



March 15, 2012

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

OFFICERS AND DIRECTORS
SUSAN WINGROVE, Anchorage
PRESIDENT

RICH CURTNER, Anchorage
VICE PRESIDENT

LLOYD EGGAN, Anchorage
TREASURER

MICHAEL KING, Anchorage
SECRETARY

WILLIE ANDERSON, Juneau
AFFIRMATIVE ACTION OFFICER

KIRSTEN BEY, Nome
DONNA GOLDSMITH, Anchorage
PAUL GRANT, Juneau
SCOTT HENDERSON, Anchorage
KATIE HURLEY, Wasilla
MARJORIE KAISER, Anchorage
CONNIE OZER, Anchorage
GALEN PAINE, Sitka
STEPHANIE PAWLOWSKI, Anchorage
JUNE PINNELL-STEPHENS, Fairbanks
TONY STRONG, Juneau

ZACH FICK, Anchorage
EMMA HILL, Anchorage
STUDENT ADVISORS

The Honorable Hollis French, Chair
The Honorable Bill Wielechowski, Vice-Chair
Senate Judiciary Committee
Alaska State Senate
State Capitol
Juneau, AK 99801

via email: Senator_Hollis_French@legis.state.ak.us
Senator_Bill_Wielechowski@legis.state.ak.us

Re: SB 218: Video Testimony and Sex Offender Registration
ACLU Review of Legal Issues

Dear Chair French and Vice-Chair Wielechowski:

Thank you for the opportunity to provide written testimony with respect to Senate Bill 218, which – amongst other provisions – permits judicial testimony by video conference and modifies the registration of sex offenders.

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, 20, and 25 of the proposed legislation.

Section 16 Unconstitutionally Violates the Confrontation Clause

If enacted, Section 16 of SB 218 would permit, in the context of determining if a criminal defendant were mentally competent to stand trial, a witness, “including the psychiatrist or psychologist who examined the defendant,” who would have to “travel more than 50 miles to the court or lives 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[.]”

Based on our review of court decisions, we believe the Alaska courts 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”).

The U.S. Constitution’s 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 (emphasis added).**

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, even the desire to have a 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 side⁶ 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).

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

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).

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 2534.⁸ **The importance of a pretrial competency hearing, with an adversarial process to determine critical rights, likely requires the full protections of the Confrontation Clauses.**

In conducting its inquiry of Section 16, 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).⁹ 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), (emphasis added). **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.5,¹⁰ 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

⁸ 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).

⁹ 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).

¹⁰ 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).

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).¹¹

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*.**¹²

Section 25 Should Be Improved to Enhance Witnesses' Reliability and to Strengthen Its Constitutionality

Section 25's proposed addition to the Alaska Rules of Criminal Procedure tracks *Craig* and so it is likely secure from federal constitutional challenge.¹³ **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). Subpart (c) of Section 25 puts the onus on the parties to "move to exclude any person other than the video conference technician from the witness's presence[.]"

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 Committee should amend the Rule and establish a default of**

¹¹ 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.

¹² 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.

¹³ Alaska courts could conclude, however, that the Rule violates the Alaska Confrontation Clause. *Lemon*, 514 P.2d at 1154 n.5

having just the video technician in the room with the witness, but permitting the parties to move 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.¹⁴

Section 20 Is Unwise; It Shackles Alaska's Policy to Outside Jurisdictions

Section 20 adds a requirement that anyone who has been convicted of “a crime in another jurisdiction that requires the person to register as a sex offender or child kidnapper in that jurisdiction” must register with the Alaska sex offender registry. Alaska Stat. § 12.63.100(6) currently ensures that out-of-state offenders register in Alaska if they “committed or attempted to commit” one of Alaska Stat. § 12.63.100(6)’s offenses or “a similar offense [or] law of another jurisdiction.” Section 20, then, serves only to unpin the Alaska registry from Alaska crimes and Alaska public policy.

This concern is not academic. Other states require registration for offenses that, if committed in Alaska, would not require the offender to register. In Alaska, for example, while most forms of indecent exposure require offenders to register, not all do: streaking (perhaps done as a prank),¹⁵ is a misdemeanor in Alaska¹⁶ and does not require registration.¹⁷ Other states are more draconian; to continue to use the indecent exposure example, some states require registration for all forms, even for those variants that Alaska has omitted from registration.¹⁸ If Section 20 is enacted, it would commit these individuals to register annually for at least 15 years¹⁹ and suffer the ignominy and consequences of registration.

Registration is life-changing. The Department of Public Safety publishes, on an easily accessible website, each registrant’s “name, aliases, address, photograph, physical description, description

¹⁴ 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.

¹⁵ Associated Press, *Juneau High School Boys Disciplined for Streaking*, Oct. 28, 2009; Julia O’Malley, *Hey, Nude Hikers, What About the Bugs?*, Anchorage Daily News, May 19, 2010 (discussing nude hiking on Anchorage’s trails).

¹⁶ Alaska Stat. § 11.41.460.

¹⁷ Alaska Stat. § 12.63.100(6)(C)(iv) (not requiring registration for indecent exposure so long as it was not “before a person under 16 years of age and the offender [does not have] a previous conviction for that offense”).

¹⁸ Including California (Cal. Penal Code § 290(c) for violating California’s indecent exposure statute, Cal. Penal Code. § 314); Colorado (Colo. Rev. Stat. § 16-22-103 for violating Colorado’s indecent exposure statute, Colo. Rev. Stat. § 18-7-302); and Oklahoma (Okla. Stat. tit. 57, § 582(A) for violating Oklahoma’s indecent exposure statute, Okla. Stat. tit. 21, § 1021).

¹⁹ 15 years is the briefest registration period in Alaska. Alaska Stat. §§ 12.63.010(d)(1), 12.63.020(a)(2).

of motor vehicles, license numbers of motor vehicles, and vehicle identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with requirements of AS 12.63 or cannot be located.” Alaska Stat. § 18.65.087(b). This “impose[s] significant affirmative obligations and a severe stigma on every [registrant],” *Doe*, 189 P.3d at 1009 (quoting *Smith v. Doe*, 538 U.S. 84, 111 (Stevens, J., dissenting)) (first alteration in original), and “through aggressive public notification of their crimes,” *id.* (internal quotation omitted), causes registrants to risk “public shunning, picketing, press vigils, ostracism, loss of employment, and eviction, to threats of violence, physical attacks, and arson,” *id.* at 1010 n.80.

If obligated to register, one must register each year for at least 15 years.²⁰ Once on the registry, there is “no mechanism” through which one “can petition the state or a court for relief from the obligations of continued registration and disclosure.” *Id.* at 1017.

At least 136 jurisdictions have sex offender registries.²¹ The State, if it enacts Section 20, will bind Alaska to each of these jurisdictions in an ever-changing, complex web. The Alaska Supreme Court held that Alaska’s registry is “punitive” and, when applied “to defendants who committed their crimes before the legislature enacted [the Alaska Sex Offender Registration Act],” *Doe*, 189 P.3d at 1019, violates the Alaska *Ex Post Facto* Clause.²²

The complex interaction between Alaska and each of these 135 jurisdictions may present future *ex post facto* issues, which may expose the State to expensive and lengthy litigation. Section 20 applies to offenses committed only after its enactment. But, how would it apply in the following example? (1) Another jurisdiction, like Alaska, does not require otherwise innocent college-student stalkers to register. (2) A college student in that jurisdiction stalks on July 1, 2013. (3) The individual moves to Alaska on January 1, 2014 and does not have to register here. (4) On February 1, 2014, that jurisdiction amends its laws, with a retroactive date to January 1, 2010, to require stalkers to register. Does that person now need to register in Alaska? With at least 135 other jurisdictions, this hypothetical is plausible and implicates the Alaska *Ex Post Facto* Clause. If the State incorrectly requires this individual to register, it would likely face an *ex post facto* challenge and a suit for civil damages. Section 20, rather than being clear and efficient, makes Alaska law more turbid and turbulent.

²⁰ Alaska Stat. §§ 12.63.010(d)(1), 12.63.020(a)(2).

²¹ The Dru Sjojin National Sex Offender Public Website, administered by the U.S. Department of Justice, lists 136 jurisdictions with sex offender registries: the 50 States; the District of Columbia; the 4 territories of Guam, Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands; and 81 Native Tribes. United States Department of Justice National Sex Offender Public Website, at <http://www.nsopw.gov/Core/PublicRegistrySites.aspx> (last visited Mar. 7, 2012).

²² Alaska Const., Art. I, § 15 (“No . . . ex post facto law shall be passed.”).

No matter one's assessment regarding registration as a policy matter, clearly placement on the registry – because of its significant, irrevocable consequences – should never be done without intentional review and action by the Alaska Legislature. Were Section 20 to be enacted, individuals would be forced to register and bear the heavy costs associated thereto, even though they had not committed an offense that Alaska, in its sound policy judgment, had decided warrants registration.

Alaska should not abdicate its sovereignty and wisdom, it should not cede its policymaking to other jurisdictions, and it should not expose itself to needless constitutional litigation. The Legislature should continue to exercise its considered judgment in determining which offenses do justify registration. Section 20 would make Alaska's registry an appendage to all other jurisdictions.

Conclusion

We hope to work with the Judiciary Committee to address the above-noted problems with Senate Bill 218, so that final legislation would not impermissibly deprive Alaskans of their constitutional rights nor abdicate the Legislature's policy judgments about the offender registry.

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,

A handwritten signature in black ink, appearing to read "J. Mittman", with a long horizontal flourish extending to the right.

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Senator Joe Paskvan, Senator_Joe_Paskvan@legis.state.ak.us
Senator Lesil McGuire, Senator_Lesil_McGuire@legis.state.ak.us
Senator John Coghill, Senator_John_Coghill@legis.state.ak.us