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AMERICAN CIVIL LIBERTIES UNION OF ALASKA FOUNDATION
1057 W. Fireweed, Suite 207
Anchorage, AK 99503
(907) 258-0044
(907) 258-0288 (fax)
WWW.AKCLU.ORG

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STUDENT ADVISORS

The Honorable Bill Stoltze, Co-Chair
The Honorable Bill Thomas, Co-Chair
House Finance Committee
Alaska State House of Representatives
State Capitol
Juneau, AK 99801
via email: Representative_Bill_Stoltze@legis.state.ak.us
Representative_Bill_Thomas@legis.state.ak.us

Re: HB 359: Video Testimony and Sex Offender Registration
ACLU Review of Legal Issues

Dear Co-Chairs Stoltze and Thomas:

Thank you for the opportunity to provide written testimony with respect to House Bill 359, which — amongst other provisions — permits judicial testimony by video conference.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout Alaska who seek to preserve and expand the individual freedoms and civil liberties guaranteed by the United States and Alaska Constitutions. In that context, we wish to advise you of constitutional and policy issues with sections 16 and 24 of this proposed legislation, and the expense the state is likely to incur in defending against multiple litigations, which would be avoided with careful redrafting of the bill.

Section 16 Unconstitutionally Violates the Confrontation Clauses

If enacted, Section 16 of HB 359 would permit, in the context of determining if a criminal defendant is mentally competent to stand trial, a witness, "including the psychiatrist or psychologist who examined the defendant," who "is in a place from which people customarily travel by air to the court,"

to "testify concerning the competency of the defendant by contemporaneous two-way video conference[.]" **A court would likely rule that this provision violates the Confrontation Clauses of the federal and Alaska Constitutions.** U.S. Const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"); Alaska Const. Art. I, § 11 ("In all criminal prosecutions, the accused shall have the right . . . to be confronted with the witnesses against him"). **Passage – as drafted – would almost certainly result in individual challenges by criminal defendants, entangling the state in unnecessary litigation, as well as opening the state to a facial constitutional challenge.**

The federal Confrontation Clause's "right to confront one's accusers is a concept that dates back to Roman times." *Crawford v. Washington*, 541 U.S. 36, 43 (2004). It is a "bedrock procedural guarantee" that "applies to both federal and state prosecutions." *Id.* at 42; *see Lemon v. State*, 514 P.2d 1151 (Alaska 1973).

This essential right serves four purposes: first, it "insures that the witness will give his statements under oath [by] impressing him with the seriousness of the matter," *Maryland v. Craig*, 497 U.S. 836, 846 (1990) (internal quotation omitted); second, it "ensur[es] that evidence admitted against an accused is reliable" by "forc[ing] the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth," *id.* (internal quotation omitted); third, it "permits the jury . . . to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility," *id.* (internal quotation omitted); and fourth, it has a "strong symbolic purpose" of assuring everyone that the prosecution is fair, *id.* at 847. Confrontation "may confound and undo the false accuser, or reveal the child coached by a malevolent adult." *Id.* at 846–47 (internal quotation omitted).

Face-to-face confrontation is "the core of the values furthered by the Confrontation Clause," *id.* at 847 (internal quotation omitted) and "[t]he prosecution *must* produce . . . witnesses . . . against the defendant," *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 2534 (2009) (emphasis in original). The face-to-face confrontation may be denied only if, after a fact-based, "case-specific" inquiry, *Craig*, 497 U.S. at 855, a court determines that "denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured," *id.* at 850.

The "necessary to further an important public policy" prong is not easily satisfied. While juvenile victims of sexual violence may be exempted from personally confronting the accused, the denial of face-to-face confrontation is only justified if "it is the presence of the defendant that causes the trauma." *Id.* at 856. But, the desire to have the child witness avoid "courtroom trauma generally" is insufficient to deny face-to-face confrontation "because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present." *Id.* And, the court must determine that "the emotional distress . . . is more than *de minimis*, *i.e.*, more than mere nervousness or excitement or some reluctance to testify." *Id.* (internal quotation omitted);

Blume v. State, 797 P.2d 664, 674 (Alaska Ct. App. 1990). Simple need for a witness's testimony,[1] expediency,[2] efficiency,[3] security,[4] "convenience and cost-saving,"[5] and a desire not to leave a severely ill, elderly spouse's side[6] do not satisfy *Craig*'s important public policy test nor justify avoiding face-to-face in-person confrontation.[7]

While no court has squarely addressed if "the [federal] Confrontation Clause applies to pretrial competency hearings," *United States v. Hamilton*, 107 F.3d 499, 504 (7th Cir. 1997), such as those in Alaska Stat. § 12.47.100, an Alaska court might hold that the federal and state Confrontation Clauses do. West Virginia holds that a defendant is entitled to face-to-face confrontation in pretrial hearings to determine whether to transfer his case from juvenile to criminal court, *State v. Gary F.*, 432 S.E.2d 793, 800 (W. Va. 1993), and Pennsylvania applies the Confrontation Clauses to pretrial suppression hearings, *Commonwealth v. Atkinson*, 987 A.2d 743, 746 (Pa. Super. Ct. 2009).

A competency hearing is an important part of a criminal prosecution, on which vital interests — whether a defendant will be tried and punished — turn. In light of its gravity, constitutional protections that exist during the criminal trial, such as the Fifth Amendment's freedom from self-incrimination[8] and the Sixth Amendment's right to counsel,[9] equally apply to competency hearings. *Estelle v. Smith*, 451 U.S. 454, 468–69 (1981).[10] The hearsay rule also applies: hearsay testimony is constitutionally insufficient to find a defendant competent. *Pate v. Robinson*, 383 U.S. 375, 383–84 (1966).

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[1] *United States v. Yates*, 438 F.3d 1307, 1316 (11th Cir. 2006) (en banc).

[2] *Id.*

[3] *Commonwealth v. Atkinson*, 987 A.2d 743, 750 (Pa. Super. Ct. 2009).

[4] *Id.*

[5] *Id.* at 751.

[6] *Bush v. State*, 193 P.3d 203, 216 (Wyo. 2008).

[7] In *Melendez-Diaz*, the U.S. Supreme Court directly faced a request to "relax the requirements of the Confrontation Clause to accommodate the 'necessities of trial and the adversary process.'" *Melendez-Diaz*, 129 S. Ct. at 2540. The Court rejected this proposal because "[i]t is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause — like those other constitutional provisions — is binding, and we may not disregard it at our convenience." *Id.* "It is a truism that constitutional protections have costs." *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988).

[8] U.S. Const. Amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself").

[9] U.S. Const. Amend. VI ("In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.").

[10] **Upon review of the oral testimony at the March 19, 2012 hearing before the House Judiciary Committee, there was some confusion whether these specific constitutional protections apply. They do.**

A competency hearing is "assuredly . . . a phase of the adversary system" and the conducting psychologist or psychiatrist is not a "perso[n] acting solely in [the defendant's] interest." *Estelle*, 451 U.S. at 467 (internal quotations omitted and first alteration in original). In light of its significance, the touchstone of a court's inquiry would be the Confrontation Clauses' purpose in a competency hearing.

A competency hearing is "critically important," *see Gary F.*, 432 S.E.2d at 801, and "an adversarial proceeding and a critical stage in a criminal proceeding . . . . at which substantive rights may be preserved or lost," *Atkinson*, 987 A.2d at 747 (internal quotation omitted). Indeed, the competency hearing is how the court determines if a "defendant is unable to understand the proceedings against [him] or to assist in [his] own defense," and if not, the defendant "may not be tried, convicted, or sentenced for the commission of a crime so long as the incompetency exists." Alaska Stat. § 12.47.100(a). The court decides this issue through an adversarial process and "[t]he party raising the issue of competency bears the burden of proving the defendant is incompetent by a preponderance of the evidence." *Id.* at § 12.47.100(c).

The court bases its decision on the testimony of "at least one qualified psychiatrist or psychologist," *id.* at § 12.47.100(b), but the scientific expertise of the witness does not affect the Confrontation Clause analysis. "The prosecution *must* produce . . . witnesses . . . against the defendant," *Melendez-Diaz*, 129 S. Ct. at 2534 (emphasis in original), even if the witnesses are scientists offering forensic analysis. "Confrontation is one means of assuring accurate forensic analysis. . . . Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." *Id.* at 2536–37. "[T]here is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." *Id.* at 2534.[11] The importance of a pretrial competency hearing, with an adversarial process to determine critical rights, likely requires the full protections of the Confrontation Clauses.

This is particularly true because unlike other pretrial proceedings, such as a probable cause hearing, the competency determination is a terminal one that the court will not re-exam absent new evidence. While a defendant who loses a probable cause hearing is able to challenge the substance of that determination — is there sufficient reason to believe that he committed the crime — in the trial's reasonable doubt inquiry, a defendant cannot reopen a finding of competence.

The importance and finality of a competency hearing explain why hearsay testimony cannot establish a finding of competence. *Pate*, 383 U.S. at 383–84. For such critical question, courts must base their determinations on evidence that is testable by cross-examination. The reasons that underpin the non-hearsay requirement — establishing the evidence's accuracy and reliability by effective cross-examination — also support the need for in-person confrontation.

[11] The two categories of witnesses are "those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter." *Melendez-Diaz*, 129 S. Ct. at 2534 (emphasis in original).

In conducting its inquiry of Section 16, which avoids this in-person confrontation, an Alaska court will rely on the *Craig* test. *Blume*, 797 P.2d at 674; *Reutter v. State*, 886 P.2d 1298, 1307 (Alaska Ct. App. 1994) (using *Craig* to evaluate Alaska Stat. § 12.45.046, which allows child victims to testify via closed-circuit television).[12] Using the *Craig* test, the Eight and Eleventh federal circuits determined "[t]he simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation. . . . the two are not constitutionally equivalent." *United States v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006) (en banc). The Confrontation Clause "is most certainly compromised when the confrontation occurs though an electronic medium. Indeed, no court that has considered the question has found otherwise[.]" *Id.* "The virtual 'confrontations' offered by closed-circuit television systems fall short of the face-to-face standard because they do not provide the same truth-inducing effect." *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005).

Given (1) the criticism of two-way video testimony and (2) that the supposed benefits of Section 16, such as cost-savings, convenience, and efficiency, do not rise to an "important public policy," a court would likely conclude that Section 16 violates the federal and Alaska Confrontation Clauses. This is especially true because the Alaska Supreme Court has expressly reserved its ability to interpret the Alaska Confrontation Clause more broadly than the federal one, *Lemon*, 514 P.2d at 1154 n.5,[13] and because it has "the authority and, when necessary, duty to construe the provisions of the Alaska Constitution to provide greater protections than those arising out of the identical federal clauses," *Doe v. State*, 189 P.3d 999, 1005 (Alaska 2008).

This conclusion is even more inexorable given the Alaska Supreme Court's long-standing recognition that one of the "vital interests" of the Confrontation Clauses is to "enable[] the defendant to demonstrate to the jury the witnesses' demeanor when confronted by the defendant so that the inherent veracity of the witness is displayed in the crucible of the courtroom," *Lemon*, 514 P.2d at 1153, and that testimony via video may alter "impressions of the witness' demeanor and credibility," *Stores v. State*, 625 P.2d 820, 828 (Alaska 1980).[14]

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[12] The Sixth, Eighth, Ninth, Tenth, and Eleventh federal circuits apply the *Craig* test to evaluate two-way video conference testimony. *Yates*, 438 F.3d at 1313 (listing cases).

[13] The supreme courts of Illinois and Pennsylvania each interpreted their state Confrontation Clause more broadly than the federal one and each concluded that their state Clauses prohibit testimony by closed-circuit television. *People v. Fitzpatrick*, 633 N.E.2d 685, 688 (Ill. 1994); *Commonwealth v. Ludwig*, 594 A.2d 281, 281–82 (Pa. 1991).

[14] Video testimony causes the "most serious . . . [e]vidence distortion . . . because the picture conveyed may influence a juror's feelings about guilt or believability. . . . Variations in lens or angle, may result in failure to convey subtle nuances, including changes in witness demeanor such as a nervous twitch or paling and blushing in response to an important question . . . Furthermore, the camera itself is selective of what it relates to the viewer. Transmission of valuable first impressions may be impossible, and off-camera evidence is necessarily excluded while the focus is on another part of the body or another witness." *Stores*, 625 P.2d at 828 n.25.

Even if a court did not completely overturn Section 16, that Section "must be construed to incorporate the requirements of *Craig*." *Reutter*, 886 P.2d at 1307. *Craig* would require that a court permit video testimony only if it "is necessary to further an important public policy," *Craig*, 497 U.S. at 850, which, as noted above, does not include efficiency, speed, convenience, or cost-savings. At best, Section 16 would be functionally overturned because it would be the rare situation when the need for video testimony in a competency hearing satisfied *Craig*.[15]

Section 24 Should Be Improved to Enhance Witnesses' Reliability and to Strengthen Its Constitutionality

Section 24's proposed addition to the Alaska Rules of Criminal Procedure tracks *Craig* and so it is likely secure from federal constitutional challenge.[16] It should, however, be altered to enhance witnesses' reliability and to further buttress its presumed constitutionality.

Craig and other courts note that the Confrontation Clause increases witnesses' reliability by exposing witness coaching. *E.g. Craig*, 497 U.S. at 847 (face-to-face confrontation may "reveal the child coached by a malevolent adult") (internal quotations omitted).

Given that witnesses who testify via video are more able to be coached (because someone in the video room, rather than in the courtroom, with the witness, may more easily coach him) and any coaching is harder to detect, the House Judiciary Committee amended the Rule and established a default of having just the video technician in the room with the witness, but permitting the court, in its discretion, to allow others to be present with him. To further caution against coaching, the Committee should also add a provision that a second camera should transmit to the courtroom a live feed of what the witness sees.[17]

Conclusion

We hope that the Finance Committee will recognize that these are just some of the problems with House Bill 359, in that it impermissibly deprives Alaskans of their constitutional rights. Passage – as currently drafted – would almost certainly result in individual challenges by criminal

[15] This analysis focused on Section 16's unconstitutionality, but the Committee should also consider practical problems with video testimony, such as the difficulties of having the witness physically use and interact with exhibits, counsel, and the court.

[16] Alaska courts could conclude, however, that the Rule violates the Alaska Confrontation Clause. *Lemon*, 514 P.2d at 1154 n.5

[17] Not all coaching is intentional or malicious. Spectators may innocently influence testimony through their facial expressions and body language. Permitting the court, counsel, and the defendant to see what the witness sees enables them to notice and check that behavior.

defendants, entangling the state in unnecessary litigation, as well as opening the state to a facial constitutional challenge.

Thank you again for letting us share our concerns. Please feel free to contact the undersigned should you have any questions or seek additional information.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Representative Anna Fairclough, Vice Chair;
Representative_Anna_Fairclough@legis.state.ak.us
Representative Mia Costello, Representative_Mia_Costello@legis.state.ak.us
Representative Bryce Edgmon, Representative_Bryce_Edgmon@legis.state.ak.us
Representative Reggie Joule, Representative_Reggie_Joule@legis.state.ak.us
Representative Mark Neuman, Representative_Mark_Neuman@legis.state.ak.us
Representative Tammie Wilson, Representative_Tammie_Wilson@legis.state.ak.us
Representative Mike Doogan, Representative_Mike_Doogan@legis.state.ak.us
Representative Les Gara, Representative_Les_Gara@legis.state.ak.us
Representative David Guttenberg, Representative_David_Guttenberg@legis.state.ak.us
Representative Mike Hawker, Representative_Mike_Hawker@legis.state.ak.us
Representative Beth Kerttula, Representative_Beth_Kerttula@legis.state.ak.us