimony must be assured before a defendant can be denied physical, face to face confrontation of the witness.

The problem with Rule 4 becomes apparent when one considers a court's discretion to modify Rule 4(1) as outlined in subsection 2. The concern here is three-fold. First, under subsection 2(a), the Rule directs that "in exercising its discretion..., the court should consider the general policy favoring

[video appearances] in civil and criminal cases." Thus, when a court is determining in a criminal case whether there is an "important state interest" necessitating video appearances, the chief principle guiding its analysis will be that it is preferable to permit video appearances. This is directly in conflict with every Confrontation Clause case from the Supreme Court and every other court in the country. The general policy must always favor in-person testimony.

Second, subsection 2 of Rule 4 could impermissibly place the burden on the defendant to prove that his Sixth Amendment interest trumps the state's interest in having a witness appear via video. The proposed rule states that "[u]pon a showing of good cause either by motion of a party or upon its own motion, the court may require a party or witness to appear in person at a proceeding...if the court determines on a hearing-by-hearing basis that a personal appearance would materially assist in the resolution of the particular proceeding or that the quality of the [video appearance] is inadequate."

This proposed Rule subverts Craig and the Confrontation Clause. As drafted, the Rule appears to place the burden on a defendant in criminal case to prove that his right to face-to-face confrontation is significant enough to require personal appearance by an adverse witness. This is completely backward; under Craig—and in all cases involving an encroachment on a defendant's constitutional rights—the burden is always on the state to prove that some important public policy trumps a defendant's confrontation rights. In order to survive constitutional scrutiny, subsection 2(b) of Rule 4 must be revised to reflect that the presumption is to require personal appearances, and that it is the state's burden to overcome that presumption.

Third, the provision in the proposed Rule requiring that defense counsel be present in the courtroom with the defendant is different from the procedure upheld in Craig, as well as subsequent cases and statutes interpreting Craig. In comparison to the Maryland statute at issue in Craig, ADKT 424 falls short of assuring the reliability of testimony given outside the physical presence of the

defendant. Under the Maryland statute, one way reliability was assured was by allowing defense counsel to be in the room with the child witness when the child testified by closed circuit televison. Craig, 497 U.S. at 841. The rule also specified the persons that were allowed in the room when the child testified. Id. This prevented the witness from being coached or otherwise inappropriately assisted during questioning.

Echoing Craig, 18 U.S.C. § 3509(b)(1)(D) requires that if a court orders the taking of testimony by television, "the attorney for the Government and an attorney for the defendant...shall be present in a room outside the courtroom with the child." Similarly, in United States v. Abu Ali, 528 F.3d 210 (4th Cir. 2008), the Fourth Circuit found no Craig violation in the video deposition of two witnesses in Saudi Arabia where two defense attorneys, including the lead defense counsel, attended the depositions. See id. at 239, 241.

By comparison, ADKT 424's proposed Rule 4(1)(a)(2) arguably forbids defense counsel from being in the same room as the testifying witness because it requires defense counsel to be in the courtroom with the defendant. Additionally, the proposed rule makes no attempt to regulate the persons that may be in the room with the defendant testifying outside the presence of the defendant, to regulate or discern what documents the witness may have in his possession while testifying, or any other issues concerning the remote location from where the witness may testify.

The problems that are likely to arise without any specific guidelines regulating the manner in which testimony may be given from a remote location are illustrated in United States v. Shabazz, 52 M.J. 585, 594 (N-M.C.C.A. 1999). In Shabazz, the defendant alleged a witness had been coached during her testimony via two-way audiovisual transmission.[3] The record indicated that another voice

[3]The court referred to it as Video Teleconference Testimony (VTC).

was heard repeating the questions of counsel. Id. The court reversed the defendant's conviction pursuant to Craig. It reasoned that the defendant's right to confrontation was violated due to the trial judge's failure to assure the witness's testimony via audiovisual transmission was reliable. Id.

Even the trial judge in Shabazz who had presided over the video testimony acknowledged the lack of an established protocol affected the reliability of the witness's testimony:

> "I believe that this case points out the difficulty associated [with] video teleconference site. And when I say that I'm making reference to my responsibility to control the environment or the atmosphere at both ends. With hindsight, I now believe that the better practice to follow is to have all the parties that were present within the room at both locations identify themselves on camera and state their purpose for being there. Because of the difficulty in trying to control a proceeding at a distant location, it might be advisable to have another with and the need to control the proceedings at both ends of the VTC or Judge Advocate present at the distant site to observe the proceedings at the location to ensure that nothing improper occurs and that can testify, if need be, should there be any questions or challenge to the proceedings at a later time."

Id. at 594, n.12.

There are several other practical limitations which could possibly effect the reliability of video testimony. The proposed rule is silent on how examinations of witnesses through traditional means which would normally be employed at a physical face-to-face examination will be performed via two-way audiovisual transmissions. For example, the rule does not contain guidelines for how counsel may ask witnesses to refer to documents, reports, or physical evidence. The rule is silent as to how counsel may ask the witnesses to refer to diagrams, maps, or other demonstrative evidence. The rule is also silent as to how counsel may refresh the recollection or impeach a witness who testifies from a remote location. Additionally, the rule is silent as to if or how witnesses will be able to make identifications of the defendant. This proposed rule does not meet the requirements of Craig without specific guidelines regarding the examination of a witness testifying from a remote location. As suggested by the court in Shabazz, such guidelines are necessary to ensure testimony via two-way audiovisual

transmission is reliable.

D. ADKT 424 Must Be Further Researched To Determine If Any Issues Regarding Separation of Powers Exist.

The proposed revision of Part IX as it relates to criminal proceedings raises possible issues regarding separation of powers. This rule should not be passed until there is a full opportunity to research these issues in depth. "The judiciary has the inherent power to govern its own procedures; and that power includes the right to adopt and promulgate rules of procedure." Whitlock v. Salmon, 104 Nev. 24, 26, 752 P.2d 210, 211 (1988). "Although such rules may not conflict with the state constitution or abridge, enlarge or modify any substantive right, the authority of the judiciary to promulgate procedural rules is independent of legislative power, and may not be diminished or compromised by the legislature." State v. Connery, 99 Nev. 342, 345 (Nev. 1983) (internal citations omitted). When a rule of procedure is promulgated in conflict with a pre-existing procedural statute, the rule supersedes the statute and controls. Id.

In Connery, this Court held its rule governing the time to file a notice of appeal (NRAP 4(b)), superseded a coinciding statute. Id. at 345-46. This Court applied the principles above and reasoned that while the right to appeal is substantive, the manner in which the appeal is taken is a matter of procedure. Id. at 345. Therefore, this Court had the inherent authority to create a rule governing its own procedures despite the existence of a statute. Id.

Under the principles discussed in Connery, it is not clear whether the proposed rule presents a separation of powers problem. Unlike the timing for taking an appeal, ADKT 424 is not unequivocally a procedural rule. As applied to criminal proceedings, especially criminal trials and preliminary hearings, ADKT 424's proposed Rules 2 and 4 involve the defendant's right to confrontation. Therefore, the Court's power is limited in the sense that it cannot pass this rule if it abridges, enlarges, or modifies

the right to confrontation.

The proposed rule arguably abridges and modifies the defendant's right to confrontation. As explained above, Proposed Rule 2 and 4(2)(b) would modify the Constitutional preference for physical face to face confrontation in exchange for testimony via two way audiovisual transmission. Furthermore, it would place the burden on the defendant to prove his Sixth Amendment interest trumps the state's interest in having a witness appear via video.

The proposed rule may also abrogate a defendant's right to physical face to face confrontation under Nevada law. Nevada already has a legislative scheme that allows for testimony via audiovisual transmission at trial and preliminary hearings in specific situations. See NRS 50.500-50.620 (Uniform Child Witness Testimony By Alternative Methods Act); NRS 50.330 (allowing certain experts to testify through use of audiovisual transmission); NRS 171.1975 (allowing witnesses to testify via audiovisual transmission at a preliminary hearing if they reside 500 miles away or unable to attend due to a medical condition.) The fact that the denial of physical face to face confrontation is only provided for in these very limited circumstances is evidence that there is a strong preference for physical face-to-face confrontation. The proposed rule would allow the denial of face to face confrontation in many more cases than is already provided for by statute.

The proposed rule also undermines the rights granted to a defendant under Nev. Rev. Stat. § 171.1975, which provides that a witness may only testify at a preliminary hearing via audiovisual transmission if the witness resides more than 500 miles away or is unable to attend due to a medical condition. The proposed rule also denies the defendant many of the safeguards granted in the statute. For instance, pursuant to § 171.1975, a witness testifying via audiovisual transmission could not be

asked to identify the defendant,[4] a certified videographer needs to be in the presence of the witness[5], the witness can not have materials to assist in his or her testimony[6], and the testimony of the witness cannot be used at trial in lieu of direct testimony.[7] By comparison, if a witness testified via audiovisual transmission at a preliminary hearing under the proposed rule, there is nothing which would prevent the use of that testimony at trial in lieu of direct testimony. This would certainly be an abrogation of the defendant's right to confrontation under current Nevada law.

The proposed rule raises real separation of powers concerns because it does not exclusively concern procedural matters such as the timing of filings with the Court. It affects a defendant's right to confrontation. This Court should amend the rule to be more consistent with the existing statutes regarding the use of video appearances. A rule which is compatible with existing law runs less of a risk of abrogating, or undermining the defendant's right to confrontation under the Sixth Amendment.

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[4] See Nev. Rev. Stat. § 171.1975(4)(b)

[5] Id. at § 171.1975(4)(a)(1)

[6] Id.

[7] Id. at § 171.1975(4)(e)

E. Conclusion

The proposed amendments to Part IX of the Nevada Supreme Court Rules violate the Confrontation Clause of Sixth Amendment. Based on the concerns outlined above, I strongly urge the Court to not adopt the amendments as currently drafted.

Thank you again for the opportunity to address you regarding this important matter.

Sincerely,

RENE L. VALLADARES
Federal Public Defender
District of Nevada

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