HB 359

<TARGET><BILL>HB 359</BILL><SUBJECT>HB 359</SUBJECT><COMM>HJUD27</COMM></TARGET>

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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February 22, 2012

The Honorable Carl Gatto, Chair
House Judiciary Committee
State Capitol Room 118
Juneau, AK 99801

Re: House Bill 359 – relating to sex crimes and video conferencing

Dear Representative Gatto:

House Bill 359 has been assigned to the House Judiciary Committee for your consideration. The Department of Law respectfully requests a hearing in the Judiciary Committee on the bill at your earliest convenience. HB 359 builds on and refines legislation enacted over the past several years to address serious problems of sexual exploitation of children and other victims.

A sectional analysis that describes each section of the bill is attached. I expect Annie Carpeneti, Legislative Liaison from the Department of Law, Criminal Division and representatives from the Department of Public Safety will testify regarding this legislation. Experienced law enforcement officers will also be available if needed. No teleconference sites are expected.

Thank you for your consideration of this request.

Sincerely

Michael C. Geraghty
Attorney General

Enclosure

STATE OF ALASKA

DEPARTMENT OF LAW
CRIMINAL DIVISION CENTRAL OFFICE

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HOUSE BILL 359
SEX TRAFFICKING AND HUMAN TRAFFICKING
SECTIONAL ANALYSIS

The increased scrutiny of crimes related to promoting prostitution of children in Alaska has prompted the proposed change in terminology from promoting prostitution to sex trafficking. There are good reasons for this change. First, a child who is put into prostitution by an adult should be considered and described as a victim, not a prostitute. The change in terminology will encourage this change. Second, a majority of law enforcement officers now refer to the crime of promoting prostitution of children as sex trafficking. Changing Alaska law will facilitate better communication and understanding.

Sections 1, 2, 7 -- 11, 14, 17 – 19, and 21 -- 24 change the statutes prohibiting promoting prostitution to prohibiting sex trafficking. The elements of the offenses remain the same. These sections also make conforming amendments to other laws that currently refer to the crime of promoting prostitution so that they cross-reference sex trafficking.

Section 3 adds the crimes of human trafficking in the first degree and sex trafficking in the first degree to the felonies described as "serious felony offenses" in the state's conspiracy law, AS 11.21.120. This change would enable the state to investigate and potentially prosecute offenders who work with other people to plan and engage in human trafficking or sex trafficking.

Section 4 amends the crime of distribution of indecent materials to minors, AS 11.61.128. This proposed amendment is in response to the recent decision by a federal district court judge holding the current version of the statute to be unconstitutional in violation of the first amendment, because it applies to conduct that is constitutionally protected. In response to the decision that the current law is overbroad, the bill would require that the state prove the defendant intentionally distributed, or possessed with intent to distribute, harmful material to another person that the offender knows is under 16 years of age or believes is under 16 years of age.

Sections 5 and 6 raise the penalty for being a patron of a prostitute, if the prostitute is a minor under 18 years of age, from a class B misdemeanor to a class C felony. It also specifies the legislative intent that the age of the prostitute is a circumstance that does not require proof of a culpable mental state.

Section 12: Under current law, no corroboration is required of the testimony of an alleged victim in a prosecution for promoting prostitution (sex trafficking) in the first, second, and third

degrees. The bill adds the crime of promoting prostitution (sex trafficking) in the fourth degree to those crimes that do not require corroboration of the testimony of an alleged victim.

Section 13: Under current law property used to facilitate or derived from a crime of promoting prostitution (sex trafficking) is subject to forfeiture. The bill adds the crime of prostitution to these crimes. Under the bill property used to facilitate or derived from the crime of prostitution would be subject to forfeiture.

Section 15 corrects an error in AS 11.81.250(b). Under current law the crime of promoting prostitution (sex trafficking) in the first degree under AS 11.66.110(a)(2) – where the person promoted is a child – is an unclassified felony. The bill adds this offense to the other offenses described as unclassified felonies in Alaska law.

Section 16 allows the testimony of a witness in a hearing addressing the competency of a defendant for being tried for a crime by way of contemporaneous two-way video conference. It allows this testimony if the witness would be required to travel more that 50 miles to attend the hearing in person or if the witness lives in a place where people customarily travel by air to the court site.

Section 19, in addition to conforming the definition of most serious felony to the changes in the sex trafficking provisions, also corrects an omission in the definition of most serious felony by including online enticement of a minor in the definition.

Section 20 adds a new provision to sex offender registration law that requires a person present in Alaska, who is convicted of an offense out of state that requires registration in that jurisdiction, to register in Alaska. This requirement would apply even if Alaska does not have a criminal provision similar to the crime in the other state that requires registration there. A person would be required to register for 15 years if convicted of one offense, and for life if convicted for two or more offenses.

Section 25 adopts Rule 38.3, Alaska Rules of Criminal Procedure, addressing the use of testimony by contemporaneous two-way video conference. It would allow this testimony if the parties agree to its use. If the parties do not agree, it would allow contemporaneous two-way video conference testimony if the court finds that its use is necessary to further an important public policy, the witness is unavailable, and the testimony is given under oath and is subject to cross-examination.

Section 26 addresses the applicability of the changes described above.

Section 27 is an instruction to the revisor of statutes regarding the heading of AS 11.66.110.

Section 28 provides for an effective date of July 1, 2012.

HOUSE BILL NO. 359

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced: 2/22/12
Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

"An Act relating to conspiracy to commit human trafficking in the first degree or sex trafficking in the first degree; relating to the crime of furnishing indecent material to minors, the crime of online enticement of a minor, the crime of prostitution, and the crime of sex trafficking; relating to forfeiture of property used in prostitution offenses; relating to sex offender registration; relating to testimony by video conference; adding Rule 38.3, Alaska Rules of Criminal Procedure; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 04.06.110 is amended to read:

Sec. 04.06.110. Peace officer powers. The director and the persons employed for the administration and enforcement of this title may, with the concurrence of the commissioner of public safety, exercise the powers of peace officers when those powers are specifically granted by the board. Powers granted by the board under this section may be exercised only when necessary for the enforcement of the criminally

punishable provisions of this title, regulations of the board, and other criminally punishable laws and regulations, including investigation of violations of laws against prostitution and **sex trafficking** [PROMOTING PROSTITUTION] described in **AS 11.66.100 - 11.66.135** [AS 11.66.100 - 11.66.130] and laws against gambling, promoting gambling, and related offenses described in AS 11.66.200 - 11.66.280.

*** Sec. 2.** AS 04.11.370(a) is amended to read:

(a) A license or permit shall be suspended or revoked if the board finds

(1) misrepresentation of a material fact on an application made under this title or a regulation adopted under this title;

(2) continuation of the manufacture, sale, or service of alcoholic beverages by the licensee or permittee would be contrary to the best interests of the public;

(3) failure on the part of the licensee to correct a defect that constitutes a violation of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or other laws after receipt of notice issued by the board or its agent;

(4) conviction of a licensee of a violation of this title, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010;

(5) conviction of an agent or employee of a licensee of a violation of this title, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010, if the licensee is found by the board to have either knowingly allowed the violation or to have recklessly or with criminal negligence failed to act in accordance with the duty prescribed under AS 04.21.030 with the result that the agent or employee violates a law, regulation, or ordinance;

(6) failure of the licensee to comply with the public health, fire, or safety laws and regulations in the state;

(7) use of the licensed premises as a resort for illegal possessors or users of narcotics, prostitutes, or **sex traffickers** [PROMOTERS OF PROSTITUTION]; in addition to any other legally competent evidence, the character of the premises may be proved by the general reputation of the premises in the community as a resort for illegal possessors or users of narcotics, prostitutes, or **sex**

traffickers [PROMOTERS OF PROSTITUTION];

(8) occurrence of illegal gambling within the limits of the licensed premises;

(9) the licensee permitted a public offense involving moral turpitude to occur on the licensed premises;

(10) violation by a licensee of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010; or

(11) violation by an agent or employee of a licensee of a provision of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010, if the licensee is found by the board to have either knowingly allowed the violation or to have recklessly or with criminal negligence failed to act in accordance with the duty prescribed under AS 04.21.030 with the result that the agent or employee violates the law, condition or restriction, regulation, or ordinance.

*** Sec. 3.** AS 11.31.120(h)(2) is amended to read:

(2) "serious felony offense" means an offense

(A) against the person under AS 11.41, punishable as an unclassified or class A felony;

(B) involving controlled substances under AS 11.71, punishable as an unclassified, class A, or class B felony;

(C) that is criminal mischief in the first degree under AS 11.46.475; [OR]

(D) that is terroristic threatening in the first degree under AS 11.56.807**;**

(E) that is human trafficking in the first degree under AS 11.41.360; or

(F) that is sex trafficking in the first degree under AS 11.66.110.

*** Sec. 4.** AS 11.61.128(a) is amended to read:

(a) A person commits the crime of distribution of indecent material to minors

if

(1) the person, being 18 years of age or older, **intentionally** [KNOWINGLY] distributes **or possesses with intent to distribute any material described in (2) and (3) of this subsection** to **either**

(A) a child that the person knows is under 16 years of age; or

(B) another person that the person believes is a child under 16 years of age;

(2) the material is [ANOTHER PERSON ANY] material that **the person knows** depicts the following actual or simulated conduct:

(A) sexual penetration;

(B) the lewd touching of a person's genitals, anus, or female breast;

(C) masturbation;

(D) bestiality;

(E) the lewd exhibition of a person's genitals, anus, or female breast; or

(F) sexual masochism or sadism; **and**

(3) [(2)] the material is harmful to minors [; AND

(3) EITHER

(A) THE OTHER PERSON IS A CHILD UNDER 16 YEARS OF AGE; OR

(B) THE PERSON BELIEVES THAT THE OTHER PERSON IS A CHILD UNDER 16 YEARS OF AGE].

*** Sec. 5.** AS 11.66.100(b) is amended to read:

(b) **Except as provided in (c) of this section, prostitution** [PROSTITUTION] is a class B misdemeanor.

*** Sec. 6.** AS 11.66.100 is amended by adding a new subsection to read:

(c) Prostitution is a class C felony if

(1) the person described in (a)(1) of this section is under 18 years of age; the age of the person is a circumstance that does not require proof of a culpable

mental state; and

(2) the person described in (a)(2) of this section is 18 years of age or older and at least three years older than the person described in (a)(1) of this section.

*** Sec. 7.** AS 11.66.110(a) is amended to read:

(a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the first degree if the person

(1) induces or causes a person to engage in prostitution through the use of force;

(2) as other than a patron of a prostitute, induces or causes a person under 18 years of age to engage in prostitution; or

(3) induces or causes a person in that person's legal custody to engage in prostitution.

*** Sec. 8.** AS 11.66.110(c) is amended to read:

(c) Except as provided in (d) of this section, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree is a class A felony.

*** Sec. 9.** AS 11.66.120 is amended to read:

Sec. 11.66.120. Sex trafficking [PROMOTING PROSTITUTION] in the second degree. (a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the second degree if the person

(1) manages, supervises, controls, or owns, either alone or in association with others, a prostitution enterprise other than a place of prostitution;

(2) procures or solicits a patron for a prostitute; or

(3) offers, sells, advertises, promotes or facilitates travel that includes commercial sexual conduct as enticement for the travel; in this paragraph, "commercial sexual conduct" means sexual conduct for which anything of value is given or received by any person.

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the second degree is a class B felony.

*** Sec. 10.** AS 11.66.130 is amended to read:

Sec. 11.66.130. Sex trafficking [PROMOTING PROSTITUTION] in the third degree. (a) A person commits the crime of **sex trafficking** [PROMOTING

PROSTITUTION] in the third degree if, with intent to promote prostitution, the person

(1) manages, supervises, controls, or owns, either alone or in association with others, a place of prostitution;

(2) as other than a patron of a prostitute, induces or causes a person 18 years of age or older to engage in prostitution;

(3) as other than a prostitute receiving compensation for personally rendered prostitution services, receives or agrees to receive money or other property pursuant to an agreement or understanding that the money or other property is derived from prostitution; or

(4) engages in conduct that institutes, aids, or facilitates a prostitution enterprise.

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the third degree is a class C felony.

* **Sec. 11.** AS 11.66.135 is amended to read:

Sec. 11.66.135. Sex trafficking [PROMOTING PROSTITUTION] in the fourth degree. (a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the fourth degree if the person engages in conduct that institutes, aids, or facilitates prostitution under circumstances not proscribed under AS 11.66.130(a)(4).

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the fourth degree is a class A misdemeanor.

* **Sec. 12.** AS 11.66.140 is amended to read:

Sec. 11.66.140. Corroboration of certain testimony not required. In a prosecution under **AS 11.66.110 - 11.66.135** [AS 11.66.110 - 11.66.130], it is not necessary that the testimony of the person whose prostitution is alleged to have been compelled or promoted be corroborated by the testimony of any other witness or by documentary or other types of evidence.

* **Sec. 13.** AS 11.66.145 is amended to read:

Sec. 11.66.145. Forfeiture. Property used to institute, aid, or facilitate, or received or derived from, a violation of **AS 11.66.100 - 11.66.135** [AS 11.66.110 -

11.66.135] shall be forfeited.

* **Sec. 14.** AS 11.81.250(a) is amended to read:

(a) For purposes of sentencing under AS 12.55, all offenses defined in this title, except murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), and kidnapping, are classified on the basis of their seriousness, according to the type of injury characteristically caused or risked by commission of the offense and the culpability of the offender. Except for murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), and kidnapping, the offenses in this title are classified into the following categories:

(1) class A felonies, which characteristically involve conduct resulting in serious physical injury or a substantial risk of serious physical injury to a person;

(2) class B felonies, which characteristically involve conduct resulting in less severe violence against a person than class A felonies, aggravated offenses against property interests, or aggravated offenses against public administration or order;

(3) class C felonies, which characteristically involve conduct serious enough to deserve felony classification but not serious enough to be classified as A or B felonies;

(4) class A misdemeanors, which characteristically involve less severe violence against a person, less serious offenses against property interests, less serious offenses against public administration or order, or less serious offenses against public health and decency than felonies;

(5) class B misdemeanors, which characteristically involve a minor risk of physical injury to a person, minor offenses against property interests, minor offenses against public administration or order, or minor offenses against public health and decency;

(6) violations, which characteristically involve conduct inappropriate to an orderly society but which do not denote criminality in their commission.

* **Sec. 15.** AS 11.81.250(b) is amended to read:

(b) The classification of each felony defined in this title, except murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, **sex trafficking in the first degree under AS 11.66.110(a)(2),** and kidnapping, is designated in the section defining it. A felony under **the** [ALASKA] law **of this state** defined outside this title for which no penalty is specifically provided is a class C felony.

* **Sec. 16.** AS 12.47.100 is amended by adding a new subsection to read:

(h) In a hearing to determine competency under this section, the court may allow the testimony of a witness, including the psychiatrist or psychologist who examined the defendant, to testify concerning the competency of the defendant by contemporaneous two-way video conference if the witness would be required to travel more than 50 miles to the court or lives in a place from which people customarily travel by air to the court. In this subsection, "contemporaneous two-way video conference"

(1) means a conference among people at different places by means of transmitted audio and video signals;

(2) includes all communication technologies that allow two or more places to interact by two-way video and audio transmissions simultaneously.

* **Sec. 17.** AS 12.55.035(b) is amended to read:

(b) Upon conviction of an offense, a defendant who is not an organization may be sentenced to pay, unless otherwise specified in the provision of law defining the

offense, a fine of no more than

(1) $500,000 for murder in the first or second degree, attempted murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, kidnapping, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), or misconduct involving a controlled substance in the first degree;

(2) $250,000 for a class A felony;

(3) $100,000 for a class B felony;

(4) $50,000 for a class C felony;

(5) $10,000 for a class A misdemeanor;

(6) $2,000 for a class B misdemeanor;

(7) $500 for a violation.

* **Sec. 18.** AS 12.55.125(i) is amended to read:

(i) A defendant convicted of

(1) sexual assault in the first degree, sexual abuse of a minor in the first degree, or **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) less than 13 years of age, 25 to 35 years;

(ii) 13 years of age or older, 20 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 30 to 40 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 35 to 45 years;

(E) if the offense is a third felony conviction and the defendant is not subject to sentencing under (F) of this paragraph or (*l*) of this section, 40 to 60 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(2) unlawful exploitation of a minor under AS 11.41.455(c)(2), online enticement of a minor under AS 11.41.452(e), or attempt, conspiracy, or solicitation to commit sexual assault in the first degree, sexual abuse of a minor in the first degree, or **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) under 13 years of age, 20 to 30 years;

(ii) 13 years of age or older, 15 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 25 to 35 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 30 to 40 years;

(E) if the offense is a third felony conviction, the offense does not involve circumstances described in (F) of this paragraph, and the defendant is not subject to sentencing under (*l*) of this section, 35 to 50 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(3) sexual assault in the second degree, sexual abuse of a minor in the second degree, online enticement of a minor under AS 11.41.452(d), unlawful exploitation of a minor under AS 11.41.455(c)(1), or distribution of child pornography under AS 11.61.125(e)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, five to 15 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, 10 to 25 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 15 to 30 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 20 to 35 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years;

(4) sexual assault in the third degree, incest, indecent exposure in the first degree, possession of child pornography, distribution of child pornography under AS 11.61.125(e)(1), or attempt, conspiracy, or solicitation to commit sexual assault in the second degree, sexual abuse of a minor in the second degree, unlawful exploitation of a minor, or distribution of child pornography, may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, two to 12 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, eight to 15 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 12 to 20 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 15 to 25 years;

(E) if the offense is a third felony conviction and the defendant

has two prior convictions for sexual felonies, 99 years.

*** Sec. 19.** AS 12.55.185(10) is amended to read:

(10) "most serious felony" means

(A) arson in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), **online enticement of a minor,** or any unclassified or class A felony prescribed under AS 11.41; or

(B) an attempt, or conspiracy to commit, or criminal solicitation under AS 11.31.110 of, an unclassified felony prescribed under AS 11.41;

*** Sec. 20.** AS 12.63.100(6) is amended to read:

(6) "sex offense" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit a sexual offense, or a similar offense under the laws of the other jurisdiction; in this subparagraph, "sexual offense" has the meaning given in AS 11.41.100(a)(3);

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit one of the following crimes, or a similar law of another jurisdiction:

(i) sexual assault in the first degree;

(ii) sexual assault in the second degree;

(iii) sexual abuse of a minor in the first degree; or

(iv) sexual abuse of a minor in the second degree; [OR]

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under the following statutes or a similar law of another jurisdiction:

(i) AS 11.41.410 - 11.41.438;

(ii) AS 11.41.440(a)(2);

(iii) AS 11.41.450 - 11.41.458;

(iv) AS 11.41.460 if the indecent exposure is before a person under 16 years of age and the offender has a previous conviction

for that offense;

(v) AS 11.61.125 - 11.61.128;

(vi) AS 11.66.110 or 11.66.130(a)(2) if the person who was induced or caused to engage in prostitution was 16 or 17 years of age at the time of the offense;

(vii) former AS 11.15.120, former 11.15.134, or assault with the intent to commit rape under former AS 11.15.160, former AS 11.40.110, or former 11.40.200; [OR]

(viii) AS 11.61.118(a)(2) if the offender has a previous conviction for that offense; **or**

(D) a crime in another jurisdiction that requires the person to register as a sex offender or child kidnapper in that jurisdiction;

*** Sec. 21.** AS 15.80.010(9) is amended to read:

(9) "felony involving moral turpitude" includes those crimes that are immoral or wrong in themselves such as murder, manslaughter, assault, sexual assault, sexual abuse of a minor, unlawful exploitation of a minor, robbery, extortion, coercion, kidnapping, incest, arson, burglary, theft, forgery, criminal possession of a forgery device, offering a false instrument for recording, scheme to defraud, falsifying business records, commercial bribe receiving, commercial bribery, bribery, receiving a bribe, perjury, perjury by inconsistent statements, endangering the welfare of a minor, escape, promoting contraband, interference with official proceedings, receiving a bribe by a witness or a juror, jury tampering, misconduct by a juror, tampering with physical evidence, hindering prosecution, terroristic threatening, riot, criminal possession of explosives, unlawful furnishing of explosives, **sex trafficking** [PROMOTING PROSTITUTION], criminal mischief, misconduct involving a controlled substance or an imitation controlled substance, permitting an escape, promoting gambling, possession of gambling records, distribution of child pornography, and possession of child pornography;

*** Sec. 22.** AS 28.15.046(c) is amended to read:

(c) The department may not issue a license under this section to an applicant who has been convicted of any of the following offenses within 20 years of the time of

application:

(1) sexual abuse of a minor in any degree under AS 11.41.434 - 11.41.440;

(2) sexual assault in any degree under AS 11.41.410 - 11.41.425;

(3) incest under AS 11.41.450;

(4) unlawful exploitation of a minor under AS 11.41.455;

(5) contributing to the delinquency of a minor under AS 11.51.130;

(6) a felony involving possession of a controlled or imitation controlled substance under AS 11.71 or AS 11.73;

(7) a felony or misdemeanor involving distribution of a controlled or imitation controlled substance under AS 11.71 or AS 11.73;

(8) **sex trafficking** [PROMOTING PROSTITUTION] in the first or second degree under AS 11.66.110 or 11.66.120;

(9) indecent exposure in the first or second degree under AS 11.41.458 or 11.41.460.

* **Sec. 23.** AS 47.12.110(d) is amended to read:

(d) Notwithstanding (a) of this section, a court hearing on a petition seeking the adjudication of a minor as a delinquent shall be open to the public, except as prohibited or limited by order of the court, if

(1) the department files with the court a motion asking the court to open the hearing to the public, and the petition seeking adjudication of the minor as a delinquent is based on

(A) the minor's alleged commission of an offense, and the minor has knowingly failed to comply with all the terms and conditions required of the minor by the department or imposed on the minor in a court order entered under AS 47.12.040(a)(2) or 47.12.120;

(B) the minor's alleged commission of

(i) a crime against a person that is punishable as a felony;

(ii) a crime in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the

crime;

(iii) arson under AS 11.46.400 - 11.46.410;

(iv) burglary under AS 11.46.300;

(v) distribution of child pornography under AS 11.61.125;

(vi) **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110; or

(vii) misconduct involving a controlled substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or AS 11.71.050; or

(C) the minor's alleged commission of a felony and the minor was 16 years of age or older at the time of commission of the offense when the minor has previously been convicted or adjudicated a delinquent minor based on the minor's commission of an offense that is a felony; or

(2) the minor agrees to a public hearing on the petition seeking adjudication of the minor as a delinquent.

* **Sec. 24.** AS 47.12.315(a) is amended to read:

(a) Notwithstanding AS 47.12.310, when an agency takes action under AS 47.12.040(a)(1) to adjust a matter, or when under AS 47.12.040(a)(2) the court directs the agency to adjust the matter, the agency

(1) shall, for a minor who is at least 13 years of age at the time of commission of the offense, disclose to the public the name of the minor, the name or names of the parent, parents, or guardian of the minor, the action required by the agency to be taken by the minor under AS 47.12.060 to adjust the matter, and information about the offense exclusive of information that identifies the victim of the offense, if the minor was, under AS 47.12.020, previously alleged to be a delinquent minor on the basis of the minor's commission of at least one offense and, on the basis of that allegation, a state agency has, under AS 47.12.040(a), been asked to make a preliminary inquiry to determine if any action on that matter is appropriate, and, if the minor is alleged to be a delinquent minor on the basis of the minor's commission of

another offense, exercise of agency jurisdiction is based on the minor's alleged commission of that other offense, and that other offense is one of the following:

(A) a crime against a person that is punishable as a felony;

(B) a crime in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the crime;

(C) arson under AS 11.46.400 - 11.46.410;

(D) burglary under AS 11.46.300;

(E) distribution of child pornography under AS 11.61.125;

(F) **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110; or

(G) misconduct involving a controlled substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or 11.71.050; and

(2) may, for a minor who is at least 13 years of age at the time of commission of the offense, disclose to the public the name of the minor, the name or names of the parent, parents, or guardian of the minor, the action required by the agency to be taken by the minor under AS 47.12.060 to adjust the matter, and information about the offense exclusive of information that identifies the victim of the offense if the minor has knowingly failed to comply with all terms and conditions required of the minor by the agency to adjust the matter under AS 47.12.060(b).

*** Sec. 25.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. The Alaska Rules of Criminal Procedure are amended by adding a new section to read:

Rule 38.3. Video Conference Testimony.

(a) **In General.** In every trial the testimony of witnesses shall be taken in open court, unless otherwise provided by statute or rule.

(b) **Testimony by Video Conference.** The parties may agree to take testimony from a witness by contemporaneous two-way video conference presented in open court. Absent the parties' agreement, the court may authorize the

amend #12 at its discretion

contemporaneous two-way video conference testimony of a witness if

(1) the requesting party establishes that testimony by two-way video conference is necessary to further an important public policy;

(2) the requesting party establishes that the witness is unavailable; and

(3) the testimony is given under oath and subject to cross-examination.

(c) **Procedures for Taking Video Conference Testimony.** If the trial court authorizes video conference testimony under (b) of this rule, it shall determine the procedures for taking the contemporaneous two-way video conference testimony. The parties, the court, the trier of fact, and the public must be able to see and hear the witness; and the witness must see and hear the courtroom proceedings, including the defendant, as if the witness were sitting in the courtroom's witness stand. The persons who are present with the witness must be identified. The parties may move to exclude any person other than the video conference technician from the witness's presence; the court, in its discretion, may exclude a person other than the video conference technician from the presence of the witness.

(d) **Definitions.**

(1) Contemporaneous Two-Way Video Conference. Contemporaneous two-way video conference means a conference among people at different places by means of transmitted audio and video signals. It includes all communication technologies that allow two or more places to interact by two-way video and audio transmissions simultaneously.

(2) Unavailable. In this rule, a witness is unavailable if

(A) by clear and convincing evidence the court finds under Rule 804(a)(4) or (5), Alaska Rules of Evidence, or Rule 15(e)(4), Alaska Rules of Criminal Procedure, that the witness is unavailable;

(B) by clear and convincing evidence the court finds that under the circumstances the witness is unavailable; or

(C) the parties agree that the witness is unavailable.

*** Sec 26.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) Sections 1, 2, 7 - 11, 14, 17 - 19, 21 - 24, and 27 of this Act

apply to offenses committed before, on, or after the effective date of the Act.

(b) Sections 3 - 6, 12, 13, 16, 20, and 25 of this Act apply to offenses committed on or after the effective date of this Act.

*** Sec. 27.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTION. The revisor of statutes is instructed to change the heading of AS 11.66.110 from "Promoting prostitution in the first degree" to "Sex trafficking in the first degree".

*** Sec. 28.** This Act takes effect July 1, 2012.

27G-2-C
3/15/2012
(3:03 pm)
Carpeneti

AMENDMENT #3

OFFERED IN THE HOUSE JUDICIARY COMMITTEE

TO: HB 359

BY Gruenberg

Page 4, line 29 through page 5, line 3:

Delete all material and insert: (amdt. to amdt. #3)

"(c) Prostitution is a class C felony if

(1) the defendant ~~is a patron of~~ patronizes a prostitute;

(2) the prostitute is under 18 years of age; and

(3) the defendant is over 18 years of age and at least three years older than the prostitute.

(d) In a prosecution for a felony under this section that provides that the prostitute be under 18 years of age, it is an affirmative defense that, at the time of the alleged offense, the defendant

(1) reasonably believed the prostitute to be 18 years of age or older; and

(2) undertook reasonable measures to verify that the prostitute was that age or older."

27G-2-A
3/15/2012
(3:01 pm)
Carpeneti

AMENDMENT #4

OFFERED IN THE HOUSE JUDICIARY COMMITTEE

BY _____

TO: HB 359

Page 8, lines 21 - 22, following "witness":

Delete "would be required to travel more than 50 miles to the court or"

Page 8, line 23, following "court":

Insert "; and the procedure allows the parties a fair opportunity to examine the witness. The video conference technician shall be the only person in the presence of the witness unless the court, in its discretion, determines that another person may be present. Any person present with the witness must be identified on the record"

27G-2-B
3/15/2012
(2:24 pm)
Carpeneti

AMENDMENT #5

OFFERED IN THE HOUSE JUDICIARY COMMITTEE

BY _____

TO: HB 359

Page 17, line 1, following "testimony":

Insert "at trial"

Page 17, line 11, following "stand.", through line 15:

Delete all material.

Insert "The video conference technician shall be the only person in the presence of the witness unless the court, in its discretion, determines that another person may be present. Any person present with the witness must be identified."

full packet fn. (7)

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version: **HB 359**
Fiscal Note Number: **1**
Publish Date: **2/22/12 (H)**

Identifier (file name): 0627-LAW-CRIM-02-17-12
Dept. Affected: Law
Title: An Act relating to sex trafficking and distribution of indecent materials.
Appropriation: Criminal
Allocation: Criminal Justice Litigation
Sponsor: Rules
Requester: Request of the Governor
OMB Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone: 465-5427
Division: Administrative Services — Date/Time: 2/17/12 3:40PM
Approved by: Michael C. Geraghty, Attorney General — Date: 2/17/2012
Department of Law

(Revised 8/17/2011 OMB)

FISCAL NOTE #1

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 359

Analysis

The bill changes the description of the crime of promoting prostitution under AS 11.66.110 – 11.66.135 from promoting prostitution in the first, second, third, and fourth degrees to sex trafficking in the first, second, third, and fourth degrees.

It adds the crimes of human trafficking in the first degree and sex trafficking in the first degree to the definition of "serious felony offense" under the conspiracy law.

The bill amends the crime of distribution of indecent materials to minors under AS 11.61.128 in response to the judicial decision that the current law is unconstitutional due to over breadth by requiring the prosecution to prove that the offender intentionally distributed, or possessed with the intent to distribute, harmful material to another person that the offender knows is under 16 years of age or believes is under 16 years of age.

It adopts a procedure for contemporaneous two-way videoconference in criminal trials where the court finds that it is necessary to further an important public policy, that the witness is unavailable, and the testimony is given under oath and subject to cross-examination. The bill would also allow contemporaneous two-way videoconference testimony in hearings addressing the competency of a defendant to be tried for criminal charges if the witness resides 50 or more miles away from the place of the hearing or the customary travel to the site of the hearing is by air.

The bill would require a person present in Alaska to register as a sex offender if the person is required to register as a sex offender in another jurisdiction.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 359**
Fiscal Note Number: **2**
(H) Publish Date: **2/22/12**

Identifier (file name)	0627-DPS-DET-02-17-12	Dept. Affected	Public Safety
Title	SEX TRAFFICKING AND DISTRIBUTION OF INDECENT MATERIAL TO MINORS	Appropriation	Alaska State Troopers
		Allocation	AST Detachments
Sponsor	Rules by Request of the Governor		
Requester	Governor Parnell	OMB Component Number	2325

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Lt. Rodney Dial — Phone: (907) 247-4480
Division: Alaska State Troopers — Date/Time: 2/17/12 5:25 PM
Approved by: Joseph A. Masters, Commissioner — Date: 2/17/2012
Department of Public Safety

(Revised 1/17/2012 OMB)

FISCAL NOTE #2

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 359

Analysis

This bill changes the name of the crime of "promoting prostitution" to "sex trafficking" in numerous sections in Alaska Statutes; makes changes to Alaska Statute to address recent court decisions regarding the distribution of indecent material to minors; adds AS 11.61.100 (Prostitution) to AS 11.66.145 (Forfeiture) relating to the forfeiture of property used in prostitution offenses; would define human trafficking and sex trafficking in the first degrees as serious felony offenses for purposes of the state conspiracy law; and requires a person who is required to register as a sex offender or child kidnapper in another jurisdiction to register in Alaska.

This bill will have no fiscal impact on the Division of Alaska State Troopers.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 359**
Fiscal Note Number: **3**
(H) Publish Date: **2/22/12**

Identifier (file name): 0627-DOA-PDA-2-17-12
Title: Sex trafficking and distribution of indecent materials
Sponsor: Rules by Request of the Governor
Requester: Governor

Dept. Affected: Administration
Appropriation: Legal and Advocacy Services
Allocation: Public Defender Agency
OMB Component Number: 1631

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	****	****	****	****	****	****	****

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		****	****	****	****	****	****	****

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Quinlan Steiner — Phone: 465-4414
Division: Public Defender Agency — Date/Time: 2/17/12 3:00 PM
Approved by: John Cramer, Deputy Commissioner, Department of Administration — Date: 2/17/2012

(Revised 1/17/2012 OMB)

FISCAL NOTE #3

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 359

Analysis

This bill changes the language used to describe conduct "promoting prostitution" to the phrase "sex trafficking," prohibits the intentional distribution of indecent material to persons known or believed to be less than 16 years of age, and prohibits possession with the intention to distribute indecent material to persons known or believed to be less than 16 years of age. This bill elevates the charge of prostitution from a B misdemeanor to an A misdemeanor if the subject person is under the age of 18. This bill includes "online enticement of a minor in the definition of "most serious felony." The bill also creates the crimes of: conspiracy to commit human trafficking, a class B felony which carries a sentence of up to 10 years imprisonment, and conspiracy to commit sex trafficking, a class A felony which carries a sentence of up to 20 years imprisonment. This bill amends the definition of "sex offense" for the purpose of sex offender registration requirements by including any conviction in another state that would require registration as a sex offender in that state.

Additionally, this bill amends Rule 38 of the Alaska Rules of Criminal Procedure by adding a new section that allows for testimony using two-way video conferencing. The bill also specifies that video conference testimony is allowed for witnesses whose testimony is used to determine competency of the defendant under this section, where the witness would be required to travel more than 50 miles to court, or where air travel to court is customary.

This bill will result in increases in felony cases and more complex sentencing for certain felonies. The Public Defender Agency does not have a reliable method for determining how many more persons may be charged for failing to register as a sex offender under the new definition or whether those charged would qualify for representation by the Public Defender. The Agency, therefore, submits an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **HB 359**
Fiscal Note Number: **4**
(H) Publish Date: **2/22/12**

Identifier (file name): LL0627-DOA-OPA-2-17-12
Title: Sex trafficking and distribution of indecent material
Sponsor: Rules by Request of the Governor
Requester: Governor

Dept. Affected: Administration
Appropriation: Legal & Advocay Services
Allocation: Office of Public Advocacy
OMB Component Number: 43

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	***	***	***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by: Richard Allen, Director — Phone: 907-269-3504
Division: Office of Public Advocacy — Date/Time: 2/17/12 3:00 PM
Approved by: John Cramer, Deputy Commissioner — Date: 2/17/2012
Department of Administration

(Revised 1/17/2012 OMB)

FISCAL NOTE #4

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 359

Analysis

This bill changes the language used to describe conduct "promoting prostitution" to the phrase, "sex trafficking," prohibits the intentional distribution of indecent material to persons known or believed to be less than 16 years of age, and prohibits possession with the intention to distribute indecent material to persons known or believed to be less than 16 years of age. This bill elevates the charge of prostitution from a B misdemeanor to an A misdemeanor if the subject person is under the age of 18. This bill includes "online enticement of a minor in the definition of "most serious felony." The bill also creates the crimes of: conspiracy to commit human trafficking, a class B felony which carries a sentence of up to 10 years imprisonment, and conspiracy to commit sex trafficking, a class A felony which carries a sentence of up to 20 years imprisonment. This bill amends the definition of "sex offense" for the purpose of sex offender registration requirements by including any conviction in another state that would require registration as a sex offender in that state.

Additionally, this bill amends Rule 38 of the Alaska Rules of Criminal Procedure by adding a new section that allows for testimony using two-way video conferencing. The bill also specifies that video conference testimony is allowed for witnesses whose testimony is used to determine competency of the defendant under this section, where the witness would be required to travel more than 50 miles to court, or where air travel to court is customary.

This bill will result in increases in felony cases and more complex sentencing for certain felonies. The Office of Public Advocacy does not have a reliable method for determining how many more persons may be charged for failing to register as a sex offender under the new definition or whether those charged would qualify for representation by the Office of Public Advocacy. Therefore, the Office of Public Advocacy submits an indeterminate fiscal note.

FISCAL NOTE

STATE OF ALASKA cost ≠ codes
2012 LEGISLATIVE SESSION

Bill Version: **HB 359**
Fiscal Note Number: **5**
Publish Date: **2/22/12 (H)**

Identifier (file name): JU2011200627
Title: "An Act relating to conspiracy to commit human trafficking in the first degree or sex trafficking in the first degr
Sponsor: Rules Committee
Requester: Governor

Dept. Affected: DOC
Appropriation: Admin & Support
Allocation: Commissioner's Office
OMB Component Number: 694

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**	**	**	**	**	**	**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**	**	**	**	**	**	**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

This is the original version of the bill.

Prepared by: Leslie Houston, Director
Division: Department of Corrections - Administrative Services
Approved by: Joseph D. Schmidt, Commissioner
Department of Corrections

Phone: 907-465-3339
Date/Time: 2/17/12 8:30 PM
Date: 2/17/2012

(Revised 8/17/2011 OMB)

FISCAL NOTE #5

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 359

Analysis

This bill adds human trafficking in the first degree and sex trafficking in the first degree to the conspiracy statues (AS 11.31.120). A person convicted of this new crime would be subject to punishment for a Class B felony. The average sentence for a Class B felony is five years. The average daily cost of care in a DOC facility is $134.90. Therefore, one individual convicted of conspiring to commit sex trafficking in the first degree could cost the Department of Corrections $246,192.50 based on a five year *average* sentence.

In the past five years, DOC has seen an average of 2.4 convictions for promoting prostitution (sex trafficking). However, DOC does not have any historical data on conspiracy to commit sex or human trafficking, as this would be a new crime if this legislation were to pass. Therefore, DOC is currently unable to quanitfy the fiscal impacts of the passage of this legislation.

The Department will closely monitor the potential future fiscal impacts should this legislation pass.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version	**HB 359**
Fiscal Note Number	**6**
(H) Publish Date	**2/22/12**

Identifier (file name)	0627-DPS-R&I-02-21-12	Dept. Affected	Public Safety
Title	SEX TRAFFICKING AND DISTRIBUTION OF INDECENT MATERIAL TO MINORS	Appropriation	Statewide Support
		Allocation	Records & Identification
Sponsor	Rules by Request of the Governor		
Requester	Governor Parnell	OMB Component Number	1190

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services	109.5		109.5	109.5	109.5	109.5	109.5
Travel	5.0		5.0	5.0	5.0	5.0	5.0
Services	5.8		5.8	5.8	5.8	5.8	5.8
Commodities	1.0		1.0	1.0	1.0	1.0	1.0
Capital Outlay	2.9		2.9	2.9	2.9	2.9	2.9
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**124.2**	**0.0**	**124.2**	**124.2**	**124.2**	**124.2**	**124.2**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF	124.2		124.2	124.2	124.2	124.2	124.2
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**124.2**	**0.0**	**124.2**	**124.2**	**124.2**	**124.2**	**124.2**

POSITIONS							
Full-time	**1**		1	1	1	1	1
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by	David Schade, Director	Phone	(907) 269-0202
Division	Division of Statewide Services	Date/Time	2/21/12 11:07 AM
Approved by	Joe Masters, Commissioner	Date	2/21/2012
	Department of Public Safety		

(Revised 1/17/2012 OMB)

FISCAL NOTE #6

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. HB 359

Analysis

This proposed legislation would require a person who is required to register as a sex offender or child kidnapper in another jurisdiction to register in Alaska even if there is no substantive law in Alaska that is similar to the offense the person was convicted of.

For the department's Records & Identification bureau to continue to accomplish a core service of providing public access to current information regarding sex offenders in Alaska, the determination that a person must register as a sex offender or child kidnapper in Alaska because of their requirement to register in another jurisdiction must be made timely and must be based on information that has been validated.

Considerable research and analysis of the criminal history background of persons with sex offense convictions outside of Alaska would be required to determine whether the offense of conviction is a registerable offense under the current laws of that jurisdiction and whether or not the person is subject to that jurisdiction's registration requirements. Coordination with the jurisdiction's sex offender central registry office would need to occur to obtain source documents and other relevant information on the person.

Additionally, it is anticipated that the department would need to continually monitor the status of registration laws and legal cases affecting sex offender registration in all jurisdictions to ensure a person required to register in Alaska under proposed AS 12.63.100(6)(D) continued to be subject to the registration requirements of the jurisdiction that their offense was committed in.

The department anticipates that these additional efforts will require one new full-time Criminal Justice Planner position. This position would be responsible to review and evaluate offender records with out-of-state sex offense convictions to determine the requirement to register under proposed AS 12.63.100(6)(D), to coordinate with other jurisdictions' sex offender central registry offices, and to monitor sex offender registration laws in other jurisdictions and any changes for possible impact to currently registered offenders.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: **CS HB 359 (JUD)**
Fiscal Note Number: (new 6) 7
() Publish Date:

Identifier (file name)	CS HB 359 (JUD)	Dept. Affected	Public Safety
Title	Sex Crimes; Testimony by Video Conference	Appropriation	Statewide Support
		Allocation	Records & Identification
Sponsor	Rules by Request of the Governor		
Requester	House Judiciary Committee	OMB Component Number	1190

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

CS HB 369 (JUD) deletes Sec. 20 of the original bill.

Prepared by	Melanie Lesh, Legislative Aide	Phone	907-465-4990
Division	House Judiciary Committee	Date/Time	3/14/12 12:00 AM
Approved by	Representative Carl Gatto, Chair	Date	3/14/2012
	House Judiciary Committee		

(Revised 1/17/2012 OMB)

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

BILL NO. CS HB 359 (JUD)

Analysis

There is no additional cost resulting from the passage of House Bill 359.

FISCAL NOTE

STATE OF ALASKA
2012 LEGISLATIVE SESSION

Bill Version: HB359-ACS-TRC-2-28-12
Fiscal Note Number:
Publish Date:

Identifier (file name): HB359-ACS-TRC-2-28-2012
Dept. Affected: Alaska Court System
Title: Human trafficking; furnishing indecent material to minors; video conferencing
Appropriation: Trial Courts
Allocation:
Sponsor: Rules
Requester: Request of the Governor
OMB Component Number: 768

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY13**	**FY13**	**FY14**	**FY15**	**FY16**	**FY17**	**FY18**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
TOTAL OPERATING	***	***	***	***	***	***	***

FUND SOURCE		(Thousands of Dollars)						
1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
TOTAL		***	***	***	***	***	***	***

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs _____ *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs _____ *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version

Prepared by: Nancy Meade, General Counsel — Phone: 907-463-4736
Division: Alaska Court System — Date/Time: 2/28/2012 1:00 p.m.
Approved by: Nancy Meade for Christine Johnson, Administrative Director — Date: 2/28/2012
Alaska Court System

(Revised 11/17/2011 OMB)

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB359-ACS-TRC-2-28-12
2012 LEGISLATIVE SESSION

Analysis

House Bill 359 changes the crimes of prostitution in the first, second, third and fourth degrees to sex trafficking, and adds the crimes of human trafficking and sex trafficking in the first degree to the definition of "serious felony offense" under the conspiracy law. These changes have no fiscal impact on the court system.

The bill also amends the crime of distribution of indecent materials to minors (AS 11.61.128(a)) by requiring intent and knowledge as elements of the crime, it creates new crimes, and it requires persons with a sex offense in another jurisdiction to register as a sex offender in Alaska. These changes could have the effect of changing the number and types of criminal cases that are filed with and handled by the court system. However, the number of cases filed under AS 11.61.128(a) in FY 2011 was low, and the court expects that it would handle any additional cases under this bill in the normal course, without any fiscal impact. The court will monitor the cases filed under the revised statutes to determine whether the bill does cause a significant change, but a fiscal impact from those revisions is not expected.

In addition, Section 25 of House Bill 359 adds a Rule of Criminal Procedure that allows for two-way videoconferencing for witness testimony in criminal trials when the parties agree or when the court authorizes it because it is found to be necessary to further an important public policy, the witness is not available, and the testimony is given under oath and subject to cross-examination. Similarly, Section 16 adds a new subsection to AS 12.47.100 allowing the testimony of witnesses in competency hearings to be presented by two-way videoconferencing in certain circumstances.

The court does not view this bill as requiring installation of high-quality, high-definition videoconferencing cameras, televisions, and speakers in courtrooms, and therefore is not basing its fiscal note on the high cost of that undertaking. Still, the bill may result in the increased costs associated with the increased use of "webcams" for the video testimony of witnesses, such as the costs of software and, possibly, access to increased bandwidth. The court cannot accurately determine how many trials and competency hearings might include testimony by videoconferencing under this bill, and therefore submits an indeterminate fiscal note.

March 4, 2012

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The Honorable Carl Gatto, Chair
The Honorable Steve Thompson, Vice-Chair
House Judiciary Committee
Alaska State House of Representatives
State Capitol
Juneau, AK 99801
via email: Representative_Carl_Gatto@legis.state.ak.us
Representative_Steve_Thompson@legis.state.ak.us

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

Dear Chair Gatto and Vice-Chair Thompson:

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 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 this proposed legislation.

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 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[.]" 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").

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

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

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).

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

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[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).

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. 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).[8] 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,[9] 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).[10]

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[8] 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).

[9] 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).

[10] 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

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*.[11]

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.[12] 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 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.[13]

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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.

[11] 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.

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

[13] 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.

Section 20 Is Unwise; It Shackles Alaska's Policy to Every Other Jurisdiction

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),[14] is a misdemeanor in Alaska[15] and does not require registration.[16] Other states are more draconian; to continue to use the indecent exposure example, some states require registration for all forms, even those variants that Alaska has omitted from registration.[17] If Section 20 is enacted, it would commit these individuals to register annually for at least 15 years[18] 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 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

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[14] 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).

[15] Alaska Stat. § 11.41.460.

[16] 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").

[17] 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).

[18] 15 years is the briefest registration period in Alaska. Alaska Stat. §§ 12.63.010(d)(1), 12.63.020(a)(2).

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.[19] 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.

No matter one's feelings about registration as a policy matter, everyone should be able to agree that placement on the registry, because of its significant, irrevocable consequences, should not be done lightly. If Section 20 is enacted, individuals will be forced to register and bear the heavy costs even though they have not committed an offense that Alaska, in its sound policy judgment, has decided warrants registration.

Alaska should not abdicate its sovereignty and wisdom nor should it cede its policymaking to other jurisdictions. The Legislature should continue to exercise its considered judgment in determining what offenses justify registration. Section 20 would make Alaska's registry an appendage to all other jurisdictions and it would carelessly ensnare otherwise anodyne individuals into its life-changing scheme.

Conclusion

We hope that the Judiciary 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 and it outsources the Legislature's policy judgments about the sex offender registry to every other jurisdiction.

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

[19] Alaska Stat. §§ 12.63.010(d)(1), 12.63.020(a)(2).

cc: Representative Wes Keller, Representative_Wes_Keller@legis.state.ak.us
Representative Bob Lynn, Representative_Bob_Lynn@legis.state.ak.us
Representative Lance Pruitt, Representative_Lance_Pruitt@legis.state.ak.us
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Representative Mike Hawker, Representative_Mike_Hawker@legis.state.ak.us

In promoting prostitution, no due process violation for statute dispensing with reasonable mistake of age defense

668 P.2d 829
(Cite as: 668 P.2d 829)

C

Court of Appeals of Alaska.
Willie B. BELL, Appellant,
v.
STATE of Alaska, Appellee.

No. 5821.
Sept. 9, 1983.

Defendant was convicted in the Superior Court, Third Judicial District, Anchorage, Milton M. Souter, J., of promoting prostitution in the first degree and managing a prostitution enterprise, and he appealed. The Court of Appeals, Bryner, C.J., held that: (1) statute which expressly dispenses with mistake of age as a defense to promoting prostitution in the first degree does not violate due process of law; (2) trial court did not abuse its discretion in admitting tape recording of phone conversation between defendant and person he was alleged to have induced to engage in prostitution even though part of tape was inaudible; (3) evidence was sufficient to support finding of existence of probable cause to support issuance of search warrant to record conversations between defendant and women who had worked for him; (4) defendant failed to show prejudice stemming from untimely notification of execution of the warrant; (5) trial court's supplemental instruction, issued in response to inquiry by jury whether inability to agree on one count of indictment constituted a hung jury, was not coercive and did not constitute an abuse of discretion; (6) conviction of the two offenses did not violate double jeopardy; and (7) increase of defendant's sentence by one year was justified by fact that defendant attempted to arrange a romantic involvement with a 14-year-old girl while he was incarcerated for promoting the prostitution of another girl under the age of 16.

Affirmed.

West Headnotes

[1] Constitutional Law 92 ⚿4509(23)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4509 Particular Offenses
92k4509(23) k. Sex offenses, incest, and prostitution. Most Cited Cases
(Formerly 92k258(5))

Prostitution 315H ⚿14

315H Prostitution
315Hk11 Constitutional, Statutory, and Regulatory Provisions
315Hk14 k. Validity. Most Cited Cases
(Formerly 92k258(5))

The Legislature may, consistent with the requirements of constitutional due process, preclude mistake of age from constituting a defense to the crime of promoting prostitution in the first degree. AS 11.66.110; Const. Art. 1, § 7; U.S.C.A. Const.Amend. 14.

[2] Criminal Law 110 ⚿20

110 Criminal Law
110I Nature and Elements of Crime
110k19 Criminal Intent and Malice
110k20 k. In general. Most Cited Cases

Criminal intent is a necessary ingredient of criminal liability, and one charged with criminal conduct must have an awareness or consciousness of wrongdoing.

[3] Prostitution 315H ⚿17

315H Prostitution
315Hk17 k. Pimping, pandering, and procuring. Most Cited Cases
(Formerly 316k1)

As an element of the offense of promoting prostitution in the first degree, defendant was required to be aware that he was procuring women to engage in acts of prostitution. AS 11.66.110(a)(2), (b).

[4] Prostitution 315H ⚿17

315H Prostitution
315Hk17 k. Pimping, pandering, and procuring. Most Cited Cases
(Formerly 316k1)
In prosecution for promoting prostitution in the first degree, while defendant was not required to know the age of those whom he procured, this is not to say that the offense did not require mens rea or a culpable mental state. AS 11.66.110(a)(2), (b).

[5] Criminal Law 110 ⚿33

110 Criminal Law
110II Defenses in General
110k33 k. Ignorance or mistake of fact. Most Cited Cases
(Formerly 316k1)

Prostitution 315H ⚿17

315H Prostitution
315Hk17 k. Pimping, pandering, and procuring. Most Cited Cases
(Formerly 316k1)
Even if defendant, who was convicted of promoting prostitution in the first degree on a basis that he induced a person under the age of 16 to engage in prostitution, had made a reasonable mistake of age of the person induced, defendant would still have been guilty of promoting prostitution in the third degree. AS 11.66.110(a)(2), (b), 11.66.130(a)(2).

[6] Prostitution 315H ⚿17

315H Prostitution
315Hk17 k. Pimping, pandering, and procuring. Most Cited Cases
(Formerly 316k1)

The act of procuring another for purposes of prostitution is malum in se, without regard to the age of the person procured, and thus, in a prosecution for procuring a person under the age of 16 years, the intent to procure satisfies the minimal constitutional requirement of criminal intent. AS 11.66.110(a)(2), (b); Const. Art. 1, § 7; U.S.C.A. Const.Amend. 14.

[7] Constitutional Law 92 ⚿4509(23)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4509 Particular Offenses
92k4509(23) k. Sex offenses, incest, and prostitution. Most Cited Cases
(Formerly 92k258(5))

Prostitution 315H ⚿14

315H Prostitution
315Hk11 Constitutional, Statutory, and Regulatory Provisions
315Hk14 k. Validity. Most Cited Cases
(Formerly 316k1)
Statute which expressly dispenses with mistake of age as a defense to promoting prostitution in the first degree does not violate due process of law. AS 11.66.110(b); Const. Art. 1, § 7; U.S.C.A. Const.Amend. 14.

[8] Criminal Law 110 ⚿1169.1(10)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.1 In General
110k1169.1(10) k. Documentary and demonstrative evidence. Most Cited Cases
In prosecution for promotion of prostitution in

first degree, trial court's decision to admit recording of a telephone conversation between defendant and a person defendant was alleged to have induced to engage in prostitution would be reversible error only if it constituted an abuse of discretion. AS 11.66.110.

[9] Criminal Law 110 ⚿438.1

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publica- tions
110k438.1 k. Sound recordings. Most Cited Cases

In prosecution for promotion of prostitution in the first degree, trial judge did not abuse his discretion in admitting tape recording of a telephone conversation between defendant and a person whom he was alleged to have induced to engage in prostitution, a portion of which was inaudible, in that most of the tape was audible, the judge gave cautionary instruction, and probative value of the tape outweighed the possibility of prejudice. AS 11.66.110.

[10] Telecommunications 372 ⚿1460

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(B) Authorization by Courts or Public Officers
372k1460 k. In general. Most Cited Cases
(Formerly 372k510)

Procedures outlined in federal electronic surveillance act need not supplement the requirements that must be met before electronic monitoring of conversations is permitted.

[11] Searches and Seizures 349 ⚿191

349 Searches and Seizures
349VI Judicial Review or Determination
349k191 k. In general; conclusiveness of warrant in general. Most Cited Cases
(Formerly 110k1158(2))

Trial judge's determination that probable cause existed for issuance of search warrant was entitled to great deference by the Court of Appeals.

[12] Telecommunications 372 ⚿1467(5)

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(B) Authorization by Courts or Public Officers
372k1464 Application or Affidavit
372k1467 Competency of Information; Hearsay
372k1467(5) k. Citizens, victims or officers. Most Cited Cases
(Formerly 372k515)

In prosecution for promotion of prostitution in the first degree, evidence was sufficient to support finding that probable cause existed for issuance of *Glass* search warrant to record conversations between defendant and two women who had worked for him, and who were the informants. AS 11.66.110.

[13] Searches and Seizures 349 ⚿115.1

349 Searches and Seizures
349II Warrants
349k115 Competency of Information; Hearsay
349k115.1 k. In general. Most Cited Cases
(Formerly 349k115, 349k3.6(3))

Aguilar-Spinelli standards for ascertaining the reliability and credibility of informants who have provided hearsay information in support of issuance of a search warrant did not apply where neither informant in support of search warrant was a confidential informant in that both testified personally and were under oath at the time, and the magistrate had ample opportunity to assess their credibility.

[14] Criminal Law 110 ⚿392.49(9)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k392.1 Wrongfully Obtained Evidence
110k392.49 Evidence on Motions
110k392.49(3) Weight and Sufficiency
110k392.49(9) k. Wiretaps; electronic surveillance. Most Cited Cases
(Formerly 110k394.3)

Defendant failed to show prejudice stemming from untimely notification of execution of search warrant authorizing his telephone conversation to be monitored and recorded, and, as it did not appear that the late notification was the result of bad faith on the part of investigating officers, the untimely notice to defendant did not justify suppression of the recording made pursuant to the warrant. Rules Crim.Proc., Rules 37, 37(b)(1, 2).

[15] Criminal Law 110 ⚿863(2)

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k863 Instructions After Submission of Cause
110k863(2) k. Requisites and sufficiency. Most Cited Cases

Trial court's supplemental instruction, issued in response to note from jury inquiring if inability to agree on one count of the indictment constituted a hung jury, stating in part that the jury had not deliberated long enough to validly reach conclusion that it could not agree, was not coercive and did not constitute an abuse of discretion, in that the jury had not deliberated for an extended time, the communication did not unequivocally indicate a deadlock, and the court's instruction did not imply that the jury would be required to deliberate until unanimity was reached.

[16] Double Jeopardy 135H ⚿148

135H Double Jeopardy
135HV Offenses, Elements, and Issues Foreclosed
135HV(A) In General
135Hk139 Particular Offenses, Identity of
135Hk148 k. Sex offenses; obscenity. Most Cited Cases
(Formerly 110k163)

Finding that defendant managed a prostitution business with at least two women working for him involved the element of management and required proof of an enterprise, neither of which were involved in separate charge of inducing a person under 16 years of age to engage in prostitution, and thus, defendant's intent and conduct differed on the two charges, and sentences on the two charges did not violate double jeopardy. AS 11.66.110(a)(2), 11.66.120(a)(1), 11.66.150(2); U.S.C.A. Const.Amend. 5.

[17] Double Jeopardy 135H ⚿112.1

135H Double Jeopardy
135HIV Effect of Proceedings After Attachment of Jeopardy
135Hk112 Resentencing; Increase of Punishment
135Hk112.1 k. In general. Most Cited
(Formerly 135Hk112, 110k163)

Trial court's failure to reduce defendant's sentence after finding that at least part of basis for increased sentence previously imposed may not have been true was not an abuse of discretion, and as there was no increase in the original sentence, no violation of double jeopardy was involved. U.S.C.A. Const.Amend. 5.

[18] Sentencing and Punishment 350H ⚿95

350H Sentencing and Punishment
350HI Punishment in General
350HI(E) Factors Related to Offender
350Hk93 Other Offenses, Charges, Misconduct
350Hk95 k. Nature, degree, or seriousness of other misconduct. Most Cited Cases
(Formerly 110k986.2(4.1), 110k986.2(4))

Fact that defendant attempted to arrange a romantic involvement with a 14-year-old girl while he was incarcerated for promoting the prostitution of another girl under the age of 16 indicated a lack of remorse on defendant's part and a greater need for deterrence of defendant himself, and thus justified imposition of a more severe sentence. AS 11.66.110.

***831** Christine Schleuss, Asst. Public Defender, Dana Fabe, Public Defender, Anchorage, for appellant.

W.H. Hawley, Jr., Asst. Atty. Gen., Anchorage, Wilson L. Condon, Atty. Gen., Juneau, for ap- pellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

BRYNER, Chief Judge.

Willie B. Bell appeals his convictions for promoting prostitution in the first degree in violation of AS 11.66.110(a)(2) and managing a prostitution enterprise in violation of AS 11.66.120(a)(1). He also appeals the sentence imposed. We affirm.

Bell was a twenty-nine-year-old army sergeant when he procured two sixteen-year-old girls, C.R. and M.J., and one fourteen-year-old girl, D.W., for prostitution. C.R. began living with Bell and engaging in prostitution after Bell promised to marry her and to buy her a new car and new clothing. At Bell's direction, D.W. and M.J. worked as prostitutes in May, 1980. On May 22, 1980, Bell assaulted M.J., claiming that she had been drinking instead of "working." Fearing that Bell would harm them, C.R. and M.J. left him and contacted police, who obtained a search warrant to record conversations between M.J., C.R. and Bell. A telephone conversation between Bell and C.R. and a conversation involving Bell, M.J. and C.R. were recorded pursuant ***832** to the warrant and used as evidence against Bell.

The indictment returned against Bell charged two counts of promoting prostitution in the first degree, alleging that he induced D.W. to engage in prostitution when she was under the age of sixteen (Count I) (AS 11.66.110(a)(2)), and that he induced C.R. to engage in prostitution by means of force (Count II) (AS 11.66.110(a)(1)). Count III of the indictment, as it went to the jury, alleged that Bell was guilty of attempted promotion of prostitution in the first degree, AS 11.66.110(a)(1) and AS 11.31.100(a), regarding M.J. The indictment also alleged that Bell managed, supervised, controlled or owned a prostitution enterprise other than a house of prostitution in violation of AS 11.66.120(a)(1) (Count IV). Bell was convicted of Counts I and IV. On Count II, Bell was acquitted of the charge but convicted of the lesser-included offense of promoting prostitution in the third degree, AS 11.66.130. On Count III, Bell was found not guilty of the charge but guilty of the lesser-included offense of attempted promotion of prostitution in the third degree, AS 11.66.130 and 11.31.100(a). Bell was not sentenced on Counts II and III. Superior Court Judge Milton M. Souter sentenced Bell to a five-year term with two years suspended on Count I, and a four-year term with three years suspended on Count IV. The sentences for these offenses were to run concurrently. Subsequently, Judge Souter refused to reduce the sentence.

On appeal, Bell argues that: (1) he should have been allowed to present a reasonable mistake of age defense to the charge contained in Count I; (2) a partially inaudible tape recording should not have been admitted into evidence; (3) the search warrant for recording of conversations was improperly issued and executed; (4) supplemental instructions given to the jury were unduly coercive; (5) the sentences imposed by the trial court violated his double jeopardy rights; and (6) Judge Souter gave improper consideration to a letter Bell wrote, while awaiting sentencing, to the fourteen-year-old daughter of another inmate.

I. MISTAKE OF AGE

[1] Bell asserts that the trial court erred in refusing to give a proposed jury instruction providing for a reasonable mistake of age defense to the charge of inducing a person under the age of sixteen to engage in prostitution in violation of AS 11.66.110(a)(2).[FN1] Bell argues that AS 11.66.110(b) violates his due process rights under the United States and Alaska constitutions by expressly precluding mistake of age as a defense to the charge of violating AS 11.66.110(a)(2). We find this argument unpersuasive and conclude that the legislature may, consistent with the requirements of constitutional due process, preclude mistake of age from constituting a defense to the ***833** crime of promoting prostitution in the first degree.

FN1. AS 11.66.110 provides:

> PROMOTING PROSTITUTION IN THE FIRST DEGREE.
>
> (a) A person commits the crime of promoting prostitution in the first degree if he
>
> (1) induces or causes a person to engage in prostitution through the use of force;
>
> (2) as other than a patron of a prostitute, induces or causes a person under 16 years of age to engage in prostitution; or
>
> (3) induces or causes a person in his legal custody to engage in prostitution.
>
> (b) In a prosecution under (a)(2) of this section, it is not a defense that the defendant reasonably believed that the person he induced or caused to engage in prostitution was 16 years of age or older.
>
> (c) Promoting prostitution in the first degree is a class B felony.

The jury was instructed on the elements of this offense. The court then instructed that:

> It is not a defense to the crime charged in Count I of the Indictment that the defendant reasonably believed that the person he induced or caused to engage in prostitution was 16 years of age or older.

The instruction proposed by Bell stated:

> It is a defense to Count I of the indictment, Inducing a Person Under 16 Years of Age to Engage in Prostitution, that the defendant reasonably and in good faith believed that the female person was of the age of sixteen years or older, even though, in fact, she was under the age of sixteen years. If from all the evidence you have a reasonable doubt as to the question whether defendant reasonably and in good faith believed that she was sixteen years of age or older, you must give the defendant the benefit of that doubt and find him not guilty.

It is apparent that the legislature considered procurement of a person under sixteen to be an aggravated form of promoting prostitution. The commentary to the Revised Criminal Code, 2 Senate Journal, Supplement No. 47, at 109 (1978), states that by denying a defendant the defense of reasonable mistake as to age, creation of strict liability was intended as to the element of the offense involving age of the victim.[FN2] Supporting the validity of the legislature's decision in this regard is the supreme court's opinion in *Hentzner v. State,* 613 P.2d 821 (Alaska 1980), in which the court held:

FN2. *See also* Alaska Criminal Code Revision Part 4, at 103 (Tent. Draft 1977) (Commentary to AS 11.66.140).

> Where a crime involved may be said to be *malum in se,* that is, one which reasoning members of society regard as condemnable, awareness of the commission of the act necessarily carries with it an awareness of wrongdoing. In such a case the requirement of criminal intent is met on

proof of conscious action, and it would be entirely acceptable to define the word "wilfully" to mean no more than a consciousness of the conduct in question.

Id. at 826. *See also Wheeler v. State,* 659 P.2d 1241, 1254 n. 18 (Alaska App.1983).

[2] Bell correctly states the well-recognized rule in this jurisdiction that criminal intent is a necessary ingredient of criminal liability and that one charged with criminal conduct must have an awareness or consciousness of wrongdoing. *Speidel v. State,* 460 P.2d 77, 78 (Alaska 1969). In *Speidel,* the awareness of wrongdoing was in the context of a larceny-type crime, for which courts have historically required a specific intent to wrongfully deprive. In *Alex v. State,* 484 P.2d 677 (Alaska 1971), the supreme court discussed the intent required for non-larceny crimes:

> However, as applied to crimes generally, what is imperative, is that an accused's act be other than simply inadvertent or neglectful. What is essential is not an awareness that a given conduct is a "wrongdoing" in the sense that it is proscribed by law, but rather, an awareness that one is committing the specific acts which are defined by law as a "wrongdoing." It is, however, no defense that one was not aware that his acts were wrong in the sense that they were proscribed by law. So long as one acts intentionally, with cognizance of his behavior, he acts with the requisite awareness of wrongdoing.

Id. at 681–82.[FN3]

> FN3. *See also State v. Rice,* 626 P.2d 104, 115 (Alaska 1981) (Matthews, J., concurring) (a statute prohibiting the transportation of illegally taken game was overbroad, because it included "within its ambit the conduct of people who have no reason to believe that what they are doing is criminal").

[3][4] We believe this language is applicable to Bell's actions, since he was consciously committing the acts proscribed by law. As an element of this offense, Bell was required to be aware that he was procuring women to engage in acts of prostitution. Indeed, the jurors in this case were instructed that they must be convinced beyond a reasonable doubt

> that the defendant engaged in conduct which caused or induced [D.W.] to engage in prostitution; [and] that the defendant engaged in said conduct with the specific intent to cause or induce [D.W.] to engage in prostitution.

Thus, while Bell was not required to know the age of those whom he procured, this is not to say that the offense did not require *mens rea* or a culpable mental state.

We also note that AS 11.66.110(b) is in accord with the common law view that there should be no exculpation for mistake where, if the facts had been as the actor believed them to be, his conduct would still be illegal or immoral. [FN4] As Bell recognizes ***834** on appeal, his conduct would still have been illegal even if D.W. had been sixteen or over. AS 11.66.130(a)(2). [FN5] Moreover, although it might be arguable that the offense of prostitution should be considered a *malum prohibitum* crime, we think it manifest that *promoting* prostitution is an offense "which reasoning members of society regard as condemnable," and thus, is *malum in se. Hentzner v. State,* 613 P.2d at 826. Accordingly, there can be little doubt that *Hentzner* 's basic requirement of an awareness or consciousness of wrongdoing is satisfied, despite the fact that AS 11.66.110(b) precludes mistake of age as a defense to the offense of promoting prostitution in the first degree.

> FN4. In the landmark case of *Regina v. Prince,* L.4., 2 Cr.Cas.Res. 154 (1875), the defendant was convicted of taking a girl under sixteen years of age from under the care of her father, even though the defendant reasonably believed she was older. The defense of mistake of age was disallowed on the ground that removal of an unmar-

> ried girl from the lawful custody of her parents would have been a crime even had she been as old as he believed. Hence, the defendant acted at his peril.
>
> FN5. AS 11.66.130 provides, in relevant part:
>
> (a) A person commits the crime of promoting prostitution in the third degree if, with intent to promote prostitution, he ...
>
> (2) as other than a patron of a prostitute, induces or causes a person 16 years of age or older to engage in prostitution ....
>
> (b) Promoting prostitution in the third degree is a class A misdemeanor.

In continuing to press his claim that AS 11.66.110(b) imposes an unconstitutional standard, Bell relies upon *State v. Guest,* 583 P.2d 836 (Alaska 1978), in which the supreme court upheld a trial court's decision to instruct the jury on a defense of reasonable mistake of age in a statutory rape case. Following the reasoning of *Speidel* and *Alex,* the court stated that an intent requirement must be read into former AS 11.15.120 to save it from unconstitutionality. To refuse a defense of mistake of age in a statutory rape case, according to the *Guest* court, would be to impose significant criminal liability without any criminal mental element. *Id.* at 839.

Bell relies most heavily upon the following language in *Guest:*

> It has been urged in other jurisdictions that where an offender is aware he is committing an act of fornication he therefore has sufficient criminal intent to justify a conviction for statutory rape because what was done would have been unlawful under the facts as he thought them to be. We reject this view. While it is true that under such circumstances a mistake of fact does not serve as a complete defense, we believe that it should serve to reduce the offense to that which the offender would have been guilty of had he not been mistaken. Thus, if an accused had a reasonable belief that the person with whom he had sexual intercourse was sixteen years of age or older, he may not be convicted of statutory rape. If, however, he did not have a reasonable belief that the victim was eighteen years of age or older, he may still be criminally liable for contribution to the delinquency of a minor.

Id. (citations and footnotes omitted). The court cited in support of its position section 2.04(2) of the Model Penal Code (Proposed Official Draft 1962), which provides:

> Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.

[5] We believe the problem addressed in *Guest* is distinguishable from the issue at hand. As we have stated, Bell did not lack criminal intent; he intended to promote prostitution. *See Hentzner v. State,* 613 P.2d at 826; *Wheeler v. State,* 659 P.2d at 1251. The court in *Guest* was careful to point out that fornication was not itself a crime, so that it could not have been considered as a lesser-included offense of statutory rape. Also, although the court went on to observe that Guest *might* still have ***835** been guilty of contributing to the delinquency of a minor under former AS 11.40.130 if he did not have a reasonable belief that his partner was under eighteen, it is clear that Bell was *necessarily* guilty of promoting prostitution in the third degree if the facts were as he supposed them to be.

This distinction is supported by analysis of other authorities. The revised criminal code contains no provision paralleling the second sentence of MPC § 2.04(2), quoted by the *Guest* court. Instead,

AS 11.81.600(b)(2) provides:

> (b) A person is not guilty of an offense unless he acts with a culpable mental state with respect to each element of the offense, except that no culpable mental state must be proved
>
> (2) *if an intent to dispense with the culpable mental state requirement for that element clearly appears.*

(Emphasis added.) AS 11.66.110(b), by proscribing any defense to AS 11.66.110(a)(2) based upon mistake of age, clearly demonstrates a legislative intent to dispense with knowledge of age.

More importantly, despite the language of MPC § 204(2), the Model Penal Code takes essentially the same approach as the Revised Code to in its treatment of criminal intent for the offense of promoting prostitution. MPC § 251.2(2) (1980) makes the conduct proscribed by AS 11.66.130(a)(2) —promoting prostitution in the third degree—a misdemeanor, while § 251.2(3)(c) provides that the same conduct shall be a felony if "the actor promotes prostitution of a child under 16, *whether or not he is aware of the child's age.* " Similarly, New York Penal Law § 230.30 (1978), from which AS 11.66.110 appears to be derived, provides that it shall be a felony to "knowingly" advance or profit from the prostitution of a person less than sixteen years old, while New York Penal Law § 15.20(3) (1967) provides that

> Notwithstanding the use of the term "knowingly" in any provision of this chapter defining an offense in which the age of a child is an element thereof, knowledge by the defendant of the age of such child is not an element of any such offense and it is not, unless expressly so provided, a defense to a prosecution therefor that the defendant did not know the age of the child or believed such age to be the same as or greater than that specified in the statute.

We find it highly persuasive that these statutory schemes are, when applied to the precise conduct engaged in by Bell, in consonance with the approach taken in the Revised Code.

[6][7] Under the Revised Alaska Criminal Code, it is Bell's intentional procurement of a person under the age of sixteen years for prostitution that renders him liable for first-degree promoting, regardless of his actual awareness of that person's age. The act of procuring another for purposes of prostitution is *malum in se,* without regard to the age of the person procured, and thus, as we have indicated, in a prosecution for procuring a person under the age of sixteen years, the intent to procure satisfies the minimal constitutional requirement of criminal intent. *Hentzner v. State,* 613 P.2d at 826. We hold that AS 11.66.110(b), which expressly dispenses with mistake of age as a defense to promoting prostitution in the first degree, does not violate due process of law. We therefore conclude that the trial court did not err in rejecting Bell's challenge to the instruction on mistake of age.

II. PARTIALLY INAUDIBLE TAPE

Bell argues that error occurred when a recording of a telephone conversation between Bell and C.R. was played for the jury. At trial, Bell's attorney objected to admission of the recorded telephone conversation, contending that parts of the tape were substantially inaudible. The tape of another conversation was played without objection. Before this tape was played, the trial judge gave a cautionary instruction ***836** admonishing the jury to consider only what it actually heard on both tapes.[FN6]

FN6. The jury was instructed:

> [I] want to admonish the jury that there are portions of these tapes that are impossible to hear .... Consider only what you hear, only what you actually hear on the tapes, together with any other evidence .... But don't speculate what is on the tape where there isn't credible evidence .... The tapes are going to be hard to understand. Don't guess at what's on

those tapes.

[8] The trial court's decision to admit the phone tape is reversible error only if it constituted an abuse of discretion. *Robinson v. State,* 593 P.2d 621, 624 n. 5 (Alaska 1979). In *Dana v. State,* 623 P.2d 348 (Alaska App.1981), we considered the correctness of the trial court's admission of a tape which had "significant gaps" due to equipment failure. We held that there could be no abuse of discretion in admitting the flawed tape unless its prejudicial impact outweighed its probative value. *Id.* at 353–54.

[9] In the present case, after weighing the possibility of prejudice against the probative value of the tape, and taking into account the other evidence at trial, the cautionary instruction, and the fact that most of the tape is audible, we conclude that Judge Souter did not abuse his discretion in admitting the tape.

III. ISSUANCE AND EXECUTION OF THE GLASS WARRANT

[10] Bell argues that procedures outlined in the federal electronic surveillance act should supplement the requirements, enumerated in *State v. Glass,* 583 P.2d 872 (Alaska 1978), that must be met before electronic monitoring of conversations is permitted. We considered and rejected a similar argument in *Jones v. State,* 646 P.2d 243, 248 (Alaska App.1982). *See also Gallagher v. State,* 651 P.2d 1185, 1187 (Alaska App.1982). Our holdings in *Jones* and *Gallagher* are dispositive of this issue.

Bell also contends that probable cause for the issuance of a *Glass* warrant did not exist because it was not known whether relevant conversations would occur between Bell, M.J. and C.R., and because M.J. and C.R. were neither reliable nor credible. Bell's motion to suppress on this ground was denied at the omnibus hearing.

[11][12] The judge's determination that probable cause existed is entitled to great deference by this court. *Spinelli v. United States,* 393 U.S. 410, 419, 89 S.Ct. 584, 590–91, 21 L.Ed.2d 637, 645 (1969). We find ample facts to support issuance of the search warrant. C.R. and M.J. stopped working for Bell less than a week before they testified at the proceeding to issue the *Glass* warrant. Since C.R. had worked for Bell for nearly six months and given him $5,000 of the money she made by prostitution, it was logical to assume she could contact him and that he would have some interest in talking to her. Although M.J. had worked for Bell for only a few weeks, the same reasoning applies. We believe the court correctly found that sufficient probable cause existed to issue the *Glass* warrant. *United States v. Ventresca,* 380 U.S. 102, 108, 85 S.Ct. 741, 745–46, 13 L.Ed.2d 684, 689 (1965); *Martel v. State,* 511 P.2d 1055, 1055 n. 1 (Alaska 1973); *Rosa v. State,* 633 P.2d 1027, 1029–30 (Alaska App.1981).

[13] Bell, relying on *Spinelli v. United States,* and *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), additionally contends that the search warrant should not have been issued because C.R. and M.J. were neither reliable nor credible. Bell's reliance on the rulings in *Aguilar* and *Spinelli* is misplaced, because those cases set forth criteria for ascertaining the reliability and credibility of informants who have provided hearsay information. Neither C.R. nor M.J. was a confidential informant; both testified personally and were under oath at the time. The magistrate thus had ample opportunity to assess their credibility. Accordingly, the *Aguilar-Spinelli* standards do not apply in this case, and Bell's argument is without merit.

Next, Bell argues that the recordings should have been suppressed because the police failed to comply with Alaska Rule of Criminal Procedure 37(b)(2), and because the police failed to mail a copy of the warrant***837** and receipt to Bell in compliance with the provision of the warrant requiring that Criminal Rule 37(b)(1) and (2) be satisfied. [FN7]

FN7. Alaska R.Crim.P. 37 provides, in pertinent part:

> (b) *Execution and Return With Inventory.* The warrant shall be executed and returned within 10 days after its date. The officer taking property under the warrant
>
> (1) shall give to the person from whom or from whose premises the property was taken a copy of the warrant, a copy of the supporting affidavits, and receipt for the property taken, or
>
> (2) shall leave the copies and the receipt at the place from which the property was taken ....

The court ordered that a copy of the warrant and receipt be mailed to Bell within ten days of May 27, 1980, when the warrant was executed. Officer George Novaky stated in an affidavit that, although he did not specifically advise Bell of the recording at the time of Bell's arrest and although Bell was not sent a copy of the search warrant, Novaky included information concerning the recording in police reports made available to Bell on June 16, 1980. Additionally, on June 13, 1980, Bell obtained actual notice of the recording when he appeared at a bail hearing with his attorney. At the bail hearing, Officer Michael Grimes testified that electronic surveillance was used to record Bell's conversation. Bell's attorney then declined to question Grimes, and the tape was played. It is unclear from the record whether Bell received notice of the recording in a copy of Officer Novaky's complaint at the time of his arraignment on May 28, 1980; consequently, we assume that Bell first received notice at the bail hearing on June 13, 1980—slightly more than two weeks after police recorded Bell's conversations.

[14] Under the circumstances, Bell has shown no prejudice stemming from untimely notification of execution of the warrant authorizing his telephone conversation to be monitored and recorded. Nor does it appear that the late notification was the result of bad faith on the part of investigating officers. We hold that the untimely notice to Bell did not justify suppression of the recording made pursuant to the *Glass* warrant. *See Gallagher v. State,* 651 P.2d 1185 (Alaska App.1982).

IV. COERCIVE INSTRUCTION DURING DELIBERATIONS

[15] Bell argues that a supplemental instruction issued by Judge Souter was coercive and that it was essentially an " *Allen* charge." [FN8] We disagree. During deliberations, the jury sent a note to the judge inquiring if inability to agree on one count of the indictment constituted a hung jury. The judge replied:

> FN8. *Allen v. United States,* 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

> If you were to be unable to agree to a verdict on one Count of the Indictment, you would be a hung jury as to that one Count, but you would not be a hung jury as to the remaining Counts unless you were also unable to agree to your verdicts on them also. *In my opinion you have not deliberated long enough yet to be able to validly reach the conclusion that you cannot agree to a verdict on any one or more Counts of the Indictment.* [Emphasis added.]
>
> The jury subsequently returned its verdicts on the four counts, as well as the two lesser-included offenses.

The Alaska Supreme Court proscribed *Allen* charges in *Fields v. State,* 487 P.2d 831, 836 (Alaska 1971). In *Fields,* the jury was instructed, after extensive deliberations and at least two prior communications indicating a deadlock, that it was required to continue deliberations until a unanimous verdict was reached. This instruction was found to be so coercive as to require reversal of the conviction. We find that Judge Souter's instruction lacked the coerciveness proscribed by *Fields.* We note in this regard that Standard 15–4.4(b) of the ABA Standards Relating to Trial by Jury specifically provides that a court may require continued deliberations if a jury is unable to agree.[FN9] In this

case, the jury had not deliberated*838 for an extended time, the communication did not unequivocally indicate a deadlock, and the court's instruction did not imply that the jury would be required to deliberate until unanimity was reached. Under these circumstances the supplemental instruction did not constitute an abuse of discretion and Bell's argument must fail.

> FN9. ABA Standard Relating to Trial by Jury § 15–4.4(b) (1980) provides:
>
> > If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in paragraph (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
> >
> > The Commentary to Standard 15–4.4(b) states:
> >
> > This paragraph confirms that a trial judge may send the jury back for further deliberations notwithstanding its indication that it has been unable to agree....
>
> ....
>
> > There is no coercion if a court requires jurors to deliberate a reasonable length of time.

V. DOUBLE JEOPARDY

Bell additionally argues that his sentences on Count I [FN10] and Count IV [FN11] violate double jeopardy under *Whitton v. State,* 479 P.2d 302 (Alaska 1970). The *Whitton* court adopted the following analysis to determine whether or not a double jeopardy violation had occurred:

> FN10. Bell's conviction on Count I was for inducing or causing a person under 16 years of age [D.W.] to engage in prostitution, AS 11.66.110(a)(2). *See supra* n. 1.
>
> FN11. Conviction on count IV was for violating AS 11.66.120(a)(1), a class C felony, which provides:
>
> > (a) A person commits the crime of promoting prostitution in the second degree if he
> >
> > (1) manages, supervises, controls, or owns, either alone or in association with others, a prostitution enterprise other than a place of prostitution ....
> >
> > AS 11.66.150(2) defines a "prostitution enterprise" as
> >
> > [A]n arrangement in which two or more persons are organized to render sexual conduct in return for a fee.
> >
> > The jury was instructed in the language of both these statutes.

> The trial judge first would compare the different statutes in question, as they apply to the facts of the case, to determine whether there were involved differences in intent or conduct. He would then judge any such differences he found in light of the basic interests of society to be vindicated or protected, and decide whether those differences were substantial or significant enough to warrant multiple punishments ....
>
> If such differences in intent or conduct are significant or substantial in relation to the social interests involved, multiple sentences may be imposed, and the constitutional prohibition against double jeopardy will not be violated. But if there are no such differences, or if they are insignificant or insubstantial, then only one sentence may be imposed under double jeopardy.
>
> *Id.* at 312 (footnotes omitted).

We must therefore compare AS 11.66.110(a)(2) and AS 11.66.120(a)(1) as applied to the facts of Bell's case, to determine whether dif-

ferences in intent or conduct were involved in this case. Then, if there are differences, we must decide whether, in light of the societal interests to be protected, the differences were so substantial as to warrant multiple punishment.

[16] AS 11.66.110(a)(2) proscribes the conduct of inducing or causing a person under the age of sixteen to engage in prostitution. AS 11.66.120(a)(1) prohibits managing, supervising, controlling or owning a prostitution enterprise. We believe that, under the *Whitton* analysis, the offenses proscribed by the two statutes in question involve different intents and different conducts. Bell's conviction on Count I was based squarely upon his inducement of D.W. Bell's conviction under AS 11.66.120(a)(1), on the other hand, required proof of management of a prostitution enterprise. No showing of inducement is necessary to establish the offense, since a prostitution enterprise can be comprised entirely of persons who willingly take part in the business, without inducement or promotion. Clearly Bell's conduct in arranging for two or more people to provide sexual services for a fee, a part of which would accrue to him, goes beyond the act of inducing a single person under the age of sixteen to engage in prostitution.***839** The finding that Bell managed a prostitution business with at least two women working for him involved the element of management and required proof of an enterprise, neither of which were involved in the inducement charge. We thus conclude that Bell's intent and conduct clearly differed on the two charges.

We must also determine whether such differences in intent or conduct are substantial in relation to the societal interests involved. As we have stated in connection with Bell's mistake of age claim, AS 11.66.110(a)(2) imposes criminal liability for nonforcible inducement of individuals under sixteen to engage in acts of prostitution with others. This liability is imposed without regard to any pecuniary gain on the part of the offender. We believe that the primary aim of this provision is to protect individuals, particularly those who are young and therefore more vulnerable, from being led into committing acts of prostitution by the efforts of others. By contrast, AS 11.66.120(a)(1) seeks to prevent and punish the commercial aspects of ongoing organized prostitution by subjecting persons who manage prostitution-related activities as business enterprises to sanctions greater than those applicable to persons who commit individual acts of prostitution, without regard to age of the persons managed. We therefore conclude that multiple punishment was appropriate in this case because of the differences in intent and conduct and because of the differing societal interests furthered by the two statutes in question.

VI. REFUSAL TO REDUCE SENTENCE

Finally, Bell contends that denial of the motion to reduce his sentence was error. While incarcerated prior to sentencing, Bell wrote a letter to L.S., the fourteen-year-old daughter of a fellow inmate. The letter was produced at the sentencing hearing, and the father of L.S. was called to testify. He stated that Bell had threatened him with violence if he did not testify favorably to Bell. Judge Souter stated that the threats convinced him to increase Bell's sentence by one year. The judge stated that, although the letter could easily be interpreted as an attempt "to strike a sexual relationship" with L.S., he would give Bell the "benefit of the doubt" and not consider it in sentencing him. Later, Bell moved for reconsideration of the sentence, based on discovery of a letter from the father of L.S. to Bell; the letter indicated that the father had committed perjury at Bell's sentencing. [FN12] A hearing was subsequently held on Bell's motion to reconsider the sentence.

> FN12. The letter from L.S.'s father, written to Bell prior to his sentencing, contained a postscript which stated, "Tell [L.S.] I love her and when I write I'll tighten it for you. I'll get you a picture 'a pose'."

Judge Souter refused to reduce Bell's sentence, reasoning that, in writing to L.S., Bell had been "attempting to arrange for [L.S.] to become a pros-

titute for him or to be involved with him in a sexual relationship." The original sentence was based on Judge Souter's belief that Bell had threatened L.S.'s father; at that point Judge Souter did not believe that Bell had "propositioned" L.S. On resentencing, Judge Souter changed his reasoning for Bell's sentence; he was persuaded that L.S.'s father had lied, but he was also persuaded that Bell *had* been trying to establish a sexual relationship with the fourteen-year-old L.S.[FN13]

FN13. Judge Souter stated:

> The court was not persuaded of this fact when the presentation of evidence concluded at the sentencing hearing, but the contents of the postscript [on the letter from L.S.'s father to Bell] have caused the court to re-examine this question and to resolve it contrary to the way it was resolved at the sentencing hearing.

[17] Bell now claims that, because the trial court did not reduce his sentence after finding that Bell had not threatened L.S.'s father, double jeopardy was violated. However, he fails to cite any authority supporting his theory that failure to reduce a sentence may violate double jeopardy. Judge Souter's reinterpretation of Bell's letter to L.S. in light of the letter from ***840** L.S.'s father to Bell was not unreasonable. Nor can we find that Judge Souter abused his discretion in refusing to reduce the original sentence, based on his reinterpretation of the letter. Since there was no increase in the original sentence, no violation of double jeopardy is involved.

[18] Bell also contends that the effective increase in the period of incarceration based upon the letter was not justified under the sentencing goals set forth in *State v. Chaney,* 477 P.2d 441, 442 (Alaska 1970). The fact that Bell attempted to arrange a romantic involvement with a fourteen-year-old girl while he was incarcerated for promoting the prostitution of another girl under the age of sixteen indicates a lack of remorse on Bell's part and a greater need for deterrence of Bell himself; it therefore justifies imposition of a more severe sentence. We conclude that Bell's sentence was not clearly mistaken.

The conviction and sentence are AFFIRMED.

Alaska App.,1983.
Bell v. State
668 P.2d 829

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110 S.Ct. 3157
497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666, 58 USLW 5044, 30 Fed. R. Evid. Serv. 1
(Cite as: 497 U.S. 836, 110 S.Ct. 3157)

Supreme Court of the United States
MARYLAND, Petitioner
v.
Sandra Ann CRAIG.

No. 89-478.
Argued April 18, 1990.
Decided June 27, 1990.

Defendant was convicted in the Maryland Circuit Court, Howard County, Raymond J. Kane, Jr., J., of sexual offenses and assault and battery arising from her operation of preschool and abuse of preschool students, and defendant appealed. The Court of Special Appeals, affirmed, 76 Md.App. 250, 544 A.2d 784,. Defendant petitioned for writ of certiorari. The Court of Appeals, 316 Md. 551, 560 A.2d 1120, reversed and remanded. Certiorari was granted. The Supreme Court, Justice O'Connor, held that: (1) confrontation clause did not categorically prohibit child witness in child abuse case from testifying against defendant at trial, outside defendant's physical presence, by one-way closed circuit television; (2) finding of necessity for use of one-way closed circuit television procedure had to be made on case specific basis; but (3) observation of child's behavior in defendant's presence and exploration of less restrictive alternatives to use of one-way closed circuit television procedure were not categorical prerequisites to use of one-way television procedure as a matter of federal constitutional law.

Vacated and remanded.

Justice Scalia filed a dissenting opinion, in which Justices Brennan, Marshall and Stevens joined.

Opinion on remand, 322 Md. 418, 588 A.2d 328.

West Headnotes

[1] Criminal Law 110 ⚿662.1

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.1 k. In general. Most Cited Cases

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. U.S.C.A. Const.Amend. 6.

[2] Criminal Law 110 ⚿662.1

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.1 k. In general. Most Cited Cases

A face-to-face confrontation enhances the accuracy of fact-finding by reducing the risk that a witness will wrongfully implicate an innocent person. U.S.C.A. Const.Amend. 6.

[3] Criminal Law 110 ⚿662.8

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.8 k. Out-of-court statements and hearsay in general. Most Cited Cases

In narrow circumstances, the confrontation clause permits the admission of hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial. U.S.C.A. Const.Amend. 6.

[4] Criminal Law 110 ⚿662.1

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.1 k. In general. Most Cited Cases

Face-to-face confrontation with witnesses is not an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers. U.S.C.A. Const.Amend. 6.

[5] Criminal Law 110 ⚿662.65

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.65 k. Conduct of trial. Most Cited Cases
(Formerly 110k662.1)

Witnesses 410 ⚿228

410 Witnesses
410III Examination
410III(A) Taking Testimony in General
410k228 k. Mode of testifying in general. Most Cited Cases

Child assault victim's testimony at trial of child abuse defendant through use of one-way closed circuit television procedure authorized by Maryland child witness protection statute did not impinge upon the truth seeking nor symbolic purposes of the confrontation clause; procedure required that child witness be competent to testify and testify under oath, defendant retained full opportunity for contemporaneous cross-examination, and judge, jury and defendant were able to view witness' demeanor and body by video monitor. Md.Code, Courts and Judicial Proceedings, § 9-102, U.S.C.A. Const.Amend. 6.

[6] Criminal Law 110 ⚿662.65

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.65 k. Conduct of trial. Most Cited Cases
(Formerly 110k662.1)

Witnesses 410 ⚿228

410 Witnesses
410III Examination
410III(A) Taking Testimony in General
410k228 k. Mode of testifying in general. Most Cited Cases

If the State makes an adequate showing of necessity, the State's interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure permitting a child witness in abuse case to testify at trial in the absence of face-to-face confrontation with the defendant. U.S.C.A. Const.Amends. 6, 14.

[7] Criminal Law 110 ⚿662.65

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.65 k. Conduct of trial. Most Cited Cases
(Formerly 110k662.1)

Witnesses 410 ⚿228

410 Witnesses
410III Examination
410III(A) Taking Testimony in General
410k228 k. Mode of testifying in general. Most Cited Cases

Determination of whether use of procedure permitting a child witness to testify in a child abuse case without face-to-face confrontation with the de-

fendant is justified by the State's interest in protecting witness from the trauma of testifying must be made on a case specific basis; trial court must determine whether use of one-way closed circuit television procedure is necessary to protect welfare of particular child witness, must find that child witness would be traumatized by the presence of the defendant, not by the courtroom generally, and must find that the emotional distress suffered by child witness in presence of defendant is more than mere nervousness, excitement or reluctance to testify. Md.Code, Courts and Judicial Proceedings, §§ 9-102, 9-102(a)(1)(ii); U.S.C.A. Const.Amend. 6.

[8] Criminal Law 110 ⚿662.65

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.65 k. Conduct of trial. Most Cited Cases
(Formerly 110k662.1)

Witnesses 410 ⚿228

410 Witnesses
410III Examination
410III(A) Taking Testimony in General
410k228 k. Mode of testifying in general. Most Cited Cases
Testimony of child witnesses in child abuse case by one-way closed circuit television would be admissible under the confrontation clause to the extent that a proper finding was made that use of procedure was necessary to protect child witness from trauma; witnesses were under oath, were subject to full cross-examination and could be observed by judge, jury and defendant as they testified. Md.Code, Courts and Judicial Proceedings, § 9-102 ; U.S.C.A. Const.Amend. 6.

[9] Criminal Law 110 ⚿662.65

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.65 k. Conduct of trial. Most Cited Cases
(Formerly 110k662.1)

Witnesses 410 ⚿228

410 Witnesses
410III Examination
410III(A) Taking Testimony in General
410k228 k. Mode of testifying in general. Most Cited Cases
Observation of child abuse victims' behavior in defendant's presence and consideration of less restrictive alternatives to one-way closed circuit television procedure, although possibly strengthening grounds for use of protective measures, were not categorically prerequisites to use of television testimony procedure as a matter of federal constitutional law. Md.Code, Courts and Judicial Proceedings, § 9-102; U.S.C.A. Const.Amends. 6, 14.

****3158** *Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***836** Respondent Craig was tried in a Maryland court on several charges related to her alleged sexual abuse of a 6-year-old child. Before the trial began, the State sought to invoke a state statutory procedure permitting a judge to receive, by one-way closed circuit television, the testimony of an alleged child abuse victim upon determining that the child's courtroom testimony would result in the child suffering serious emotional distress, such that he or she could not reasonably communicate. If the procedure is invoked, the child, prosecutor, and defense counsel withdraw to another room, where the

child is examined and cross-examined; the judge, jury, and defendant remain in the courtroom, where the testimony is displayed. Although ****3159** the child cannot see the defendant, the defendant remains in electronic communication with counsel, and objections may be made and ruled on as if the witness were in the courtroom. The court rejected Craig's objection that the procedure's use violates the Confrontation Clause of the Sixth Amendment, ruling that Craig retained the essence of the right to confrontation. Based on expert testimony, the court also found that the alleged victim and other allegedly abused children who were witnesses would suffer serious emotional distress if they were required to testify in the courtroom, such that each would be unable to communicate. Finding that the children were competent to testify, the court permitted testimony under the procedure, and Craig was convicted. The State Court of Special Appeals affirmed, but the State Court of Appeals reversed. Although it rejected Craig's argument that the Clause requires in all cases a face-to-face courtroom encounter between the accused and accusers, it found that the State's showing was insufficient to reach the high threshold required by *Coy v. Iowa,* 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 before the procedure could be invoked. The court held that the procedure usually cannot be invoked unless the child initially is questioned in the defendant's presence and that, before using the one-way television procedure, the trial court must determine whether a child would suffer severe emotional distress if he or she were to testify by two-way television.

Held:

1. The Confrontation Clause does not guarantee criminal defendants an *absolute* right to a face-to-face meeting with the witnesses against ***837** them at trial. The Clause's central purpose, to ensure the reliability of the evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding before the trier of fact, is served by the combined effects of the elements of confrontation: physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. Although face-to-face confrontation forms the core of the Clause's values, it is not an indispensable element of the confrontation right. If it were, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme, *Ohio v. Roberts,* 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597. Accordingly, the Clause must be interpreted in a manner sensitive to its purpose and to the necessities of trial and the adversary process. See, *e.g., Kirby v. United States,* 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890. Nonetheless, the 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 testimony's reliability is otherwise assured. *Coy, supra,* at 1021. Pp. 3162-3166.

2. Maryland's interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of its special procedure, provided that the State makes an adequate showing of necessity in an individual case. Pp. 3166-3170.

(a) While Maryland's procedure prevents the child from seeing the defendant, it preserves the other elements of confrontation and, thus, adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These assurances are far greater than those required for the admission of hearsay statements. Thus, the use of the one-way closed circuit television procedure, where it is necessary to further an important state interest, does not impinge upon the Confrontation Clause's truth-seeking or symbolic purposes. Pp. 3166-3167.

(b) A State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her ac-

cusers in court. The fact that most States have enacted similar****3160** statutes attests to widespread belief in such a public policy's importance, and this Court has previously recognized that States have a compelling interest in protecting minor victims of sex crimes from further trauma and embarrassment, see, *e.g., Globe Newspaper Co. v. Superior Court of Norfolk County,* 457 U.S. 596, 607, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248. The Maryland Legislature's considered judgment regarding the importance of its interest will not be second-guessed, given the State's traditional and transcendent interest in protecting the welfare of children and the growing body of academic literature ***838** documenting the psychological trauma suffered by child abuse victims who must testify in court. Pp. 3167-3169.

(c) The requisite necessity finding must be case specific. The trial court must hear evidence and determine whether the procedure's use is necessary to protect the particular child witness' welfare; find that the child would be traumatized, not by the courtroom generally, but by the defendant's presence; and find that the emotional distress suffered by the child in the defendant's presence is more than *de minimis.* Without determining the minimum showing of emotional trauma required for the use of a special procedure, the Maryland statute, which requires a determination that the child will suffer serious emotional distress such that the child cannot reasonably communicate, clearly suffices to meet constitutional standards. Pp. 3169-3170.

(d) Since there is no dispute that, here, the children testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, admitting their testimony is consonant with the Confrontation Clause, provided that a proper necessity finding has been made. P. 3170.

3. The Court of Appeals erred to the extent that it may have rested its conclusion that the trial court did not make the requisite necessity finding on the lower court's failure to observe the children's behavior in the defendant's presence and its failure to explore less restrictive alternatives to the one-way television procedure. While such evidentiary requirements could strengthen the grounds for the use of protective measures, only a case-specific necessity finding is required. This Court will not establish, as a matter of federal constitutional law, such categorical evidentiary prerequisites for the use of the one-way procedure. Pp. 3170-3171.

316 Md. 551, 560 A.2d 1120 (1989). Vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, BLACKMUN, and KENNEDY, JJ., joined. SCALIA, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post,* p. 3171.
J. Joseph Curran, Jr., Attorney General of Maryland, argued the cause for petitioner. With him on the briefs were *Gary E. Bair* and *Ann N. Bosse,* Assistant Attorneys General, and *William R. Hymes.*

***839** *William H. Murphy, Jr.,* argued the cause for respondent. With him on the brief were *Maria Cristina Gutierrez, Gary S. Bernstein, Byron L. Warnken,* and *Clarke F. Ahlers.* *

* Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Robert A. Butterworth,* Attorney General of Florida, and *Richard E. Doran* and *Bradley R. Bischoff,* Assistant Attorneys General, *Don Siegelman,* Attorney General of Alabama, *Doug Baily,* Attorney General of Alaska, *Robert K. Corbin,* Attorney General of Arizona, *John Steven Clark,* Attorney General of Arkansas, *Duane Woodard,* Attorney General of Colorado, *John J. Kelly,* Chief State's Attorney of Connecticut, *Charles M. Oberly III,* Attorney General of Delaware, *Warren Price III,* Attorney General of Hawaii, *Jim Jones,* Attorney General of Idaho, *Neil F. Hartigan,* Attorney General of Illinois, *Linley E. Pearson,* Attorney General of Indiana, *Thomas J. Miller,* Attorney General of Iowa, *Robert T. Stephan,* Attorney General of Kansas, *Frederic J. Cowan,* Attorney General of Kentucky, *William J.*

Guste, Jr., Attorney General of Louisiana, *James E. Tierney,* Attorney General of Maine, *James M. Shannon,* Attorney General of Massachusetts, *Frank J. Kelley,* Attorney General of Michigan, *Hubert H. Humphrey III,* Attorney General of Minnesota, *Mike Moore,* Attorney General of Mississippi, *William L. Webster,* Attorney General of Missouri, *Marc Racicot,* Attorney General of Montana, *Robert M. Spire,* Attorney General of Nebraska, *Brian McKay,* Attorney General of Nevada, *Robert J. Del Tufo,* Attorney General of New Jersey, *Hal Stratton,* Attorney General of New Mexico, *Robert Abrams,* Attorney General of New York, *Lacy H. Thornburg,* Attorney General of North Carolina, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Robert H. Henry,* Attorney General of Oklahoma, *Ernest D. Preate,* Attorney General of Pennsylvania, *Hector Rivera Cruz,* Attorney General of Puerto Rico, *T. Travis Medlock,* Attorney General of South Carolina, *Roger A. Tellinghuisen,* Attorney General of South Dakota, *Charles W. Burson,* Attorney General of Tennessee, *Jim Mattox,* Attorney General of Texas, *R. Paul Van Dam,* Attorney General of Utah, *Godfrey R. de Castro,* Attorney General of the Virgin Islands, *Mary Sue Terry,* Attorney General of Virginia, *Kenneth O. Eikenberry,* Attorney General of Washington, and *Joseph B. Mayer,* Attorney General of Wyoming; for the District Attorney of Kings County, New York, et al. by *Charles J. Hynes, Peter A. Weinstein, Jay Cohen, Robert T. Johnson, Anthony Girese,* and *Howard R. Relin;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson;* for the National Association of Counsel for Children et al. by *Jacqueline Y. Parker, Philip J. McCarthy, Jr.*, and *Thomas R. Finn;* for People Against Child Abuse by *Judith D. Schretter, Wallace A. Christensen,* and *Paul A. Dorf;* and for the Stephanie Roper Foundation by *Gary B. Born.*

Briefs of *amici curiae* urging affirmance were filed for the Illinois Public Defender Association et al. by *David P. Bergschneider;* for the National Association of Criminal Defense Lawyers by *Maria Cristina Gutierrez* and *Annabelle Whiting Hall;* and for Victims of Child Abuse Laws National Network (Vocal) by *Alan Silber.*

Briefs of *amici curiae* were filed for the American Psychological Association by *David W. Ogden;* for the Appellate Committee of the California District Attorney's Association by *Jonathan B. Conklin;* for the Institute for Psychological Therapies by *Louis Kiefer;* and for Richard A. Gardner by *Alan Silber.*

***840** Justice O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the Confrontation Clause of the Sixth Amendment categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television.

I

In October 1986, a Howard County grand jury charged respondent, Sandra Ann Craig, with child abuse, first and second degree sexual offenses, perverted sexual practice, assault, and battery. The named victim in each count was a 6-year-old girl who, from August 1984 to June 1986, had attended a kindergarten and prekindergarten center owned and operated by Craig.

In March 1987, before the case went to trial, the State sought to invoke a Maryland ****3161** statutory procedure that permits a judge to receive, by one-way closed circuit television, the testimony of a child witness who is alleged to be a victim of child abuse.[FN1] To invoke the procedure, the ***841** trial judge must first "determin[e] that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." Md.Cts. & Jud.Proc.Code Ann. § 9-102(a)(1)(ii) (1989). Once the procedure is invoked, the child witness, prosecutor, and defense counsel withdraw to a separate room; the judge, jury, and defendant remain in the courtroom. The child witness is then examined

and cross-examined in the separate room, while a video monitor records and displays the witness' testimony to those in the courtroom. During this time the witness cannot see the defendant.***842** The defendant remains in electronic communication with defense counsel, and objections may be made and ruled on as if the witness were testifying in the courtroom.

FN1. Maryland Cts. & Jud.Proc.Code Ann. § 9-102 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland (1989) provides in full:

"(a)(1) In a case of abuse of a child as defined in § 5-701 of the Family Law Article or Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of a closed circuit television if:

"(i) The testimony is taken during the proceeding; and

"(ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communic- ate.

"(2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.

"(3) The operators of the closed circuit television shall make every effort to be unobtrusive.

"(b)(1) Only the following persons may be in the room with the child when the child testifies by closed circuit televi- sion:

"(i) The prosecuting attorney;

"(ii) The attorney for the defendant;

"(iii) The operators of the closed circuit television equipment; and

"(iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.

"(2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.

"(3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.

"(c) The provisions of this section do not apply if the defendant is an attorney pro se.

"(d) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time."

For a detailed description of the § 9-102 procedure, see *Wildermuth v. State,* 310 Md. 496, 503-504, 530 A.2d 275, 278-279 (1987).

In support of its motion invoking the one-way closed circuit television procedure, the State presented expert testimony that the named victim as well as a number of other children who were alleged to have been sexually abused by Craig, would suffer "serious emotional distress such that [they could not] reasonably communicate," § 9-102 (a)(1)(ii), if required to testify in the courtroom. App. 7-59. The Maryland Court of Appeals characterized the evidence as follows:

"The expert testimony in each case suggested that each child would have some or considerable difficulty in testifying in Craig's presence. For example, as to one child, the expert said that what 'would cause him the most anxiety would be to testify in front of Mrs. Craig....' The child 'wouldn't be able to communicate effectively.' As to another, an expert said she 'would probably stop talking and she would withdraw and curl up.' With respect to two others, the testimony was that one would 'become highly agitated, that he may refuse to talk or if he did talk, that he would choose his subject regardless of the questions' while the other would 'become extremely timid and unwilling to talk.' " 316 Md. 551, 568-569, 560 A.2d 1120, 1128-1129 (1989).

Craig objected to the use of the procedure on Confrontation Clause grounds, but the trial ****3162** court rejected that contention, concluding that although the statute "take[s] away the right of the defendant to be face to face with his or her accuser," the defendant retains the "essence of the right of confrontation," including the right to observe, cross-examine, and have the jury view the demeanor of the witness. App. 65-66. The trial court further found that, "based upon the evidence presented ... the testimony of each of these children in a courtroom will result in each child suffering serious emotional distress ... such that each of these children cannot reasonably***843** communicate." *Id.,* at 66. The trial court then found the named victim and three other children competent to testify and accordingly permitted them to testify against Craig via the one-way closed circuit television procedure. The jury convicted Craig on all counts, and the Maryland Court of Special Appeals affirmed the convictions, 76 Md.App. 250, 544 A.2d 784 (1988).

The Court of Appeals of Maryland reversed and remanded for a new trial. 316 Md. 551, 560 A.2d 1120 (1989). The Court of Appeals rejected Craig's argument that the Confrontation Clause requires in all cases a face-to-face courtroom encounter between the accused and his accusers, *id.,* at 556-562, 560 A.2d, at 1122-1125, but concluded:

"[U]nder § 9-102(a)(1)(ii), the operative 'serious emotional distress' which renders a child victim unable to 'reasonably communicate' must be determined to arise, at least primarily, from face-to-face confrontation with the defendant. Thus, we construe the phrase 'in the courtroom' as meaning, for sixth amendment and [state constitution] confrontation purposes, 'in the courtroom in the presence of the defendant.' Unless prevention of 'eyeball-to-eyeball' confrontation is necessary to obtain the trial testimony of the child, the defendant cannot be denied that right." *Id.,* at 566, 560 A.2d, at 1127.

Reviewing the trial court's finding and the evidence presented in support of the § 9-102 procedure, the Court of Appeals held that, "as [it] read *Coy* [v. *Iowa,* 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988)], the showing made by the State was insufficient to reach the high threshold required by that case before § 9-102 may be invoked." *Id.* 316 Md., at 554-555, 560 A.2d, at 1121 (footnote omitted).

We granted certiorari to resolve the important Confrontation Clause issues raised by this case. 493 U.S. 1041, 110 S.Ct. 834, 107 L.Ed.2d 830 (1990).

***844** II

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

We observed in *Coy v. Iowa* that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." 487 U.S., at 1016, 108 S.Ct., at 2801 (citing *Kentucky v. Stincer,* 482 U.S. 730, 748, 749-750, 107 S.Ct. 2658, 2669, 2669, 2670, 96 L.Ed.2d 631 (1987) (MARSHALL, J., dissenting)); see also *Pennsylvania v. Ritchie,* 480 U.S. 39, 51, 107 S.Ct. 989, 998, 94 L.Ed.2d 40 (1987) (plurality

opinion); *California v. Green,* 399 U.S. 149, 157, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489 (1970); *Snyder v. Massachusetts,* 291 U.S. 97, 106, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934); *Dowdell v. United States,* 221 U.S. 325, 330, 31 S.Ct. 590, 592, 55 L.Ed. 753 (1911); *Kirby v. United States,* 174 U.S. 47, 55, 19 S.Ct. 574, 577, 43 L.Ed. 890 (1899); *Mattox v. United States,* 156 U.S. 237, 244, 15 S.Ct. 337, 340, 39 L.Ed. 409 (1895). This interpretation derives not only from the literal text of the Clause, but also from our understanding of its historical roots. See *Coy, supra,* 487 U.S., at 1015-1016, 108 S.Ct., at 2800; *Mattox, supra,* 156 U.S., at 242, 15 S.Ct. at 339 (Confrontation Clause intended to prevent conviction by affidavit); *Green, supra,* 399 U.S., at 156, 90 S.Ct., at 1934 ****3163** (same); cf. 3 J. Story, Commentaries on the Constitution § 1785, p. 662 (1833).

We have never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial. Indeed, in *Coy v. Iowa,* we expressly "le[ft] for another day ... the question whether any exceptions exist" to the "irreducible literal meaning of the Clause: 'a right to *meet face to face* all those who appear and give evidence *at trial.* ' " 487 U.S., at 1021, 108 S.Ct., at 2803 (quoting *Green, supra,* 399 U.S., at 175, 90 S.Ct., at 1943 (Harlan, J., concurring)). The procedure challenged in *Coy* involved the placement of a screen that prevented two child witnesses in a child abuse case from seeing the defendant as they testified against him at trial. See 487 U.S., at 1014-1015, 108 S.Ct., at 2799-2800. In holding that the use of this procedure violated the defendant's right to confront witnesses against him, we suggested that ***845** any exception to the right "would surely be allowed only when necessary to further an important public policy"-*i.e.,* only upon a showing of something more than the generalized, "legislatively imposed presumption of trauma" underlying the statute at issue in that case. *Id.,* at 1021, 108 S.Ct., at 2803; see also *id.,* at 1025, 108 S.Ct., at 2805 (O'Connor, J., concurring). We concluded that "[s]ince there ha[d] been no individualized findings that these particular witnesses needed special protection, the judgment [in the case before us] could not be sustained by any conceivable exception." *Id.,* at 1021, 108 S.Ct., at 2803. Because the trial court in this case made individualized findings that each of the child witnesses needed special protection, this case requires us to decide the question reserved in *Coy.*

[1] 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. The word "confront," after all, also means a clashing of forces or ideas, thus carrying with it the notion of adversariness. As we noted in our earliest case interpreting the Clause:

> "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which 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." *Mattox, supra,* 156 U.S., at 242-243, 15 S.Ct., at 339-340.

As this description indicates, the right guaranteed by the Confrontation Clause includes not only a "personal examination," 156 U.S., at 242, 15 S.Ct., at 339, but also "(1) insures that the witness will give his statements under oath-thus impressing him with ***846** the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; [and] (3) permits the jury that is to decide the defendant's fate to

observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." *Green, supra,* 399 U.S., at 158, 90 S.Ct., at 1935 (footnote omitted).

The combined effect of these elements of confrontation-physical presence, oath, cross-examination, and observation of demeanor by the trier of fact-serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings. See *Stincer, supra,* 482 U.S., at 739, 107 S.Ct., at 2664 ("[T]he right to confrontation is a functional****3164** one for the purpose of promoting reliability in a criminal trial"); *Dutton v. Evans,* 400 U.S. 74, 89, 91 S.Ct. 210, 219, 27 L.Ed.2d 213 (1970) (plurality opinion) ("[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the [testimony]' "); *Lee v. Illinois,* 476 U.S. 530, 540, 106 S.Ct. 2056, 2061, 90 L.Ed.2d 514 (1986) (confrontation guarantee serves "symbolic goals" and "promotes reliability"); see also *Faretta v. California,* 422 U.S. 806, 818, 95 S.Ct. 2525, 2532, 45 L.Ed.2d 562 (1975) (Sixth Amendment "constitutionalizes the right in an adversary criminal trial to make a defense as we know it"); *Strickland v. Washington,* 466 U.S. 668, 684-685, 104 S.Ct. 2052, 2062-2063, 80 L.Ed.2d 674 (1984).

[2] We have recognized, for example, that face-to-face confrontation enhances the accuracy of fact-finding by reducing the risk that a witness will wrongfully implicate an innocent person. See *Coy, supra,* 487 U.S., at 1019-1020, 108 S.Ct., at 2802 ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' ... 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 ***847** reveal the child coached by a malevolent adult"); *Ohio v. Roberts,* 448 U.S. 56, 63, n. 6, 100 S.Ct. 2531, 2537 n. 6, 65 L.Ed.2d 597 (1980); see also 3 W. Blackstone, Commentaries * 373-* 374. We have also noted the strong symbolic purpose served by requiring adverse witnesses at trial to testify in the accused's presence. See *Coy,* 487 U.S., at 1017, 108 S.Ct., at 2801 ("[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution' ") (quoting *Pointer v. Texas,* 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965)).

Although face-to-face confrontation forms "the core of the values furthered by the Confrontation Clause," *Green,* 399 U.S., at 157, 90 S.Ct., at 1934, we have nevertheless recognized that it is not the *sine qua non* of the confrontation right. See *Delaware v. Fensterer,* 474 U.S. 15, 22, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985) (*per curiam*) ("[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony"); *Roberts, supra,* 448 U.S., at 69, 100 S.Ct., at 2540 (oath, cross-examination, and demeanor provide "all that the Sixth Amendment demands: 'substantial compliance with the purposes behind the confrontation requirement' ") (quoting *Green, supra,* 399 U.S., at 166, 90 S.Ct., at 1939); see also *Stincer,* 482 U.S. at 739-744, 107 S.Ct., at 2664-2667 (confrontation right not violated by exclusion of defendant from competency hearing of child witnesses, where defendant had opportunity for full and effective cross-examination at trial); *Davis v. Alaska,* 415 U.S. 308, 315-316, 94 S.Ct. 1105, 1109-1110, 39 L.Ed.2d 347 (1974); *Douglas v. Alabama,* 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965); *Pointer, supra,* 380 U.S., at 406-407, 85 S.Ct., at 1069; 5 J. Wigmore, Evidence § 1395, p. 150 (J. Chadbourn rev. 1974).

[3] For this reason, we have never insisted on an actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant. Instead, we have repeatedly held that the Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite***848** the defendant's inability to confront the declarant at trial. See, *e.g., Mattox,* 156 U.S., at 243, 15 S.Ct., at 339 ("[T]here could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations"); ****3165** *Pointer, supra,* 380 U.S., at 407, 85 S.Ct., at 1069 (noting exceptions to the confrontation right for dying declarations and "other analogous situations"). In *Mattox,* for example, we held that the testimony of a Government witness at a former trial against the defendant, where the witness was fully cross-examined but had died after the first trial, was admissible in evidence against the defendant at his second trial. See 156 U.S., at 240-244, 15 S.Ct., at 338-340. We explained:

> "There is doubtless reason for saying that ... if notes of [the witness'] testimony are permitted to be read, [the defendant] is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." *Id.,* at 243, 15 S.Ct., at 339-340.

We have accordingly stated that a literal reading of the Confrontation Clause would "abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." *Roberts,* 448 U.S., at 63, 100 S.Ct., at 2537. Thus, in certain narrow circumstances, "competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial." *Id.,* at 64, 100 S.Ct., at 2538 (quoting *Chambers v. Mississippi,* 410 U.S. 284, 295, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973), and citing *Mattox, supra*). We have recently held, ***849** for example, that hearsay statements of nontestifying co-conspirators may be admitted against a defendant despite the lack of any face-to-face encounter with the accused. See *Bourjaily v. United States,* 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987); *United States v. Inadi,* 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986). Given our hearsay cases, the word "confronted," as used in the Confrontation Clause, cannot simply mean face-to-face confrontation, for the Clause would then, contrary to our cases, prohibit the admission of any accusatory hearsay statement made by an absent declarant-a declarant who is undoubtedly as much a "witness against" a defendant as one who actually testifies at trial.

[4] In sum, our precedents establish that "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial," *Roberts, supra,* 448 U.S., at 63, 100 S.Ct., at 2537 (emphasis added; footnote omitted), a preference that "must occasionally give way to considerations of public policy and the necessities of the case," *Mattox, supra,* 156 U.S., at 243, 15 S.Ct., at 339-340. "[W]e have attempted to harmonize the goal of the Clause-placing limits on the kind of evidence that may be received against a defendant-with a societal interest in accurate factfinding, which may require consideration of out-of-court statements." *Bourjaily, supra,* 483 U.S., at 182, 107 S.Ct., at 2782. We have accordingly interpreted the Confrontation Clause in a manner sensitive to its purposes and sensitive to the necessities of trial and the adversary process. See, *e.g., Kirby,* 174 U.S., at 61, 19 S.Ct., at 578 ("It is scarcely necessary to say that to the rule that an accused is entitled to be confronted with witnesses against him the admission of dying

declarations is an exception which arises from the necessity of the case"); *Chambers, supra,* 410 U.S., at 295, 93 S.Ct., at 1045 ("Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process"). Thus, though we reaffirm the importance of face-to-face confrontation with witnesses**3166 appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee *850 of the right to confront one's accusers. Indeed, one commentator has noted that "[i]t is all but universally assumed that there are circumstances that excuse compliance with the right of confrontation." Graham, The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 Crim.L.Bull. 99, 107-108 (1972).

This interpretation of the Confrontation Clause is consistent with our cases holding that other Sixth Amendment rights must also be interpreted in the context of the necessities of trial and the adversary process. See, *e.g., Illinois v. Allen,* 397 U.S. 337, 342-343, 90 S.Ct. 1057, 1060, 25 L.Ed.2d 353 (1970) (right to be present at trial not violated where trial judge removed defendant for disruptive behavior); *Ritchie,* 480 U.S., at 51-54, 107 S.Ct., at 998-1000 (plurality opinion) (right to cross-examination not violated where State denied defendant access to investigative files); *Taylor v. Illinois,* 484 U.S. 400, 410-416, 108 S.Ct. 646, 653-657, 98 L.Ed.2d 798 (1988) (right to compulsory process not violated where trial judge precluded testimony of a surprise defense witness); *Perry v. Leeke,* 488 U.S. 272, 280-285, 109 S.Ct. 594, 599-602, 102 L.Ed.2d 624 (1989) (right to effective assistance of counsel not violated where trial judge prevented testifying defendant from conferring with counsel during a short break in testimony). We see no reason to treat the face-to-face component of the confrontation right any differently, and indeed we think it would be anomalous to do so.

That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in *Coy,* our precedents confirm that 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. See 487 U.S., at 1021, 108 S.Ct., at 2803 (citing *Roberts, supra,* 448 U.S. at 64, 100 S.Ct., at 2538; *Chambers, supra,* 410 U.S. at 295, 93 S.Ct., at 1045); *Coy, supra,* 487 U.S., at 1025, 108 S.Ct., at 2805 (O'Connor, J., concurring).

***851 III**

[5] Maryland's statutory procedure, when invoked, prevents a child witness from seeing the defendant as he or she testifies against the defendant at trial. We find it significant, however, that Maryland's procedure preserves all of the other elements of the confrontation right: The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies. Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation-oath, cross-examination, and observation of the witness' demeanor-adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These safeguards of reliability and adversariness render the use of such a procedure a far cry from the undisputed prohibition of the Confrontation Clause: trial by *ex parte* affidavit or inquisition, see *Mattox,* 156 U.S., at 242, 15 S.Ct., at 389; see also *Green,* 399 U.S., at 179, 90 S.Ct., at 1946 (Harlan, J., concurring) ("[T]he Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses"). Rather, we think these elements of effect-

ive confrontation not only permit a defendant to "confound and undo the false accuser, or reveal the child coached by a malevolent adult," ****3167***Coy, supra,* 487 U.S., at 1020, 108 S.Ct., at 2802, but may well aid a defendant in eliciting favorable testimony from the child witness. Indeed, to the extent the child witness' testimony may be said to be technically given out of court (though we do not so hold), these assurances of reliability and adversariness are far greater than those required for admission of hearsay testimony under the Confrontation Clause. See *Roberts,* 448 ***852** U.S., at 66, 100 S.Ct., at 2539. We are therefore confident that use of the one-way closed circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause.

The critical inquiry in this case, therefore, is whether use of the procedure is necessary to further an important state interest. The State contends that it has a substantial interest in protecting children who are allegedly victims of child abuse from the trauma of testifying against the alleged perpetrator and that its statutory procedure for receiving testimony from such witnesses is necessary to further that interest.

We have of course recognized that a State's interest in "the protection of minor victims of sex crimes from further trauma and embarrassment" is a "compelling" one. *Globe Newspaper Co. v. Superior Court of Norfolk County,* 457 U.S. 596, 607, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248 (1982); see also *New York v. Ferber,* 458 U.S. 747, 756-757, 102 S.Ct. 3348, 3354, 73 L.Ed.2d 1113 (1982); *FCC v. Pacifica Foundation,* 438 U.S. 726, 749-750, 98 S.Ct. 3026, 3040-3041, 57 L.Ed.2d 1073 (1978); *Ginsberg v. New York,* 390 U.S. 629, 640, 88 S.Ct. 1274, 1281, 20 L.Ed.2d 195 (1968); *Prince v. Massachusetts,* 321 U.S. 158, 168, 64 S.Ct. 438, 443, 88 L.Ed. 645 (1944). "[W]e have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Ferber, supra,* 458 U.S., at 757, 102 S.Ct., at 3354. In *Globe Newspaper,* for example, we held that a State's interest in the physical and psychological well-being of a minor victim was sufficiently weighty to justify depriving the press and public of their constitutional right to attend criminal trials, where the trial court makes a case-specific finding that closure of the trial is necessary to protect the welfare of the minor. See 457 U.S., at 608-609, 102 S.Ct., at 2620-21. This Term, in *Osborne v. Ohio,* 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990), we upheld a state statute that proscribed the possession and viewing of child pornography, reaffirming that " '[i]t is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and ***853** psychological well-being of a minor" is "compelling." ' " *Id.,* at 109, 110 S.Ct. at 1696 (quoting *Ferber, supra,* 458 U.S., at 756-757, 102 S.Ct., at 3354-55).

[6] We likewise conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. That a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy. See *Coy,* 487 U.S., at 1022-1023, 108 S.Ct., at 2803-2804 (O'Connor, J., concurring) ("Many States have determined that a child victim may suffer trauma from exposure to the harsh atmosphere of the typical courtroom and have undertaken to shield the child through a variety of ameliorative measures"). Thirty-seven States, for example, permit the use of videotaped testimony of sexually abused children; [FN2] 24 States have authorized the use of ****3168** one-way ***854** closed circuit television testimony in child abuse cases; [FN3] and 8 States authorize the use of a two-way system in which the child witness is permitted to see the courtroom and the defendant on a video monitor and in which the jury and judge are permitted to view the child during the testimony.[FN4]

FN2. See Ala.Code § 15-25-2 (Supp.1989); Ariz.Rev.Stat.Ann. §§ 13-4251 and 4253(B), (C) (1989); Ark.Code Ann. § 16-44-203 (1987); Cal.Penal Code Ann. § 1346 (West Supp.1990); Colo.Rev.Stat. §§ 18-3-413 and 18-6-401.3 (1986); Conn.Gen.Stat. § 54-86g (1989); Del.Code Ann., Tit. 11, § 3511 (1987); Fla.Stat. § 92.53 (1989); Haw.Rev.Stat., ch. 626, Rule Evid. 616 (1985); Ill.Rev.Stat., ch. 38, ¶ 106A-2 (1989); Ind.Code §§ 35-37-4-8(c), (d), (f), (g) (1988); Iowa Code § 910A.14 (1987); Kan.Stat.Ann. § 38-1558 (1986); Ky.Rev.Stat.Ann. § 421.350(4) (Baldwin Supp.1989); Mass.Gen.Laws § 278:16D (Supp.1990); Mich.Comp.Laws Ann. § 600.2163a(5) (Supp.1990); Minn.Stat. § 595.02(4) (1988); Miss.Code Ann. § 13-1-407 (Supp.1989); Mo.Rev.Stat. §§ 491.675-491.690 (1986); Mont.Code Ann. §§ 46-15-401 to 46-15-403 (1989); Neb.Rev.Stat. § 29-1926 (1989); Nev.Rev.Stat. § 174.227 (1989); N.H.Rev.Stat.Ann. § 517:13-a (Supp.1989) ; N.M.Stat.Ann. § 30-9-17 (1984); Ohio Rev.Code Ann. §§ 2907.41(A), (B), (D), (E) (1987); Okla.Stat., Tit. 22, § 753(C) (Supp.1988); Ore.Rev.Stat. § 40.460(24) (1989); 42 Pa.Cons.Stat. §§ 5982, 5984 (1988); R.I.Gen.Laws § 11-37-13.2 (Supp.1989); S.C.Code Ann. § 16-3-1530 (G) (1985); S.D.Codified Laws § 23A-12-9 (1988); Tenn.Code Ann. §§ 24-7-116(d), (e), (f) (Supp.1989); Tex.Code Crim.Proc.Ann., Art. 38.071, § 4 (Vernon Supp.1990); Utah Rule Crim.Proc. 15.5 (1990); Vt.Rule Evid. 807(d) (Supp.1989); Wis.Stat. §§ 967.04(7) to (10) (1987-1988); Wyo.Stat. § 7-11-408 (1987).

FN3. See Ala.Code § 15-25-3 (Supp.1989); Alaska Stat.Ann. § 12.45.046 (Supp.1989); Ariz.Rev.Stat.Ann. § 13-4253 (1989); Conn.Gen.Stat. § 54-86g (1989); Fla.Stat. § 92.54 (1989); Ga.Code Ann. § 17-8-55 (Supp.1989); Ill.Rev.Stat., ch. 38, ¶ 106A-3 (1987); Ind.Code § 35-37-4-8 (1988); Iowa Code § 910A.14 (Supp.1990); Kan.Stat.Ann. § 38-1558 (1986); Ky.Rev.Stat.Ann. §§ 421-350(1), (3) (Baldwin Supp.1989); La.Rev.Stat.Ann. § 15:283 (West Supp.1990); Md.Cts. & Jud.Proc.Code Ann. § 9-102 (1989); Mass.Gen.Laws § 278:16D (Supp.1990); Minn.Stat. § 595.02 (4) (1988); Miss.Code Ann. § 13-1-405 (Supp.1989); N.J.Stat.Ann. § 2A:84A-32.4 (Supp.1989); Okla.Stat., Tit. 22, § 753(B) (West Supp.1988); Ore.Rev.Stat. § 40.460 (24) (1989); 42 Pa. Cons.Stat. §§ 5982, 5985 (1988); R.I.Gen.Laws § 11-37-13.2 (Supp.1989); Tex.Code Crim.Proc.Ann., Art. 38.071, § 3 (Vernon Supp.1990); Utah Rule Crim.Proc. 15.5 (1990); Vt.Rule Evid. 807(d) (Supp.1989).

FN4. See Cal.Penal Code Ann. § 1347 (West Supp.1990); Haw.Rev.Stat., ch. 626, Rule Evid. 616 (1985); Idaho Code § 19-3024A (Supp.1989); Minn.Stat. § 595.02(4)(c)(2) (1988); N.Y.Crim.Proc.Law §§ 65.00 to 65.30 (McKinney Supp.1990); Ohio Rev.Code Ann. §§ 2907.41(C), (E) (1987); Va.Code Ann. § 18.2-67.9 (1988); Vt.Rule Evid. 807(e) (Supp.1989).

The statute at issue in this case, for example, was specifically intended "to safeguard the physical and psychological well-being of child victims by avoiding, or at least minimizing, the emotional trauma produced by testifying." *Wildermuth v. State,* 310 Md. 496, 518, 530 A.2d 275, 286 (1987). The *Wildermuth* court noted:

> "In Maryland, the Governor's Task Force on Child Abuse in its *Interim Report* (Nov.1984) documented the existence of the [child abuse] problem in our State. *Interim Report* at 1. It brought the picture up to date in its *Final Report*

(Dec.1985). In the first six months of 1985, investigations of child abuse were 12 percent more numerous than during the same period of 1984. In 1979, 4,615 cases of child abuse were investigated; in 1984, ***855** 8,321. *Final Report* at iii. In its *Interim Report* at 2, the Commission proposed legislation that, with some changes, became § 9-102. The proposal was 'aimed at alleviating the trauma to a child victim in the courtroom atmosphere by allowing the child's testimony to be obtained outside of the courtroom.' *Id.,* at 2. This would both protect the child and enhance the public interest by encouraging effective prosecution of the alleged abuser." *Id.,* at 517, 530 A.2d, at 285.

Given the State's traditional and " 'transcendent interest in protecting the welfare of children,' " *Ginsberg,* 390 U.S., at 640, 88 S.Ct., at 1281 (citation omitted), and buttressed by the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court, see Brief for American Psychological Association as *Amicus Curiae* 7-13; G. Goodman et al., Emotional Effects of Criminal Court Testimony on Child Sexual ****3169** Assault Victims, Final Report to the National Institute of Justice (presented as conference paper at annual convention of American Psychological Assn., Aug.1989), we will not second-guess the considered judgment of the Maryland Legislature regarding the importance of its interest in protecting child abuse victims from the emotional trauma of testifying. Accordingly, we hold that, if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

[7] The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. See *Globe Newspaper Co.,* 457 U.S., at 608-609, 102 S.Ct., at 2621 (compelling interest in protecting ***856** child victims does not justify a *mandatory* trial closure rule); *Coy,* 487 U.S., at 1021, 108 S.Ct., at 2803; *id.,* at 1025, 108 S.Ct., at 2805 (O'Connor, J., concurring); see also *Hochheiser v. Superior Court,* 161 Cal.App.3d 777, 793, 208 Cal.Rptr. 273, 283 (1984). The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. See, *e.g., State v. Wilhite,* 160 Ariz. 228, 772 P.2d 582 (1989); *State v. Bonello,* 210 Conn. 51, 554 A.2d 277 (1989); *State v. Davidson,* 764 S.W.2d 731 (Mo.App.1989); *Commonwealth v. Ludwig,* 366 Pa.Super. 361, 531 A.2d 459 (1987). Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis, i.e.,* more than "mere nervousness or excitement or some reluctance to testify," *Wildermuth, supra,* 310 Md., at 524, 530 A.2d, at 289; see also *State v. Mannion,* 19 Utah 505, 511-512, 57 P. 542, 543-544 (1899). We need not decide the minimum showing of emotional trauma required for use of the special procedure, however, because the Maryland statute, which requires a determination that the child witness will suffer "serious emotional distress such that the child cannot reasonably communicate," § 9-102(a)(1)(ii), clearly suffices to meet constitutional standards.

To be sure, face-to-face confrontation may be said to cause trauma for the very purpose of elicit-

ing truth, cf. *Coy, supra,* 487 U.S., at 1019-1020, 108 S.Ct., at 2802-03, but we think that the use of Maryland's special procedure, where necessary to further the important state interest in preventing trauma to child witnesses in child ***857** abuse cases, adequately ensures the accuracy of the testimony and preserves the adversary nature of the trial. See *supra,* at 3166-3167. Indeed, where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal. See, *e.g., Coy, supra,* 487 U.S., at 1032, 108 S.Ct., at 2809 (BLACKMUN, J., dissenting) (face-to-face confrontation "may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself"); Brief for American Psychological Association as *Amicus Curiae* 18-24; *State v. Sheppard,* 197 N.J.Super. 411, 416, 484 A.2d 1330, 1332 (1984); Goodman & Helgeson, ****3170**Child Sexual Assault: Children's Memory and the Law, 40 U. Miami L.Rev. 181, 203-204 (1985); Note, Videotaping Children's Testimony: An Empirical View, 85 Mich.L.Rev. 809, 813-820 (1987).

[8] In sum, we conclude that where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation. Because there is no dispute that the child witnesses in this case testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, we conclude that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause.

IV

[9] The Maryland Court of Appeals held, as we do today, that although face-to-face confrontation is not an absolute constitutional requirement, it may be abridged only where there ***858** is a " 'case-specific finding of necessity.' " 316 Md., at 564, 560 A.2d, at 1126 (quoting *Coy, supra,* 487 U.S., at 1025, 108 S.Ct., at 2805 (O'Connor, J., concurring)). Given this latter requirement, the Court of Appeals reasoned that "[t]he question of whether a child is unavailable to testify ... should not be asked in terms of inability to testify in the ordinary courtroom setting, but in the much narrower terms of the witness's inability to testify in the presence of the accused." 316 Md., at 564, 560 A.2d, at 1126 (footnote omitted). "[T]he determinative inquiry required to preclude face-to-face confrontation is the effect of the presence of the defendant on the witness or the witness's testimony." *Id.,* at 565, 560 A.2d, at 1127. The Court of Appeals accordingly concluded that, as a prerequisite to use of the § 9-102 procedure, the Confrontation Clause requires the trial court to make a specific finding that testimony by the child in the courtroom *in the presence of the defendant* would result in the child suffering serious emotional distress such that the child could not reasonably communicate. *Id.,* at 566, 560 A.2d, at 1127. This conclusion, of course, is consistent with our holding today.

In addition, however, the Court of Appeals interpreted our decision in *Coy* to impose two subsidiary requirements. First, the court held that " § 9-102 ordinarily cannot be invoked unless the child witness initially is questioned (either in or outside the courtroom) in the defendant's presence." *Id.,* at 566, 560 A.2d, at 1127; see also *Wildermuth,* 310 Md., at 523-524, 530 A.2d, at 289 (personal observation by the judge should be the rule rather than the exception). Second, the court asserted that, before using the one-way television procedure, a trial judge must determine whether a child would suffer "severe emotional distress" if he or she were to testify by *two*-way closed circuit television. 316 Md., at 567, 560 A.2d, at 1128.

Reviewing the evidence presented to the trial court in support of the finding required under § 9-102(a)(1)(ii), the Court of Appeals determined that "the finding of necessity required ***859** to limit the defendant's right of confrontation through invocation of § 9-102 ... was not made here." *Id.,* at 570-571, 560 A.2d, at 1129. The Court of Appeals noted that the trial judge "had the benefit only of expert testimony on the ability of the children to communicate; he did not question any of the children himself, nor did he observe any child's behavior on the witness stand before making his ruling. He did not explore any alternatives to the use of one-way closed-circuit television." *Id.,* at 568, 560 A.2d, at 1128 (footnote omitted). The Court of Appeals also observed that "the testimony in this case was not sharply focused on the effect of the defendant's presence****3171** on the child witnesses." *Id.,* at 569, 560 A.2d, at 1129. Thus, the Court of Appeals concluded:

> "Unable to supplement the expert testimony by responses to questions put by him, or by his own observations of the children's behavior in Craig's presence, the judge made his § 9-102 finding in terms of what the experts had said. He ruled that 'the testimony of each of these children *in a courtroom* will [result] in each child suffering serious emotional distress ... such that each of these children cannot reasonably communicate.' He failed to find-indeed, on the evidence before him, *could not have found*-that this result would be the product of testimony in a courtroom in the defendant's presence or outside the courtroom but in the defendant's televised presence. That, however, is the finding of necessity required to limit the defendant's right of confrontation through invocation of § 9-102. Since that finding was not made here, and since the procedures we deem requisite to the valid use of § 9-102 were not followed, the judgment of the Court of Special Appeals must be reversed and the case remanded for a new trial." *Id.,* at 570-571, 560 A.2d, at 1129 (emphasis added).

The Court of Appeals appears to have rested its conclusion at least in part on the trial court's failure to observe the children's behavior in the defendant's presence and its failure to ***860** explore less restrictive alternatives to the use of the one-way closed circuit television procedure. See *id.,* at 568-571, 560 A.2d, at 1128-1129. Although we think such evidentiary requirements could strengthen the grounds for use of protective measures, we decline to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way television procedure. The trial court in this case, for example, could well have found, on the basis of the expert testimony before it, that testimony by the child witnesses in the courtroom in the defendant's presence "will result in [each] child suffering serious emotional distress such that the child cannot reasonably communicate," § 9-102(a)(1)(ii). See *id.,* at 568-569, 560 A.2d, at 1128-1129; see also App. 22-25, 39, 41, 43, 44-45, 54-57. So long as a trial court makes such a case-specific finding of necessity, the Confrontation Clause does not prohibit a State from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case. Because the Court of Appeals held that the trial court had not made the requisite finding of necessity under its interpretation of "the high threshold required by [*Coy*] before § 9-102 may be invoked," 316 Md., at 554-555, 560 A.2d, at 1121 (footnote omitted), we cannot be certain whether the Court of Appeals would reach the same conclusion in light of the legal standard we establish today. We therefore vacate the judgment of the Court of Appeals of Maryland and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice SCALIA, with whom Justice BRENNAN, Justice MARSHALL, and Justice STEVENS join, dissenting.

Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitu-

tion against the tide of prevailing current opinion. The Sixth Amendment provides, with unmistakable clarity, that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted ***861** with the witnesses against him." The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court. The Court, however, says:

> "We ... conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face ****3172** his or her accusers in court. That a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy." *Ante,* at 3167.

Because of this subordination of explicit constitutional text to currently favored public policy, the following scene can be played out in an American courtroom for the first time in two centuries: A father whose young daughter has been given over to the exclusive custody of his estranged wife, or a mother whose young son has been taken into custody by the State's child welfare department, is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, "it is really not true, is it, that I-your father (or mother) whom you see before you-did these terrible things?" Perhaps that is a procedure today's society desires; perhaps (though I doubt it) it is even a fair procedure; but it is assuredly not a procedure permitted by the Constitution.

Because the text of the Sixth Amendment is clear, and because the Constitution is meant to protect against, rather than conform to, current "widespread belief," I respectfully dissent.

***862** I

According to the Court, "we cannot say that [face-to-face] confrontation [with witnesses appearing at trial] is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers." *Ante,* at 3166. That is rather like saying "we cannot say that being tried before a jury is an indispensable element of the Sixth Amendment's guarantee of the right to jury trial." The Court makes the impossible plausible by recharacterizing the Confrontation Clause, so that confrontation (redesignated "face-to-face confrontation") becomes only one of many "elements of confrontation." *Ante,* at 3163-3164. The reasoning is as follows: The Confrontation Clause guarantees not only what it explicitly provides for-"face-to-face" confrontation-but also implied and collateral rights such as cross-examination, oath, and observation of demeanor (TRUE); the purpose of this entire cluster of rights is to ensure the reliability of evidence (TRUE); the Maryland procedure preserves the implied and collateral rights (TRUE), which adequately ensure the reliability of evidence (perhaps TRUE); therefore the Confrontation Clause is not violated by denying what it explicitly provides for-"face-to-face" confrontation (unquestionably FALSE). This reasoning abstracts from the right to its purposes, and then eliminates the right. It is wrong because the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was "face-to-face" confrontation. Whatever else it may mean in addition, the defendant's constitutional right "to be confronted with the witnesses against him" means, always and everywhere, at least what it explicitly says: the " 'right to meet face to face all those who appear and give evidence at trial.' " *Coy v. Iowa,* 487 U.S. 1012, 1016, 108 S.Ct. 2798, 2800, 101 L.Ed.2d 857 (1988), quoting *California v. Green,* 399 U.S. 149, 175, 90 S.Ct. 1930, 1943-44, 26 L.Ed.2d 489 (1970) (Harlan, J., concurring).

***863** The Court supports its antitextual conclusion by cobbling together scraps of dicta from various cases that have no bearing here. It will suffice to discuss one of them, since they are all of a kind: Quoting *Ohio v. Roberts,* 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980), the Court says that "[i]n sum, our precedents establish that 'the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial,' " *ante,* at 3165. (emphasis added by the Court). But *Roberts,* and all the other "precedents" the Court enlists to prove the implausible, ****3173** dealt with the *implications* of the Confrontation Clause, and not its literal, unavoidable text. When *Roberts* said that the Clause merely "reflects a preference for face-to-face confrontation at trial," what it had in mind as the nonpreferred alternative was not (as the Court implies) the appearance of a witness at trial without confronting the defendant. That has been, until today, not merely "nonpreferred" but utterly unheard-of. What *Roberts* had in mind was the receipt of *other-than-first-hand testimony* from witnesses at trial-that is, witnesses' recounting of hearsay statements by absent parties who, *since they did not appear at trial,* did not have to endure face-to-face confrontation. Rejecting that, I agree, was merely giving effect to an evident constitutional preference; there are, after all, many exceptions to the Confrontation Clause's hearsay rule. But that the defendant should be confronted by the witnesses who appear at trial is not a preference "reflected" by the Confrontation Clause; it is a constitutional right unqualifiedly guaranteed.

The Court claims that its interpretation of the Confrontation Clause "is consistent with our cases holding that other Sixth Amendment rights must also be interpreted in the context of the necessities of trial and the adversary process." *Ante,* at 3166. I disagree. It is true enough that the "necessities of trial and the adversary process" limit the *manner* in which Sixth Amendment rights may be exercised, and limit the *scope* of Sixth Amendment guarantees to the extent that scope is textually indeterminate. Thus (to ***864** describe the cases the Court cites): The right to confront is not the right to confront in a manner that disrupts the trial. *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). The right "to have compulsory process for obtaining witnesses" is not the right to call witnesses in a manner that violates fair and orderly procedures. *Taylor v. Illinois,* 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). The scope of the right "to have the assistance of counsel" does not include consultation with counsel at all times during the trial. *Perry v. Leeke,* 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989). The scope of the right to cross-examine does not include access to the State's investigative files. *Pennsylvania v. Ritchie,* 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). But we are not talking here about denying expansive scope to a Sixth Amendment provision whose scope for the purpose at issue is textually unclear; "to confront" plainly means to encounter face-to-face, whatever else it may mean in addition. And we are not talking about the manner of arranging that face-to-face encounter, but about whether it shall occur at all. The "necessities of trial and the adversary process" are irrelevant here, since they cannot alter the constitutional text.

II

Much of the Court's opinion consists of applying to this case the mode of analysis we have used in the admission of hearsay evidence. The Sixth Amendment does not literally contain a prohibition upon such evidence, since it guarantees the defendant only the right to confront "the witnesses against him." As applied in the Sixth Amendment's context of a prosecution, the noun "witness"-in 1791 as today-could mean either (a) one "who knows or sees any thing; one personally present" or (b) "one who gives testimony" or who "testifies," *i.e.,* "[i]n *judicial proceedings,* [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of some fact to a court." 2 N. Webster, An American Dictionary of the English Language (1828) (emphasis added). See also J. Buchanan, Linguae Britannicae Vera Pronunciatio (1757). The former meaning (one "who ***865**

knows or sees") would cover hearsay evidence, but is excluded in the Sixth Amendment by the words following the noun: "witnesses *against him.* " The phrase obviously refers to those who give testimony against the defendant at trial. We have nonetheless found implicit in the Confrontation**3174 Clause some limitation upon hearsay evidence, since otherwise the government could subvert the confrontation right by putting on witnesses who know nothing except what an absent declarant said. And in determining the scope of that implicit limitation, we have focused upon whether the reliability of the hearsay statements (which are not *expressly* excluded by the Confrontation Clause) "is otherwise assured." *Ante,* at 3166. The same test cannot be applied, however, to permit what is explicitly forbidden by the constitutional text; there is simply no room for interpretation with regard to "the irreducible literal meaning of the Clause." *Coy, supra,* 487 U.S., at 1020-1021, 108 S.Ct., at 2803.

Some of the Court's analysis seems to suggest that the children's testimony here was itself hearsay of the sort permissible under our Confrontation Clause cases. See *ante,* at 3166-3167. That cannot be. Our Confrontation Clause conditions for the admission of hearsay have long included a "general requirement of unavailability" of the declarant. *Idaho v. Wright,* 497 U.S. 805, 815, 110 S.Ct. 3139, 3146, 111 L.Ed.2d 638. "In the usual case ..., the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Ohio v. Roberts,* 448 U.S., at 65, 100 S.Ct., at 2538. We have permitted a few exceptions to this general rule-*e.g.,* for co-conspirators' statements, whose effect cannot be replicated by live testimony because they "derive [their] significance from the circumstances in which [they were] made," *United States v. Inadi,* 475 U.S. 387, 395, 106 S.Ct. 1121, 1126, 89 L.Ed.2d 390 (1986). "Live" closed-circuit television testimony, however-if it can be called hearsay at all-is surely an example of hearsay as "a weaker substitute for live testimony," *id.,* at 394, 106 S.Ct., at 1126, which can be employed only when the genuine article is unavailable. "When ***866** two versions of the same evidence are available, long-standing principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence." *Ibid.* See also *Roberts, supra* (requiring unavailability as precondition for admission of prior testimony); *Barber v. Page,* 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968) (same).

The Court's test today requires unavailability only in the sense that the child is unable to testify in the presence of the defendant.[FN1] That cannot possibly be the relevant sense. If unconfronted testimony is admissible hearsay when the witness is unable to confront the defendant, then presumably there are other categories of admissible hearsay consisting of unsworn testimony when the witness is unable to risk perjury, un-cross-examined testimony when the witness is unable to undergo hostile questioning, etc. *California v. Green,* 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), is not precedent for such a silly system. That case held that the Confrontation Clause does not bar admission of prior testimony when the declarant is sworn as a witness but refuses to answer. But in *Green,* as in most cases of refusal, we could not know *why* the declarant refused to testify. Here, by contrast, we know that it is precisely because the child is unwilling to testify in the presence of the defendant. 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." *Coy,* 487 ***867** U.S., at 1020, 108 S.Ct., at 2802. To say ****3175** 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.

FN1. I presume that when the Court says "trauma would impair the child's ability to communicate," *ante,* at 3170, it means that trauma would make it impossible for the child to communicate. That is the requirement of the Maryland law at issue here: "serious emotional distress such that the child cannot reasonably communicate." Md.Cts. & Jud.Proc.Code Ann. § 9-102 (a)(1)(ii) (1989). Any implication beyond that would in any event be dictum.

III

The Court characterizes the State's interest which "outweigh[s]" the explicit text of the Constitution as an "interest in the physical and psychological well-being of child abuse victims," *ante,* at 3167, an "interest in protecting" such victims "from the emotional trauma of testifying," *ante,* at 3169. That is not so. A child who meets the Maryland statute's requirement of suffering such "serious emotional distress" from confrontation that he "cannot reasonably communicate" would seem entirely safe. Why would a prosecutor want to call a witness who cannot reasonably communicate? And if he did, it would be the State's own fault. Protection of the child's interest-as far as the Confrontation Clause is concerned [FN2]-is entirely within Maryland's control. The State's interest here is in fact no more and no less than what the State's interest always is when it seeks to get a class of evidence admitted in criminal proceedings: more convictions of guilty defendants. That is not an unworthy interest, but it should not be dressed up as a humanitarian one.

FN2. A different situation would be presented if the defendant sought to call the child. In that event, the State's refusal to compel the child to appear, or its insistence upon a procedure such as that set forth in the Maryland statute as a condition of its compelling him to do so, would call into question-initially, at least, and perhaps exclusively-the scope of the defendant's Sixth Amendment right "to have compulsory process for obtaining witnesses in his favor."

And the interest on the other side is also what it usually is when the State seeks to get a new class of evidence admitted: fewer convictions of innocent defendants-specifically, in the ***868** present context, innocent defendants accused of particularly heinous crimes. The "special" reasons that exist for suspending one of the usual guarantees of reliability in the case of children's testimony are perhaps matched by "special" reasons for being particularly insistent upon it in the case of children's testimony. Some studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality. See Lindsay & Johnson, Reality Monitoring and Suggestibility: Children's Ability to Discriminate Among Memories From Different Sources, in Children's Eyewitness Memory 92 (S. Ceci, M. Toglia, & D. Ross eds. 1987); Feher, The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?, 14 Am.J.Crim.L. 227, 230-233 (1987); Christiansen, The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews, 62 Wash.L.Rev. 705, 708-711 (1987). The injustice their erroneous testimony can produce is evidenced by the tragic Scott County investigations of 1983-1984, which disrupted the lives of many (as far as we know) innocent people in the small town of Jordan, Minnesota. At one stage those investigations were pursuing allegations by at least eight children of multiple murders, but the prosecutions actually initiated charged only sexual abuse. Specifically, 24 adults were charged with molesting 37 children. In the course of the investigations, 25 children were placed in foster homes. Of the 24 indicted defendants, one pleaded guilty, two were acquitted at trial, and the charges against the remaining 21 were voluntarily dismissed. See Feher, *supra,* at 239-240. There is no doubt that some sexual abuse took place in Jordan; but there is no reason to believe it was as wide-

spread as charged. A report by the Minnesota attorney general's office, based on inquiries conducted by the Minnesota Bureau of Criminal Apprehension and the Federal Bureau of Investigation, ****3176** concluded that there was an "absence of credible testimony and [a] lack of ***869** significant corroboration" to support reinstitution of sex-abuse charges, and "no credible evidence of murders." H. Humphrey, Report on Scott County Investigation 8, 7 (1985). The report describes an investigation full of well-intentioned techniques employed by the prosecution team, police, child protection workers, and foster parents, that distorted and in some cases even coerced the children's recollection. Children were interrogated repeatedly, in some cases as many as 50 times, *id.,* at 9; answers were suggested by telling the children what other witnesses had said, *id.,* at 11; and children (even some who did not at first complain of abuse) were separated from their parents for months, *id.,* at 9. The report describes the consequences as follows:

> "As children continued to be interviewed the list of accused citizens grew. In a number of cases, it was only after weeks or months of questioning that children would 'admit' their parents abused them.
>
> . . . . .
>
> "In some instances, over a period of time, the allegations of sexual abuse turned to stories of mutilations, and eventually homicide." *Id.,* at 10-11.

The value of the confrontation right in guarding against a child's distorted or coerced recollections is dramatically evident with respect to one of the misguided investigative techniques the report cited: some children were told by their foster parents that reunion with their real parents would be hastened by "admission" of their parents' abuse. *Id.,* at 9. Is it difficult to imagine how unconvincing such a testimonial admission might be to a jury that witnessed the child's delight at seeing his parents in the courtroom? Or how devastating it might be if, pursuant to a psychiatric evaluation that "trauma would impair the child's ability to communicate" in front of his parents, the child were permitted to tell his story to the jury on closed-circuit television?

In the last analysis, however, this debate is not an appropriate one. I have no need to defend the value of confrontation,***870** because the Court has no authority to question it. It is not within our charge to speculate that, "where face-to-face confrontation causes significant emotional distress in a child witness," confrontation might "in fact *disserve* the Confrontation Clause's truth-seeking goal." *Ante,* at 3169. If so, that is a defect in the Constitution-which should be amended by the procedures provided for such an eventuality, but cannot be corrected by judicial pronouncement that it is archaic, contrary to "widespread belief," and thus null and void. For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it. To quote the document one last time (for it plainly says all that need be said): "In *all* criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him" (emphasis added).

* * *

The Court today has applied "interest-balancing" analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings. The Court has convincingly proved that the Maryland procedure serves a valid interest, and gives the defendant virtually everything the Confrontation Clause guarantees (everything, that is, except confrontation). I am persuaded, therefore, that the Maryland procedure is virtually constitutional. Since it is not, however, actually constitutional I would affirm the judgment of the Maryland Court of Appeals reversing the judgment of conviction.

U.S.Md.,1990.

Maryland v. Craig
497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666, 58
USLW 5044, 30 Fed. R. Evid. Serv. 1

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535 F.Supp.2d 176
(Cite as: 535 F.Supp.2d 176)

H

United States District Court,
D. Maine.
UNITED STATES of America
v.
William C. BURHOE, Defendant.

No. CR-06-57-B-W.
Feb. 27, 2008.

Background: Defendant was indicted by a federal grand jury for the alleged possession of a firearm by a person previously involuntarily committed to a mental institution. Defendant moved for hospitalization proceeding. Thereafter, defendant requested to be present during competency hearing, and requested that the court rescind its hospitalization extension.

Holdings: The District Court, John A. Woodcock, Jr., J., held that:
(1) skipping a competency hearing and initiating a hospitalization proceeding was not an appropriate sanction for failure to maintain active order of custody over defendant, and
(2) defendant was entitled to be present during competency hearing in District of Maine.

Ordered accordingly.

West Headnotes

[1] Mental Health 257A ⚿436.1

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak436 Custody and Confinement
257Ak436.1 k. In General. Most Cited Cases

Skipping a competency hearing and initiating a hospitalization proceeding in its place was not an appropriate sanction for the government's failure to maintain an active order of custody over defendant while competency determination was being resolved, where government's failure to move for an extension of custody while mental health professionals completed *Sell* determination as to whether defendant required involuntary medication was apparently inadvertent, lasted approximately one month, and had been remedied by a subsequent order, and it otherwise remained in defendant's best interest to remain in medical center pending the *Sell* determination. 18 U.S.C.A. §§ 4241(d)(2)(A), 4246 .

[2] Criminal Law 110 ⚿636(3)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k636 Presence of Accused
110k636(3) k. During Preliminary Proceedings and on Hearing of Motions. Most Cited Cases

Defendant was entitled to be present during competency hearing in District of Maine; defendant's presence in Maine would satisfy his right to counsel, such as it was, and would have the added benefit of the defendant's physical presence before the court. U.S.C.A. Const.Amend. 6; 18 U.S.C.A. §§ 4241, 4247(d).

***176** David W. Bate, Law Office of David W. Bate, Bangor, ME, for Defendant.

F. Todd Lowell, Office of the U.S. Attorney, Bangor, ME, for Plaintiff.

ORDER ON DEFENDANT'S MOTION FOR A § 4246 HOSPITALIZATION PROCEEDING AND FOR THE RIGHT TO BE PHYSICALLY PRESENT AT A § 4247(d) HEARING PURSUANT TO § 4241

JOHN A. WOODCOCK, JR., District Judge.

Under 18 U.S.C. § 4241, a defendant whose

competence is at issue is entitled to ***177** a hearing to determine his competence, and under 18 U.S.C. § 4246, a defendant who has been found incompetent and unlikely to improve is entitled to a hearing to determine whether he should be hospitalized. Over the Defendant's objection, the Court concludes that skipping a § 4241 hearing and initiating a § 4246 proceeding in its place would not be an appropriate sanction for the Government's failure to maintain an active order of custody while a § 4241 determination is being resolved. The Court grants Defendant's request to be present at the 18 U.S.C. § 4247(d) hearing held pursuant to 18 U.S.C. § 4241, and orders that Mr. Burhoe be brought to Maine for the hearing. Finally, over Mr. Burhoe's objection, the Court declines to rescind its prior Order, which authorized the Attorney General to retain him for hospitalization until the Court rules on the § 4241 issue or until April 30, 2008, whichever is earlier.

I. STATEMENT OF FACTS

On September 7, 2006, a federal grand jury indicted William C. Burhoe for an alleged violation of 18 U.S.C. § 922(g)(4), possession of a firearm by a person previously involuntarily committed to a mental institution. *Indictment* (Docket # 1). On October 6, 2006, the Government moved for detention and for a psychiatric examination. *Mot. for Psychiatric or Psychological Evaluation* (Docket # 8); *Mot. for Detention* (Docket # 9). On the same day, the Court ordered Mr. Burhoe committed to the custody of the Attorney General to undergo a psychiatric examination to determine his competency to stand trial.[FN1] *Order* (Docket # 10). Following the receipt of a psychological report, the Court held a competency hearing on June 15, 2007 pursuant to 18 U.S.C. § 4246(d). By written order dated June 20, 2007, the Court found that "the defendant is presently suffering from a mental disease or defect that renders him unable to understand the nature and consequences of the proceedings against him and unable to assist properly in his defense." *Order* at 1 (Docket # 42). The Court committed Mr. Burhoe to the custody of the Attorney General to hospitalize him for treatment

FN1. The Defendant later moved for reconsideration based on his contention that he had established a rapport with a particular treating psychologist and would likely deteriorate if moved out of state to a federal facility for the evaluation. *Def.'s Mot. to Recon. Order for Competency Evaluation* (Docket # 12). The Court denied the motion. *Order* (Docket # 22).

> for such reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future the defendant will attain the capacity to permit the proceedings to go forward; and for an additional reasonable period of time until-(A) his mental condition is so improved that trial may proceed, if the Court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceeding to go forward; or (B) the pending charges against him are disposed of according to law; whichever is earlier.
> *Id.* at 2.

On October 29, 2007, the Court received a psychiatric report from the Bureau of Prisons. The report concluded that Mr. Burhoe remained not competent to proceed to trial and recommended antipsychotic medication, opining that there is a substantial probability that Mr. Burhoe can be restored to competency if he receives antipsychotic medication. At the same time, however, the report noted that Mr. Burhoe had refused to voluntarily undergo the recommended therapy. The report recommended that the Court require ***178** Mr. Burhoe to undergo involuntary prescriptive treatment.

The October report left unanswered certain questions relevant to the analysis dictated by *Sell v. United States,* 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003). Accordingly, on November 13, 2007, after a conference with counsel, the Court ordered that the Federal Medical Center prepare a supplemental report, addressing the *Sell* concerns. *Order* (Docket # 62). On November 20, 2007, the

Government moved to extend Mr. Burhoe's hospitalization to January 11, 2008, and on November 21, 2007, the Court granted the motion without objection by the Defendant. *Mot. to Extend Period of Hospitalization* (Docket # 66); *Order* (Docket # 68). The Court received a faxed copy of a supplemental report on February 8, 2008, and a hard copy on February 19, 2008. On February 14, 2008, Mr. Burhoe moved for a § 4246 hospitalization proceeding and the same day, the Court held a conference of counsel. *Def.'s Mot. for a § 4246 Hospitalization Proceeding* (Docket # 69) (*Def.'s Mot.*). At the conference, it was agreed that an evidentiary hearing will be necessary, whether it is a *Sell* hearing or a § 4246 hospitalization hearing. On February 15, 2008, the Court granted the Government's motion, without objection, to extend the hospitalization period to April 30, 2008. *Order on Government's Second Mot. to Extend Period of Hospitalization* (Docket # 74). On February 25, 2008, Mr. Burhoe filed another motion, requesting to be present during the hearing, and asking the Court to rescind its second hospitalization extension. *Def.'s Mot. to be Present During § 4241(d) Hearing* (Docket # 78) (*Def.'s Mot. to be Present*).

II. DISCUSSION

A. THE DEFENDANT'S MOTION FOR A § 4246 PROCEEDING

[1] Mr. Burhoe first contends that the lapse of the custodial order on January 11 requires that the case be treated as a § 4246 hospitalization proceeding. *Def.'s Mot.* He asserts that "January 11, 2008 [was] the 'end of the time period' authorized by this Court pursuant to § 4241(d)(2)(A) " and the Court is required "to determine whether 'the defendant's mental condition has not so improved as to permit the trial to proceed.' " *Id.* at 2. He goes on to state that "[i]f the defendant's mental condition has not so improved, then § 4246 hospitalization proceedings must commence immediately." *Id.* He cites § 4241(d) as support. *Id.*

The Court disagrees with Mr. Burhoe on a number of bases. First, the statute contemplates a resort to § 4246 only if the court has made a determination that "the defendant's mental condition has not so improved as to permit proceedings to go forward." 18 U.S.C. § 4241(d). The Court has made no such determination. Second, a § 4246 proceeding is not a procedural default provision for § 4241. If the Government fails to comply with the custodial timing requirements of § 4241, the statute does not contemplate that § 4246 proceedings must be commenced as a sanction for the Government's miscue. [FN2] ***179** Third, the Defendant's position improperly conflates custody with a § 4241 determination. The remedy for the Government's failure to obtain an ongoing custodial order is to resolve the custody issue, not to make assumptions about the defendant's mental condition and to proceed with a hospitalization hearing.

> FN2. This is particularly true here, where the Government's failure to move for an extension of Mr. Burhoe's custody while the mental health professionals completed the supplemental *Sell* report was apparently inadvertent, lasted approximately one month, and has been remedied by a subsequent order. Further, the parties agreed both before and after the lapse in the custodial extension that it is in Mr. Burhoe's best interest to remain at Butner while the *Sell* determination is resolved. *Order* at 1 ("[t]he parties agree that it is in the best interest of the defendant for him to remain at the medical center pending the determination of whether the involuntary administration of medication is appropriate under *Sell.* "); *Order on Government's Mot. to Extend Period of Hospitalization* (Docket # 68) ("The parties agree that an extension of the defendant's hospitalization is necessary in order to allow the doctors at the Butner facility to issue a supplemental order and they agree that an extension for that purpose is in the best interest of the defendant.").

> Mr. Burhoe now contends that remaining at Butner until the *Sell* issue is decided is not in his best interest. *Def.'s Mot. to be Present* at 2. He asks that the Court rescind its *Order on Government's Second Motion to Extend Period of Hospitalization* based upon his current position. In the circumstances of this case, there is no reason to alter the Court's Order dated February 15, 2008, which extended his hospitalization period "until the Court rules on the pending request to involuntarily medicate the defendant ... or no later than April 30, 2008, unless further extended by the Court." *Order on Government's Second Mot. to Extend Period of Hospitalization* at 2 (Docket # 74). As the § 4241 hearing will be held forthwith, the current custodial order merely maintains the status quo. To rescind its custodial order makes little sense. An immediate recission would likely result in Mr. Burhoe's transportation to a jail, not a medical center, and it seems apparent as the parties earlier agreed that Mr. Burhoe's best interests are served for the time being by the availability of greater not fewer mental health services.

But, the Court disagrees on a more fundamental level with the Defendant. Mr. Burhoe's motion contains the implicit view that the § 4241 procedure under which the court determines competency is a matter to be avoided and that he would be better protected by a § 4246 proceeding. The Court takes serious exception to Mr. Burhoe's premise. By safeguarding the rights of a defendant whose competency to stand trial is in doubt, the § 4241 procedure is designed to protect, not to punish defendants. The combined statutory protections under § 4241 and its companion provisions include the right to a mental competency evaluation by mental health professionals, the right to challenge their determinations by separate evaluation, and the right to a hearing. These statutory protections have been judicially enhanced by the *Sell* restrictions against involuntary treatment.

Moreover, if the Court concludes that the defendant's mental condition has not so improved as to permit proceedings to go forward, the additional protections of § 4246 may become effective. Thus, a defendant has the possibility of dual protections, both a § 4241 hearing and a § 4246 hearing. To sanction the Government's failure to obtain currently effective custodial orders by ordering that the matter proceed directly to § 4246 would be to sanction the defendant for the Government's lapse, depriving him of his statutory right to have his competency to stand trial judicially evaluated and determined.

B. THE DEFENDANT'S MOTION FOR PHYSICAL PRESENCE AT THE § 4247(d) HEARING OR THE PHYSICAL PRESENCE OF HIS ATTORNEY WITH HIM AT A VIDEO CONFERENCE HEARING

[2] Mr. Burhoe requests that he "be transported from FMC Butner to the District of Maine to enable him to participate, in person, at all hearings in this matter." *Def.'s Mot. to be Present* at 1. Whether a defendant is entitled to the full panoply of constitutional rights at a § 4247(d) hearing to determine competency under § 4241 is not settled. *United States v. Hamilton,* 107 F.3d 499, 504 (7th Cir.1997) ("And it is unclear whether the Confrontation Clause applies to pretrial competency hearings."); *United States v. Algere,* 457 F.Supp.2d 695, 702 (E.D.La.2005) (concluding that conducting a *Sell* hearing by videoconference***180** in which the Court appears by video teleconference and all other participants and witnesses are present in the same place as the defendant does not violate any rule or constitutional provision). Mr. Burhoe's presence in Maine will satisfy his right to counsel, such as it is, and will have the added benefit of the defendant's physical presence before the Court. Expert witnesses from North Carolina will be free to testify by video conference.[FN3]

FN3. The Court had tentatively scheduled

the § 4241 hearing for March 5, 2008 at 3:00 p.m. In view of the fact that Mr. Burhoe will now have to be brought to Maine for the hearing, the Court will schedule a conference with counsel and the United States Marshal to determine how quickly Mr. Burhoe can be brought here and, if his physical presence cannot be secured in Maine by March 5, the Court will reset the hearing for an earliest possible date.

III. CONCLUSION

The Court:

1) DENIES the Defendant's Motion for a § 4246 Hospitalization Proceeding (Docket # 69);

2) GRANTS IN PART the Defendant's Motion to be Present during the hearing, by ORDERING the Defendant brought to Maine for the § 4247(d) hearing under § 4241 (Docket # 78); and

3) DENIES the Defendant's motion to rescind the Court's February 15, 2008 *Order on Government's Second Motion to Extend Period of Hospitalization* (Docket # 78).

SO ORDERED.

D.Me.,2008.
U.S. v. Burhoe
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477 F.3d 716, 07 Cal. Daily Op. Serv. 1494
(Cite as: 477 F.3d 716)

▷

United States Court of Appeals,
Ninth Circuit.
HUU THANH NGUYEN, Petitioner–Appellant,
v.
Silvia GARCIA, Warden; Edward S. Alameida, Jr., Director, Director of Corrections, California State Department of Corrections, Respondents–Appellees.

No. 05–56596.
Argued and Submitted Oct. 24, 2006.
Filed Feb. 9, 2007.

Background: State prisoner convicted of attempted murder filed petition for writ of habeas corpus, challenging admission during mental competency hearing of his post-*Miranda* invocation of right to counsel. The United States District Court for the Central District of California, James V. Selna, J., denied petition. Prisoner appealed.

Holding: The Court of Appeals, Bea, Circuit Judge, held that admission during pre-trial mental competency of invocation of right to counsel did not violate Fifth Amendment privilege against self-incrimination.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⚿1023(3)

110 Criminal Law
110XXIV Review
110XXIV(C) Decisions Reviewable
110k1021 Decisions Reviewable
110k1023 Appealable Judgments and Orders
110k1023(3) k. Preliminary or interlocutory orders in general. Most Cited Cases

California law does not allow the separate appeal of a competency determination. West's Ann.Cal.Penal Code § 1368(c).

[2] Habeas Corpus 197 ⚿842

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k842 k. Review de novo. Most Cited Cases

Habeas Corpus 197 ⚿846

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k846 k. Clear error. Most Cited Cases

The district court's decision to deny a petition for writ of habeas corpus is reviewed de novo, and its factual findings are reviewed for clear error. 28 U.S.C.A. § 2254(d).

[3] Habeas Corpus 197 ⚿450.1

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k450.1 k. In general. Most Cited Cases

Habeas Corpus 197 ⚿452

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k452 k. Federal or constitutional questions. Most Cited Cases

A habeas court will defer to the state court's determination of the federal issues unless that determination is contrary to, or involved an unreasonable application of, clearly established federal law. 28 U.S.C.A. § 2254(d)(1).

[4] Habeas Corpus 197 ⚿452

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k452 k. Federal or constitutional questions. Most Cited Cases

Only United States Supreme Court holdings, but not dicta, constitute "clearly established federal law" for purposes of the Antiterrorism and Effective Death Penalty Act (AEDPA) deference standard. 28 U.S.C.A. § 2254(d)(1).

[5] Habeas Corpus 197 ⚿841

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k841 k. In general. Most Cited

Review of the district court's decision in a habeas proceeding is de novo, and the Court of Appeals may affirm on any ground supported by the record, even if it differs from the rationale of the district court. 28 U.S.C.A. § 2254(d).

[6] Constitutional Law 92 ⚿4687

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)5 Evidence and Witnesses
92k4684 Defendant as Witness
92k4687 k. Silence. Most Cited
(Formerly 92k268(10))

It would be fundamentally unfair and a deprivation of due process to allow defendant's post-arrest silence after receiving *Miranda* warnings to be used to impeach the defendant's explanation subsequently offered at trial. U.S.C.A. Const.Amend. 5.

[7] Criminal Law 110 ⚿393(1)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k393 Compelling Self-Incrimination
110k393(1) k. In general. Most Cited Cases

Criminal Law 110 ⚿410.36

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)4 Adoptive Admissions; Silence
110k410.32 Silence
110k410.36 k. Post-arrest silence; custody. Most Cited Cases
(Formerly 110k407(1))

Admission during pre-trial mental competency hearing of defendant's post- *Miranda* invocation of right to counsel did not violate defendant's Fifth Amendment privilege against self-incrimination; the references to defendant's invocation of his right to counsel were not used to show defendant's guilt, but rather to show cognition, and the privilege against self-incrimination was inapplicable at competency hearing. U.S.C.A. Const.Amend. 5.

[8] Mental Health 257A ⚿432

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak432 k. Mental disorder at time of trial. Most Cited Cases

Under California law, the goal of the competency hearing is not to examine the defendant's sanity at the time of the commission of the offense; rather, the goal is to determine whether the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. West's Ann.Cal.Penal Code § 1367(a).

[9] Mental Health 257A ⚿432

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak432 k. Mental disorder at time of trial. Most Cited Cases

Under California law, the effect of being found competent to stand trial and assist counsel in no way affects the determination of the defendant's guilt; it merely removes a procedural barrier to the commencement of trial. West's Ann.Cal.Penal Code § 1367(a).

[10] Mental Health 257A ⚿432

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak432 k. Mental disorder at time of trial. Most Cited Cases

Under California law, the effect of being found incompetent to stand trial is the suspension of the criminal trial until such time, if any, that the defendant regains the capacity to participate in his defense and understand the proceedings against him. West's Ann.Cal.Penal Code § 1367(a).

[11] Mental Health 257A ⚿432

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak432 k. Mental disorder at time of trial. Most Cited Cases

Under California law, the effect of being found competent to stand trial is the continuation of criminal proceedings to the guilt phase of trial. West's Ann.Cal.Penal Code § 1367(a).

[12] Criminal Law 110 ⚿393(1)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k393 Compelling Self-Incrimination
110k393(1) k. In general. Most Cited Cases

The Fifth Amendment privilege against self-incrimination exists to prohibit the government from forcing the defendant to talk and then using the defendant's own statements to satisfy its burden of establishing guilt. U.S.C.A. Const.Amend. 5.

[13] Criminal Law 110 ⚿411.71

110 Criminal Law
110XVII Evidence
110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused
110XVII(M)15 Persons to Whom Made
110k411.71 k. Statements in connection with mental examination. Most Cited Cases
(Formerly 110k412(4))

Under California law, immunity for competency hearing statements is necessary to ensure that an accused is not convicted by use of his own statements made at a court-compelled examination. U.S.C.A. Const.Amend. 5; West's Ann.Cal.Penal Code § 1369.

[14] Criminal Law 110 ⚿393(1)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k393 Compelling Self-Incrimination
110k393(1) k. In general. Most Cited Cases

A defendant seeking to establish incompetence

can be compelled to talk without violating his Fifth Amendment right against self-incrimination; a defendant may be required to be a witness to his own competency, if not his own crime. U.S.C.A. Const.Amend. 5.

***718** Allen Bloom, San Diego, CA, for the petitioner-appellant.

Bill Lockyer, Attorney General of the State of California, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Kevin Vienna, Deputy Attorney General, Lise Jacobsen, Deputy Attorney General, Quisteen S. Shum, Deputy Attorney General, San Diego, CA, for the respondents-appellees.

Appeal from the United States District Court for the Central District of California; James V. Selna, District Judge, Presiding. D.C. No. CV–03–01385–JVS.

Before EUGENE E. SILER, JR.,[FN*]TASHIMA, and BEA, Circuit Judges.

FN* The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

BEA, Circuit Judge.

In *Wainwright v. Greenfield,* 474 U.S. 284, 295, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986), the Supreme Court held that prosecution evidence the defendant maintained silence after his arrest, offered to show he wasn't all *that* crazy, and to rebut defendant's insanity defense in the guilt phase of trial, constituted a violation of due process. Here, we consider whether *Wainwright,* or other applicable federal law, prohibits the prosecutor's mention that defendant requested counsel to show he was able to cooperate in his own defense—not at the guilt phase of trial but during a hearing to determine whether the defendant was mentally competent to stand trial. We conclude that the state court decision finding *Wainwright* inapplicable to a state court competency hearing is not "contrary to" clearly established federal law and therefore affirm the denial of appellant's petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254.

I.

In the early morning of November 15, 1997, a fight broke out at a billiard hall in Stanton, California. The fight continued in the parking lot of the billiard hall and shots were fired. Two of the shots fired struck the outer wall of the billiard hall and one shot pierced the front window and struck an interior wall. No one was killed or hit, but probably not for lack of trying. The owner of the billiard hall saw someone firing a weapon out of the passenger window of a Nissan Maxima. After hearing the shots, Deputy Albert Macias observed a beige Nissan Maxima automobile speed away from the billiard hall parking lot. A brief pursuit ended when the Maxima spun out of control. Appellant Huu Thanh ***719** Nguyen ("Nguyen") was the sole occupant of the vehicle.

Deputy Macias ordered Nguyen out of the car and then handcuffed Nguyen and placed him in the back of the patrol car. Macias read Nguyen his *Miranda* rights after arresting him, and Nguyen responded that he understood each of his rights. Nguyen then stated he wanted to tell Macias what had happened. Nguyen told Macias that a friend had fired the shots. Nguyen stated he drove off to allow his friend to escape, and that Nguyen had tossed the gun out of his window because it was not his. After telling Deputy Macias these details, Nguyen stated he wanted to talk with a lawyer. Macias stopped his interrogation.

The gun used to fire the shots was found 30 to 50 feet from where the Maxima came to rest. Gunshot residue was found on Nguyen's left hand, on the interior and exterior of the passenger door, and on the windshield.

In January 1998, Nguyen was charged with attempted first degree murder, Cal.Penal Code §§

187(a), 664, assault with the personal use of a firearm, *id.* § 245(a)(2), shooting at an occupied building, *id.* § 246, and being a felon in possession of a firearm, *id.* § 12021(a)(1).[FN1] He was charged to have committed the attempted murder willfully, deliberately, and with premeditation. Before the jury trial, the proceedings in the criminal prosecution were suspended pursuant to California Penal Code §§ 1367 – 69 for a hearing to determine whether Nguyen was competent to stand trial. [FN2]

FN1. Nguyen stood twice convicted, once in 1992 and once in 1993, of felony burglary offenses. Cal.Penal Code §§ 459–60.

FN2. Under California law,

> [a] person cannot be tried or adjudged to punishment while that person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational man- ner.

Cal.Penal Code § 1367(a).

The competency hearing was held in March 1999 before a jury impaneled solely to decide whether Nguyen was competent to stand trial on the charges lodged against him.[FN3] At this competency hearing, Dr. Paul Blair testified for the defense. He testified that he had evaluated Nguyen twice, once in September 1992 (at the request of a public defender who was defending Nguyen for the 1992 burglary charge) and again in January 1999. Dr. Blair opined that Nguyen "is not competent to participate in his own defense at this point in time, nor is he competent to discuss with you in a legitimate, forthright manner...." During cross examination of Dr. Blair, the prosecutor mentioned Nguyen's ***720** request for an attorney on the night of the billiard hall shooting:

FN3. In California, competency hearings are distinct from the criminal prosecution: "when an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of the defendant has been determined." Cal.Penal Code § 1368(c). If a jury has been impaneled to decide the guilt of the defendant, the jury is "retained on call" pending resolution of the defendant's competency unless such retention would cause "undue hardship." *Id.* A separate jury may be impaneled to determine the sole issue of the defendant's competency. *See id.* §§ 1368(c), 1369(e), (f); *People v. Turner,* 34 Cal.4th 406, 424, 20 Cal.Rptr.3d 182, 99 P.3d 505 (2004). Defendant has the burden of proving by a preponderance of the evidence that he is mentally incompetent. *Id.* § 1369(f).

> Here, of course, the competency hearing preceded the guilt phase trial; the composition of the competency jury was totally different from that of the eventual guilt phase jury.

Q: Let me ask you this, Dr. Blair. If Mr. Nguyen on the day of his arrest in November of 1997 gave a police officer a rational, apparently cogent statement, even—even a defense to what he was suspected of doing, saying he may not have been involved, telling him that he didn't want to speak to him any longer, *wanted a lawyer,* would that mean that he's competent to stand trial today? [FN4]

FN4. There was neither an objection to this question nor a motion to strike the answer.

A: No.
(emphasis added).

The prosecution's psychiatric expert, Dr.

Kaushal Sharma, testified about his interview with Nguyen. Sharma explained that Nguyen described in detail the charges against him and explained his defenses. Nguyen's request for an attorney on the night of the shooting was not mentioned during Sharma's testimony. But Sharma testified that Nguyen's statement that he understood his *Miranda* rights demonstrated "mental intact functioning."

Deputy Macias, the arresting officer, testified as to the arrest, his recitation of the *Miranda* rights, and Nguyen's acknowledgment of the rights (including his request for an attorney) and explanation of the events of the crime. Finally, during closing arguments of the competency hearing, the prosecution mentioned Nguyen's acknowledgment of his *Miranda* rights as evidence of his competency:

> When [Macias] says, "You have the right to an attorney. Do you understand that? One will be appointed to you free of charge before speaking to me." "Yes," he understands that.
>
> That tends to show circumstantially that he's aware of at least the element that he's involved in a criminal court proceeding. He's aware of going to court, things that he says to the deputy could be used against him, he has a right to a lawyer free of charge before talking to the sheriff's deputy. So circumstantially, that tends to show to a reasonable person he's aware of things.

SER 435–36. Following closing arguments, the jury empaneled only for the competency hearing found Nguyen mentally competent to stand trial.

On November 16, 1999, a jury composed totally of persons who had not served on the jury which determined competency convicted Nguyen of the charged offenses and found true the allegations that Nguyen had acted willfully, deliberately, and with premeditation and that he personally used the firearm in committing the attempted murder. Nguyen makes no assertion that his invocation of his right to counsel was at all mentioned during the criminal phase of trial. On January 21, 2000, Nguyen was sentenced to state prison for 25 years to life pursuant to California's Three Strikes Law.

[1] Nguyen appealed the judgment, asserting, *inter alia,* that his due process rights were violated when his request to talk to an attorney was used against him during the competency hearing. Nguyen relied on *Wainwright v. Greenfield,* 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986) as support for this contention. On direct appeal, the California Court of Appeal rejected Nguyen's application of *Wainwright* on the ground that evidence of a defendant's invocation of *Miranda* rights as an indicum of competency during a competency hearing is distinguishable from the use of post-*Miranda* silence to overcome a plea of insanity during the criminal phase of trial. Specifically, the court stated that whereas the criminal phase of trial involves a penalty—a potential***721** guilty verdict—a "mental competency hearing does not involve any penalty...." Therefore, "what applies to a criminal case does not necessarily apply to a competency proceeding." On these grounds, the state appellate court held that it was not a violation of due process to use Nguyen's invocation of his right to counsel as evidence during the competency hearing. Without comment, the California Supreme Court denied Nguyen's petition for review.[FN5]

> FN5. California law does not allow the separate appeal of a competency determination: "A determination of mental competency is a nonappealable interlocutory ruling and may be reviewed only on an appeal from a final judgment in the underlying criminal proceeding." 5 Witkin, *California Criminal Law, Criminal Trial* § 716 (3d ed.); *see also People v. Mickle,* 54 Cal.3d 140, 180, 284 Cal.Rptr. 511, 814 P.2d 290 (1991) ("We conclude that the verdict finding defendant competent is a nonappealable, interlocutory ruling. It may be reviewed on appeal only from a final judgment in the underlying criminal proceeding.").

Nguyen then filed a petition for writ of habeas corpus with the United States District Court for the Central District of California. Nguyen raised only one claim in his petition: "[Nguyen's] constitutional right to due process was violated when his post-*Miranda* warning invocation of his right to counsel was admitted, over defense objections,[FN6] as evidence of his mental competency at a hearing under California Penal Code section 1368."

> FN6. The record does not contain any defense objection, much less "objections," to the question in answer to which Deputy Macias stated Nguyen requested an attorney. *See supra* page 719–20. However, in view of the basis of our decision, the case does not turn on whether a claimed evidentiary error was properly preserved below or whether any error meets the standard for plain error.

The district court adopted its magistrate's Report, denied Nguyen's habeas petition, and dismissed Nguyen's habeas petition with prejudice. The district court held the California Court of Appeal's decision was not an objectively unreasonable application of either *Wainwright,* 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623, or *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) (holding that it is a violation of due process to use a defendant's invocation of his right to remain silent to impeach defendant's testimony at trial, where such claim of right to remain silent follows a *Miranda* warning).

Here, a certificate of appealability was granted on one issue: "[w]hether the state court's decision—that Petitioner had suffered no violation of his Miranda rights when his invocation of his right to counsel was brought out at his competency hearing—was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court...." [FN7] Accordingly, Nguyen appeals the district court's denial of his federal habeas petition and claims the state court's decision holding *Wainwright* is inapplicable to competency hearings is contrary to federal law. The holding in *Wainwright,* Nguyen posits, extended *Doyle* from silence to the request for an attorney and is not limited to issues of guilt or non-guilt.

> FN7. We note that Nguyen's Notice of Appeal was timely under Fed. R.App. P. 4(a)(6) because Nguyen received no notice of the entry of Judgment.

II.

A.

[2] The district court's decision to deny Nguyen's petition for writ of habeas corpus is reviewed *de novo,* and its factual findings are reviewed for clear error. *Rios v. Garcia,* 390 F.3d 1082, 1084 (9th Cir.2004).

***722** [3][4] The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104–132, 110 Stat. 1214, ("AEDPA") applies to this case because Nguyen's petition for writ of habeas corpus was filed after April 24, 1996. Under AEDPA, habeas relief is proper only if the state court's adjudication of the merits of a habeas claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).[FN8] We will "defer to the state court's determination of the federal issues unless that determination is 'contrary to, or involved an unreasonable application of, clearly established Federal law.' " *Himes v. Thompson,* 336 F.3d 848, 852 (9th Cir.2003) (quoting *Lockyer v. Andrade,* 538 U.S. 63, 71, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003)). The relevant state court decision here is the decision of the California Court of Appeal, as that is the last reasoned state decision. *See Ylst v. Nunnemaker,* 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). Only United States Supreme Court holdings, but not dicta, constitute "clearly established federal law" for purposes of the AEDPA deference standard. *See Williams v. Taylor,* 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Lambert v. Blodgett,* 393 F.3d 943, 974 (9th Cir.2004) (quoting

Lockyer, 538 U.S. at 71–72, 123 S.Ct. 1166).

FN8. AEDPA provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> 28 U.S.C. § 2254(d).

B.

[5][6] Because resolution of this case turns on whether the state court's decision is contrary to the holdings in *Wainwright,* 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623, and *Doyle,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91, we begin by examining these holdings.[FN9] First, in *Doyle,* defendants charged with selling marijuana testified at trial that they had not sold marijuana but been set up by law enforcement in an effort to buy marijuana. *Id.* at 612–13, 96 S.Ct. 2240. To impeach the ***723** veracity of the defendants' exculpatory story, the prosecutor on cross-examination questioned each defendant why they had not told this story at the time of their arrest. *Id.* at 613–14, 96 S.Ct. 2240. On these facts, the Supreme Court considered whether the prosecutor's use of post-*Miranda* silence to impeach a defendant's exculpatory testimony given at trial violates due process. The Court held that it did and thereby proscribed the use of an arrestee's post-*Miranda* silence to impeach trial testimony: "while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." *Doyle,* 426 U.S. at 618, 96 S.Ct. 2240; *see also United States v. Hale,* 422 U.S. 171, 182–83, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975) (White, J., concurring). Hence, "it would be fundamentally unfair and a deprivation of due process to allow the arrested persons's silence to be used to impeach an explanation subsequently offered at trial." *Doyle,* 426 U.S. at 619, 96 S.Ct. 2240.

FN9. The "contrary to" clause is the correct clause for analysis in this case. We have explained that a state court decision is contrary to federal law if the court either " 'applies a rule that contradicts the governing law set forth' by the Supreme Court or arrives at a different result in a case, that is 'materially indistinguishable from a [Supreme Court] decision.' " *Luna v. Cambra,* 306 F.3d 954, 960 (alteration in the original) (quoting *Penry v. Johnson,* 532 U.S. 782, 792, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001), *as amended* 311 F.3d 928 (9th Cir.2002)). The state court did not apply the holdings of *Wainwright* and *Doyle* to the facts of Nguyen's case; rather, it distinguished *Wainwright* and *Doyle* on the basis that errors in those cases occurred during the guilt phase of a trial, not during a hearing to determine competency to stand trial. The state court thus found *Wainwright* and *Doyle* inapplicable to a competency hearing. Whether Nguyen is entitled to habeas relief depends on whether this decision is contrary to federal law. That the district court applied the "unreasonable application" clause in its analysis is immaterial to our analysis. Our review of the district court's decision is de novo, and we may "affirm on any ground supported by the record, even if it differs from the rationale of the district court." *Pollard v. White,* 119 F.3d 1430, 1433 (9th

Cir.1997).

Wainwright presented the Court with a variation on the theme of *Doyle.* The question in *Wainwright* was whether post-*Miranda* silence could be used as evidence to prove a defendant's sanity, following a defendant's plea of insanity, during the criminal phase of trial. 474 U.S. at 285, 106 S.Ct. 634. Pursuant to the state law applicable in *Wainwright,* "when a defendant pleads not guilty by reason of insanity and when his evidence is sufficient to raise a reasonable doubt about his sanity, the State has the burden of proving sanity beyond a reasonable doubt." *Id.* at 286, 106 S.Ct. 634. If the State were unable to meet this burden, the defendant would be entitled to an acquittal. *Id.* at 286 n. 1, 106 S.Ct. 634 (citing cases). The Court found *Doyle* analogous:

> The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the State gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, *the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction.* The implicit promise, the breach, and the consequent penalty are identical in both situations.

Id. at 284–85, 106 S.Ct. 634 (emphasis added). The Court ruled the use of post-*Miranda* silence to disprove insanity unfairly penalized the defendant in contravention of the Due Process Clause of the Fourteenth Amendment. *Id.* at 293–95, 106 S.Ct. 634.

In sum, the due process violations found in these decisions are a result of the fundamental unfairness of the prosecution's use of post-*Miranda* silence to infer the defendant's guilt and thereby aid in persuading a jury to convict. Such use amounts to "penalizing" the defendant for invocation of their rights. *Compare Doyle,* 426 U.S. at 617–18, 96 S.Ct. 2240, *with Wainwright,* 474 U.S. at 295, 106 S.Ct. 634. After all, that the defendant will not be penalized is implicit in the opening line of the *Miranda* warnings: "You have the right to remain silent...." *See Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). It would not be much of a "right" if its *use* penalizes the user.

C.

[7] We now consider whether reference to a defendant's post-*Miranda* invocation of his right to counsel during a ***724** pretrial competency hearing causes the same penalty at issue in *Wainwright* and *Doyle.* A review of the nature of competency hearings demonstrates that the penalty contemplated in *Wainwright* and *Doyle* simply does not occur in the context of competency hearings.

1.

It has long been a principle of our law that one who becomes "mad" after committing an offense should not be tried for the offense "for how can he make his defense?" William Blackstone, 4 *Commentaries* 24; *see also Drope v. Missouri,* 420 U.S. 162, 171, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."). The Supreme Court has held that failure "to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Id.* at 172, 95 S.Ct. 896 (citing *Pate v. Robinson,* 383 U.S. 375, 385, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966)).

[8] To protect against the improper trial of mentally incompetent defendants, California has established a competency hearing procedure to determine a defendant's competency *prior to* a criminal trial. *See* Cal.Penal Code §§ 1367 – 69. The goal of the competency hearing is not to examine the de-

fendant's sanity *at the time of the commission of the offense* (the issue in *Wainwright*); rather, the goal is to determine whether "the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." *Id.* § 1367(a); *see also Godinez v. Moran,* 509 U.S. 389, 401 n. 12, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) ("The focus of a competency hearing is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings."); *People v. Masterson,* 8 Cal.4th 965, 971, 35 Cal.Rptr.2d 679, 884 P.2d 136 (1994) ("The *sole purpose* of a competency proceeding is to determine the defendant's present mental competence, i.e., whether the defendant is able to understand the nature of the criminal proceedings and to assist counsel in a rational manner." (emphasis added)). California law "presume[s] that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent." Cal.Penal Code § 1369(f) . The California Supreme Court explained that "[a]lthough it arises in the context of a criminal trial, a competency hearing is a special proceeding, governed generally by the rules applicable to civil proceedings." *People v. Lawley,* 27 Cal.4th 102, 131, 115 Cal.Rptr.2d 614, 38 P.3d 461 (2002).

[9][10][11] The effect of being found competent in no way affects the determination of the defendant's guilt; it merely removes a procedural barrier to the commencement of trial. *See Jackson v. Indiana,* 406 U.S. 715, 739, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972) ("[C]riminal responsibility at the time of the alleged offenses, however, is a distinct issue from [one's] competency to stand trial."). Indeed, the Supreme Court has carefully distinguished a pretrial competency determination from a guilt/innocence determination: "In a competency hearing, the 'emphasis is on [the defendant's] capacity to consult with counsel and to comprehend the proceedings, and ... this is by no means the same test as those which determine criminal responsibility at the time of the crime.' " *Medina v. California,* 505 U.S. 437, 448, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992), (alteration and omission***725** in the original) (quoting *Pate v. Robinson,* 383 U.S. 375, 388–89, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966) (Harlan, J., dissenting)). Regarding California's competency procedure, California state courts have explained:

> The purpose of [a competency hearing] is not to determine guilt or innocence. It has no relation to the plea of not guilty by reason of insanity. Rather, the sole purpose of [the competency hearing] is the humanitarian desire to assure that one who is mentally unable to defend himself not be tried upon a criminal charge.
>
> *Tarantino v. Superior Court,* 48 Cal.App.3d 465, 469, 122 Cal.Rptr. 61 (1975).

The effect of being found incompetent is the "suspension of the criminal trial until such time, if any, that the defendant regains the capacity to participate in his defense and understand the proceedings against him." *Medina,* 505 U.S. at 448, 112 S.Ct. 2572; *see also Dusky v. United States,* 362 U.S. 402, 402–03, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (per curiam). The effect of being found competent is the continuation of criminal proceedings to the guilt phase of trial. [FN10]

> FN10. We acknowledge that using a defendant's post-*Miranda* invocation of the right to counsel to establish competency to stand trial may help to remove a procedural barrier to trial and eliminates the tactical advantage of indefinite pretrial delay, during which time witnesses die and evidence deteriorates. The removal of a procedural barrier to trial and the loss of a tactical advantage, however, do not raise the same constitutional concern at issue in *Wainwright.* One has a constitutional right not to have one's silence be used to prove guilt. No one has a constitutional right to stall trial until evidence is lost and witnesses expire.

Likewise, the use of a defendant's invoc-

> ation of *Miranda* rights at a suppression or evidentiary hearing does not raise the same constitutional concern at issue in *Wainwright.* Thus, use of evidence procured in violation of *Miranda* warnings has never been barred in such non-jury, non-guilt phase proceedings. For example, in *United States v. Lemon,* 550 F.2d 467, 473 (9th Cir.1977), we held that although "[s]tatements taken in violation of Miranda may not be used to prove the prosecution's case at trial," such statements "elicited prior to the giving of Miranda warnings may be used during a motion to suppress to show defendant's consent to a search." We relied on *Lemon* in *United States v. Patterson,* 812 F.2d 1188, 1193 (9th Cir.1987), *cert. denied,* 485 U.S. 922, 108 S.Ct. 1093, 99 L.Ed.2d 255 (1988), where we held that statements taken in violation of *Miranda* may be used in an affidavit to establish probable cause for a search warrant.

2.

[12] Not only are competency hearings entirely distinct in purpose from the guilt phase of trial, but competency hearings do not invoke the same concerns of self-incrimination—the right *Miranda* is designed to protect—that are relevant during the guilt and penalty phases of trial. The Fifth Amendment privilege against self-incrimination exists to prohibit the government from forcing the defendant to talk and then using the defendant's own statements to satisfy its burden of establishing guilt. *See Oregon v. Elstad,* 470 U.S. 298, 304–05, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985) (explaining that use of voluntary statements does not violate the Fifth Amendment); *Estelle v. Smith,* 451 U.S. 454, 462, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). These concerns have no place at a competency hearing.

[13] In California, the court may order a competency hearing and *compel* a defendant to submit to psychiatric evaluation as part of the competency determination. Cal.Penal Code § 1369. Accordingly, California state courts have expressly held there is no Fifth Amendment right against self incrimination during competency hearing proceedings so long as statements ***726** made during a competency hearing are immune from later use by the prosecution to establish guilt. *Tarantino,* 48 Cal.App.3d at 469–70, 122 Cal.Rptr. 61. Immunity for competency hearing statements "is necessary to ensure that an accused is not convicted by use of his own statements made at a court-compelled examination.... Hence, the rule protects both an accused's privilege against self-incrimination and the public policy of not trying persons who are mentally incompetent." *People v. Arcega,* 32 Cal.3d 504, 522, 186 Cal.Rptr. 94, 651 P.2d 338 (1982).

This judicially-created immunity is buttressed by the Supreme Court's holding in *Estelle,* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359. There, in holding that the Fifth Amendment privilege against self-incrimination extends to psychiatric examinations that are later used in the penalty phase of trial, [FN11] the Court declared that "[t]he essence" of the Fifth Amendment privilege against self-incrimination "is 'the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.' " *Id.* at 462, 101 S.Ct. 1866 (emphasis omitted) (quoting *Culombe v. Connecticut,* 367 U.S. 568, 581–82, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961)). Since neither conviction nor punishment are the result of a competency hearing, the rationale underlying *Estelle's* holding simply does not extend to statements used solely at such a hearing.[FN12]

> FN11. In *Estelle,* a psychiatrist spoke with the defendant during competency proceedings to determine whether he was competent to stand trial. *Estelle,* 451 U.S. at 456–57, 101 S.Ct. 1866. Later, during the penalty phase of trial, the psychiatrist testi-

fied against the defendant—on the basis of their discussions during the competency hearing—to establish that the defendant posed great risk to society. *Id.* at 459–60, 101 S.Ct. 1866.

FN12. In dicta, the Court expressed as much in *Estelle:* "Indeed, if the application of [the psychiatrist's] findings had been confined to [a competency hearing], no Fifth Amendment issue would have arisen." *Estelle,* 451 U.S. at 465, 101 S.Ct. 1866.

[14] Unlike guilt or punishment, incompetency can rarely be determined without the participation of the person claimed to be incompetent. Furthermore, because under California law the *defendant* bears the burden to establish *incompetence* by a preponderance of the evidence, the use of a defendant's own statements during a competency hearing in no way affects the government's evidentiary burden. Cal.Penal Code § 1369(f). In short, a defendant seeking to establish incompetence can be compelled to talk: a defendant may be required to be a witness to his own competency, if not his own crime.[FN13]

FN13. This conclusion is in line with previous holdings regarding the right against self-incrimination at analogous pretrial hearings. For example, in *United States v. Mitchell H.,* 182 F.3d 1034, 1035–36 (9th Cir.1999), we held that the privilege against self-incrimination does not apply to a juvenile transfer hearing because the hearing is not a criminal hearing, and statements during the hearing, like statements made during a competency hearing, cannot be used at a later criminal trial. We noted that "a juvenile transfer hearing is a close cousin of a competency hearing" because both hearings " 'deal with whether a defendant should be exempted from criminal prosecution because he falls within a category of persons who, in the eyes of the law, are not viewed as fully responsible for their acts.' " *Id.* at 1035 n. 3 (quoting *United States v. A.R.,* 38 F.3d 699, 703 (3d. Cir.1994)).

Miranda exists to provide "procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The privilege ***727** against self-incrimination, in turn, exists to protect the defendant from being forced to be a witness against himself. *Estelle,* 451 U.S. at 462, 101 S.Ct. 1866; *see also United States v. Patane,* 542 U.S. 630, 637, 124 S.Ct. 2620, 159 L.Ed.2d 667 (2004) (noting "that the core protection afforded by the Self–Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial" in lieu of producing other evidence). We fail to see how *Wainwright* and *Doyle,* which hold that a defendant shall not be penalized for invoking *Miranda* rights, should apply to a hearing at which the Fifth Amendment privilege against self-incrimination is inapplicable. Here, reference to Nguyen's post-arrest invocation at the competency hearing was not used to satisfy the prosecutorial burden of proof of guilt; it was used, rather, to show cognition.

III.

On these bases, we hold that the California Court of Appeal's decision not to apply *Wainwright* and *Doyle* to Nguyen's competency hearing was not "contrary to" federal law. The court correctly explained that "the nature of the proceeding in this case distinguishes it from *Wainwright,* " and that "[a] mental competency hearing does not involve any penalty...." [FN14] Absent a holding by the Supreme Court to apply the principles of *Wainwright* and *Doyle* to competency hearings, we are bound by the strictures of AEDPA to defer to the state court's determination. *See Carey v. Musladin,* 549U.S. 70, —— – ——, 127 S.Ct. 649, 652–54, 166 L.Ed.2d 482 (2006). [FN15]

FN14. Having determined that the state court's decision was not contrary to estab-

lished federal law, we need not address Nguyen's contention that reference to his post-*Miranda* invocation of his right to counsel during the competency hearing was not harmless error under *Brecht v. Abrahamson,* 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

FN15. We reject Nguyen's contention that *Medina v. California,* 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992), extended *Wainwright* to competency hearings. In *Medina,* the sole issue before the Court was whether the Due Process Clause permitted California to place the burden of establishing incompetence on the defendant. *Id.* at 439, 112 S.Ct. 2572. The Court held that California's competency determination framework did not violate due process. *Id.* at 448–53, 112 S.Ct. 2572. Nothing in the decision suggests the principles of *Wainwright* and *Doyle* should apply in the context of competency hearings.

AFFIRMED.

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886 P.2d 1298, 63 USLW 2444
(Cite as: 886 P.2d 1298)

H

Court of Appeals of Alaska.
David C. REUTTER, Appellant,
v.
STATE of Alaska, Appellee.

No. A-4889.
Dec. 9, 1994.

Defendant was convicted in the Superior Court, First Judicial District, Sitka, Larry C. Zervos, J., of sexual abuse of minor in first and second degree. Defendant appealed. The Court of Appeals, Bryner, C.J., held that: (1) statute permitting child sexual abuse victim to testify via one-way closed circuit television was constitutional; (2) finding that qualifications of witnesses were sufficient to allow them to testify as experts was not abuse of discretion; and (3) determination that child's inability to testify at trial would be caused by defendant's presence was supported by evidence.

Affirmed.

West Headnotes

[1] Witnesses 410 ⚿228

410 Witnesses
410III Examination
410III(A) Taking Testimony in General
410k228 k. Mode of testifying in general. Most Cited Cases

Although statute permitting child sexual abuse victim to testify via one-way closed circuit television did not explicitly require finding of necessity based on likelihood of serious emotional distress and did not specifically require finding that victim's emotional distress would be caused specifically by presence of defendant, these requirements were deemed implicit part of statutory provision. AS 12.45.046.

[2] Criminal Law 110 ⚿662.65

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.65 k. Conduct of trial. Most Cited Cases
(Formerly 110k662.1)

In order to find it necessary to subordinate defendant's right of face-to-face confrontation to child victim's need for protection by authorizing child sexual abuse victim to testify via one-way closed circuit television, determination of child's inability to effectively communicate must be based on case specific evidence establishing that child witness would be traumatized, not by court generally, but by presence of defendant, that confrontation would pose threat of serious emotional harm to child, and that use of closed circuit television was necessary to protect welfare of child. AS 12.45.046(a)(2).

[3] Criminal Law 110 ⚿662.65

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.65 k. Conduct of trial. Most Cited Cases
(Formerly 110k662.1)

No dilution of right to confrontation should be permitted by allowing child sexual abuse victim to testify via one-way closed circuit television without express finding that requirements of statute authorizing closed circuit testimony have been met by clear and convincing evidence. AS 12.45.046.

[4] Criminal Law 110 ⚿478(1)

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k477 Competency of Experts

110k478 Knowledge, Experience, and Skill

110k478(1) k. In general. Most Cited Cases

Rule regarding expert testimony gives trial court broad latitude to allow witness to testify as expert when court finds that testimony will be helpful to fact finder; there is no requirement that witness possess particular license or academic degree, provided that fact finder can receive appreciable help from witnesses' testimony. Rules of Evid., Rule 702(a).

[5] Criminal Law 110 ⚿1153.12(2)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.12 Opinion Evidence
110k1153.12(2) k. Competency of witness. Most Cited Cases
(Formerly 110k1153(2))

Trial court's decision to allow witness to testify as expert is reviewable only for abuse of discretion. Rules of Evid., Rule 702(a).

[6] Criminal Law 110 ⚿479

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k477 Competency of Experts
110k479 k. Bodily and mental condition. Most Cited Cases
(Formerly 110k478(1))

Determination that qualifications of witnesses were sufficient to allow them to testify as experts in defendant's prosecution for child sexual abuse was supported by evidence that, although witnesses did not possess expertise in field of psychology, witnesses had professional experiences that made their opinions helpful to court, that witnesses had considerable contact with victim, and that witnesses did not pretend to address deep psychological issues. Rules of Evid., Rule 702(a).

[7] Criminal Law 110 ⚿465

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k449 Witnesses in General
110k465 k. Facts forming basis of opinion. Most Cited Cases

Even if expertise of witnesses who testified in defendant's prosecution for child sexual abuse to some degree fell short of meeting standard established for expert's testimony, their opinions were properly admitted under more permissive standard governing opinion testimony by lay witnesses, where, although testimony of challenged witnesses was necessarily informed by their educational and professional backgrounds, their opinions were almost wholly based on reasonable inferences drawn from their recent observations of child victim. Rules of Evid., Rules 701, 702(a).

[8] Criminal Law 110 ⚿366(1)

110 Criminal Law
110XVII Evidence
110XVII(E) Res Gestae
110k362 Res Gestae; Excited Utterances
110k366 Acts and Statements of Person Injured
110k366(1) k. In general. Most Cited Cases

Criminal Law 110 ⚿419(2.15)

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(2.15) k. Present sense impression. Most Cited Cases

Criminal Law 110 ⚿419(2.20)

110 Criminal Law
110XVII Evidence

110XVII(N) Hearsay
110k419 Hearsay in General
110k419(2.20) k. Then-existing state of mind or body. Most Cited Cases

Testimony of expert witnesses relating to various statements made by child sexual abuse victim were properly admitted under hearsay exceptions governing present sense impression, excited utterance, and existing mental or emotional condition. Rules of Evid., Rule 803(1-3).

[9] Criminal Law 110 ⚖1158.1

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.1 k. In general. Most Cited Cases
(Formerly 110k1158(1))

Appellate court will reverse factual findings only when they are clearly erroneous.

[10] Witnesses 410 ⚖228

410 Witnesses
410III Examination
410III(A) Taking Testimony in General
410k228 k. Mode of testifying in general. Most Cited Cases

Determination that child sexual abuse victim's inability to testify at trial would be caused by defendant's presence, rather than by general courtroom setting, and that, therefore, child could testify via one-way closed circuit television, was supported by evidence regarding child's chronological age, her developmental level, and degree of emotional and psychological injury that she had already suffered and would likely suffer if forced to testify in court. AS 12.45.046.

***1299** William E. Olmstead, Olmstead & Conheady, Juneau, for appellant.

Nancy R. Simel, Asst. Atty. Gen., Office of Special Prosecutions and Appeals, Anchorage, and Charles E. Cole, Atty. Gen., Juneau, for appellee.

Before BRYNER, C.J., and COATS and MANNHEIMER, JJ.

OPINION

BRYNER, Chief Judge.

David C. Reutter was convicted by a jury of one count of sexual abuse of a minor in the first degree, AS 11.41.434(a)(1), and one count of sexual abuse of a minor in the second degree, AS 11.41.436(a)(2). The convictions stemmed from Reutter's sexual abuse of his nine-year-old daughter, A.R. At trial, over Reutter's objection, Superior Court Judge Larry C. Zervos permitted A.R. to testify via one-way closed-circuit television from a room adjacent to the courtroom. Reutter appeals, contending that this arrangement violated his constitutional right to confrontation. We affirm.

FACTS

1. *Background Facts*

On February 15, 1992, Reutter locked A.R. out of their house in Sitka. The Division of Family and Youth Services (DFYS) became involved and placed A.R. and her mother, Patti Reutter, in a local women's shelter operated by Sitkans Against Family Violence (SAFV). Patti eventually returned home to Reutter. DFYS removed A.R. from the shelter and placed her in a foster home.

While A.R. was staying at the shelter, and afterwards while staying at the foster home, she attended support-group sessions at the SAFV shelter for child victims of domestic violence. During one of the support-group sessions, A.R. told Elizabeth Willis,[FN1] the children's program coordinator and A.R.'s "child advocate," about Reutter's sexual abuse. Willis immediately notified DFYS. A.R.'s case was assigned to DFYS social worker Sandra Beare-Spencer, who reported the allegations of sexual abuse to the Sitka police and arranged for A.R. to be physically examined by Sitka family practitioner Dr. Debra Pohlman. Pohlman found that A.R. had a larger than normal vaginal opening and that she had scarring in the area, both signs of ***1300** sexual abuse. The state then filed a Child In Need of Aid

(CINA) petition to determine the most appropriate custodial placement for A.R.

> FN1. Throughout the proceedings Willis was also referred to by her former married name, Elizabeth Sayer or Elizabeth Willis Sayer.

2. *The CINA Hearing*

A.R. was placed with relatives in Chevak pending the CINA determination. She returned to Sitka in May to testify at the CINA hearing. When A.R. first entered the courtroom to testify, she appeared confident and very happy to see her parents. However, during her testimony, she became anxious and distracted by stares and smiles from her parents and by the whispering and conferring between her parents and their attorneys. Soon, A.R. simply "shut down." The court was forced to recess, and A.R. had to be taken from the courtroom. According to Beare-Spencer, A.R. became "[v]ery, very upset. Her face contorted[,] ... her eyebrows were together and ... her arms were tight in front of her, and she was leaning against a wall and just shaking. She ... was extremely upset." A.R. told Beare-Spencer that "she couldn't talk about what happened, that her mom was going to be hurt, that her dad would hurt her mom."

Later, the court attempted to take A.R.'s testimony by placing her in the district attorney's office with just Willis and her guardian *ad litem,* Mary Hughes; the assistant attorney general who was handling the CINA proceeding questioned her by telephone from the courtroom. However, the electronic equipment in the district attorney's office malfunctioned, causing A.R. to become even more upset. The hearing was postponed for several days. When it reconvened, A.R. was placed in a grand jury room, again with just Willis and Hughes present in the same room. From there, she was able to answer some questions over the speakerphone, but she still refused to testify regarding the sexual abuse.

3. *Pretrial Hearing*

On May 8, 1992, the same day the CINA hearing began, Reutter was indicted for sexually abusing A.R. Prior to trial, the state moved, pursuant to AS 12.45.046(a)(2), to have A.R. be allowed to testify via one-way closed-circuit television or through one-way mirrors. Reutter opposed on confrontation clause grounds. Judge Zervos conducted a two-day evidentiary hearing to determine whether A.R. should be permitted to testify without actually confronting Reutter. At the hearing, the state presented testimony from Beare-Spencer, Willis, Jan Rutherdale (the assistant attorney general who had handled the CINA proceeding), and Martha Ann Lyman (the mental health clinician who treated A.R. while she was staying in Chevak). In addition, Judge Zervos considered a psychological evaluation of A.R. that had been written by Dr. Christiane Brems of the Yukon-Kuskokwim Mental Health Center.

In the course of the hearing, Reutter questioned the qualifications of each of the state's witnesses to testify as experts on the issue of whether A.R. should be allowed to testify without confronting Reutter. Judge Zervos overruled the objections and allowed the witnesses to testify.

Beare-Spencer, the DFYS social worker assigned to A.R.'s case, indicated that she had worked as a social worker for DFYS in Sitka for five years. She had a bachelor's degree in sociology and was only eighteen hours away from receiving a master's degree from Boise State University. She testified that her primary responsibility at DFYS was "protecting children from physical or emotional harm" and that, when making decisions regarding when to intervene, she relied primarily on the on-the-job training and experience that she received, first in Idaho, and then in Sitka.

Beare-Spencer testified that she had spent "[q]uite a bit" of time with A.R. and had talked to her often on the telephone in the previous six months and that she had even spent "four solid days with her" while they traveled to Chevak together. She testified that she knew "a lot of who [A.R.] is,"

but that there was a part of A.R. that she did not know because A.R. "closes down" when she ***1301** becomes upset. When asked whether she believed A.R. could testify in the presence of Reutter, she answered: "She can't do it." Beare-Spencer based her answer on her observations of A.R.'s emotional condition during and after the CINA proceeding and on A.R.'s statement to Beare-Spencer regarding her desire to protect her mother by remaining silent. Reutter objected, on hearsay grounds, to Beare-Spencer's testimony concerning A.R.'s statement. Judge Zervos overruled the objection.

The prosecution also asked Beare-Spencer whether, in her opinion, "Reutter's presence would significantly impair the substance of [A.R.'s] testimony if she were forced to testify." Reutter objected, arguing that the witness did not have the psychological expertise to testify regarding "this child's psyche." Judge Zervos overruled the objection, and Beare-Spencer testified that she did not believe that A.R. could testify in an open courtroom.

Next, Elizabeth Willis, A.R.'s child advocate, testified. Willis testified that, prior to becoming a child advocate in Sitka, she completed "early childhood trainings" and had taken many classes and workshops in psychology. In addition, she testified that she operated a day-care business for five years in Anchorage before she moved to Sitka. She testified that she and A.R. developed a trusting relationship soon after A.R. arrived at the SAFV shelter and that they thereafter exchanged letters. Willis had accompanied A.R. at the previous CINA hearing.

Willis was asked whether, in her opinion, A.R. would be able to testify in the presence of her father. Reutter again objected for lack of expert qualification. The court again overruled the objection. Willis stated that she believed that A.R.'s ability to effectively communicate would be affected by Reutter's presence in the courtroom. She based her opinion on A.R.'s statements after the CINA hearing that she was unable to talk because Reutter had been staring and smiling at her and whispering about her. Again, Reutter objected on hearsay grounds, but was overruled.

Jan Rutherdale, the state's CINA counsel, testified next. Rutherdale stated that, for the previous three and one-half years, she had been employed by the attorney general's office in Juneau, exclusively handling child-in-need-of-aid and juvenile-delinquency matters. Prior to becoming an assistant attorney general, she had worked as an assistant public defender in Juneau. In the years of her practice, she testified, she had interviewed roughly twenty children. Over Reutter's objection, the trial court found Rutherdale to have substantial expertise in the behavior of witnesses; the court also indicated that Rutherdale was qualified to testify about A.R.'s conduct at the CINA hearing-"what happened on the days in question."

Rutherdale testified that she first met A.R. the evening before the CINA hearing. On the morning of the CINA hearing, A.R. seemed to be "friendly" and "bouncy," but a little immature. Rutherdale recalled that A.R. did not appear to be too shy to testify, that she was happy to see her parents, and that she was able to answer some preliminary questions. She testified that A.R. soon became distracted by her parents and was unable to continue. The first question that A.R. was unable to answer was "[Do you] remember the night that you were removed from your house?" Again over Reutter's objection, Rutherdale testified that, based on her previous experience with and observations of A.R. in the courtroom and on questions that A.R. asked her about the conduct of her parents during the proceeding, Rutherdale did not think that A.R. would testify in Reutter's presence: "[S]he was just so affected by his presence. I mean, ... it was like her attention to me evaporated and-and all she could think about or ... react to was her father." She testified that A.R. asked her in a whispered voice why her parents were talking to each other during her testimony.

Rutherdale further testified that A.R. had been

a very isolated child, that the Reutters had restricted her movement considerably, and that the particular dynamics of her family "may make it impossible for her to testify." ***1302** She stated that she did not know whether A.R. would ever be able to testify to the sexual abuse under any circumstances. When asked by the trial court whether A.R. would be able to testify in the presence of Reutter if the testimony occurred outside a formal courtroom setting, Rutherdale responded: "[T]he problem with getting Mr. Reutter and her in a small room, I think that might almost be worse."

Next, the trial court requested that Martha Ann Lyman be called to testify telephonically. She testified that, as a mental health clinician in the Yukon-Kuskokwim delta region, she treated A.R. for three sessions during A.R.'s stay in Chevak. She testified that A.R. was very bright, but guarded and distrustful. She stated that she thought A.R. should not be forced to testify in the presence of Reutter because she would not feel safe doing so, she would suffer emotional harm, and she would not "be able to give a real open testimony in front of her father."

In addition to the foregoing testimony, Judge Zervos considered the psychological evaluation of A.R. that had been submitted by Dr. Brems. Brems' report stated that A.R. "currently functions in the low average range of intelligence," but that this level of function "may be largely explained by her academic deprivation." Brems concluded that A.R. exhibited "strong traits of a borderline personality disorder "; and Brems summarized the results of her evaluation as follows:

> [T]his is a child who has been severely traumatized and whose sexual trauma has resulted in clear implications for all areas of functioning. Specifically it is likely that her social, academic, and psychological deprivation have interfered with her cognitive and perceptual-motor development. With regard to intrapsychic functioning, her coping is impaired and she has difficulty controlling affect and behavior. She tends to isolate herself from others to avoid being overwhelmed by her own needs which would result in acting out. Hence, she initiates a vicious cycle of isolation and lack of nurturance in her own life. Her view of the world is largely hostile and unpredictable, leaving her in a conflict, as she also has very strong dependency and security needs.

Finally, prior to issuing his written decision on the state's motion to allow A.R. to testify by closed-circuit television, Judge Zervos reviewed a tape recording of the previous CINA proceeding.

Judge Zervos ultimately granted the state's motion to take A.R.'s testimony via closed-circuit television. In a written order issued on August 11, 1992, the judge set out specific findings and conclusions in support of the decision. Specifically, in conclusion number six of the decision, Judge Zervos stated:

> It is clear that [A.R.] will not testify because of fear, guilt or severe psychological distress. It is also clear that [A.R.'s] failure to testify is due, in large part, to the presence of her father. Therefore, under the statutes and the case law the confrontation clause must give way in the most minimal way possible. Allowing the child's testimony to be taken outside of the defendant's presence may facilitate the child's ability to testify. Denying the request to take the testimony outside the defendant's presence, based in [sic] past attempts, guarantees the child's silence.

4. *Trial*

At the time of trial, Judge Zervos finalized the arrangements for A.R.'s testimony. A.R. testified from a separate room adjacent to the courtroom. In the room with A.R. were the videocamera operator, the prosecutor, Reutter's counsel, and A.R.'s guardian *ad litem,* Mary Hughes; Hughes, who was to provide moral support for A.R., remained out of the camera's focus. Reutter was given the option of observing A.R. from a third room, outside the presence of both A.R. and the jury. He elected instead to remain in the courtroom, so that the jury could observe his reaction to A.R.'s testimony. Reutter

had continuous access to his attorney by a telephone connected to the room from which ***1303** A.R. testified.[FN2]

> FN2. The trial court indicated that it would declare a recess any time Reutter wished to confer with his attorney. Objections by either attorney would be handled in the same way; the court would declare a recess and discuss the objection outside the presence of the jury. The trial court instructed the attorneys not to make objections and arguments while the videotape was running, but to request an immediate hearing.

Although Reutter preserved a general, continuing objection to the taking of A.R.'s testimony via one-way closed-circuit television, he indicated that he did not object to the specific procedure outlined above.

The state called A.R. to testify as its first witness. Before A.R. testified, the trial court instructed the jury as follows:

> Ladies and gentlemen, what we're going to do next is a little unusual. As you'll see for the rest of the trial, most all witnesses will always testify in this chair here. But the parties have decided, both the prosecution and the defense, that because of the age of [A.R.] and of twelve strangers and me sitting up here in this black robe, it may be less disconcerting to her to take the testimony in another room in a closed circuit kind of TV arrangement.
>
> She will be testifying live and we'll be able to witness everything. Of course, you can watch her as she testifies on these monitors. [The attorneys] will be in the room asking questions of her.

On direct examination, A.R. testified that her father had touched her "in [her] privates" on several occasions and that he "made [her] touch his private part." She testified that, in February, her father had "pulled up" on her "privates," making them bleed. She testified that her father had told her, "Don't tell no one" and that he would "hurt" her if she did tell someone. A.R. testified that, although she did not tell anyone, her father hurt her anyway.

During a break between direct and cross-examination, Reutter encountered A.R. in the hallway and said, "Hi, [A.R.], hi, honey, I love you." Since such direct contact had been forbidden by the court under the previously issued CINA order, Judge Zervos admonished Reutter not to let it happen again. Cross-examination was eventually postponed until the day after direct examination was completed, since only fifteen minutes remained in the trial day and Reutter decided that he would rather start fresh the next morning.

Before proceedings commenced the next morning, the prosecutor reported that Patti Reutter had intercepted A.R. after trial the previous day and had whispered, "Don't say nothing," and "Daddy loves you, Daddy loves you." The trial court admonished Patti Reutter not to interfere with A.R.'s testimony and not to have any contact with her inside the courthouse building. Then, after a short recess, the prosecutor reported:

> [A.R. is] in my office, basically in tears, refuses to come forward. She's basically locked in the office at this point so she just doesn't run away.
>
> The reason being as they-she arrived this morning with Ms. Willis, I mean, essentially she was a little nervous as we expected her to be. As Mr. and Mrs. Reutter took a seat in the hallway they saw each other, they were waving back and forth. And as Ms. [Willis] and Ms. Hughes would actually testify to, you could just see her just, the term is shut down. And now she is basically sitting on the floor, refuses to budge, period.

A.R. nevertheless eventually did testify on cross-examination.

DISCUSSION

In moving for an order allowing A.R. to testify

by closed-circuit television outside Reutter's physical presence, the state relied on AS 12.45.046. This statute permits the trial court to order the testimony of a child to be communicated to the jury and the defendant by closed-circuit television, but only in exceptional cases, and only upon a case-specific ***1304** showing of actual necessity.[FN3] For such testimony to be received, the accused must be charged with an assault under chapter 41 of the Alaska Revised Criminal Code. AS 12.45.046(a). The crime charged must involve a victim or witness who is under the age of thirteen; the proposed witness must be either the alleged child-victim or the child-witness. *Id.* In such cases, the court may order testimony to be taken by closed-circuit television, "if the court determines that the testimony by the child victim or witness under normal court procedures would result in the child's inability to effectively communicate." AS 12.45.046(a)(2).

FN3. The full text of AS 12.45.046 is as follows:

> **Testimony of children in criminal proceedings.** (a) In a criminal proceeding under AS 11.41 involving the prosecution of an offense committed against a child under the age of 13, or witnessed by a child under the age of 13, the court
>
> (1) may appoint a guardian ad litem for the child;
>
> (2) on its own motion or on the motion of the party presenting the witness or the guardian ad litem of the child, may order that the testimony of the child be taken by closed circuit television or through one-way mirrors if the court determines that the testimony by the child victim or witness under normal court procedures would result in the child's inability to effectively communicate.
>
> (b) In making a determination under (a)(2) of this section, the court shall consider factors it considers relevant, including
>
> (1) the child's chronological age;
>
> (2) the child's level of development;
>
> (3) the child's general physical health;
>
> (4) any physical, emotional or psychological injury experienced by the child; and
>
> (5) the mental or emotional strain that will be caused by requiring the child to testify under normal courtroom procedures.
>
> (c) If the court determines under (a)(2) of this section that the testimony by the child victim or witness under normal court procedures would result in the child's inability to effectively communicate, the court may order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the defendant, the court, and the finder of fact in the proceeding. If the court authorizes use of closed circuit televised testimony under this subsection,
>
> (1) each of the following may be in the room with the child when the child testifies:
>
> (A) the prosecuting attorney;
>
> (B) the attorney for the defendant; and
>
> (C) operators of the closed circuit television equipment;
>
> (2) the court may, in addition to persons specified in (1) of this subsection, admit a person whose presence, in the opinion of the court, contributes to the well-be-

ing of the child.

(d) When a child is to testify under (c) of this section, only the court and counsel may question the child. The persons operating the equipment shall do so in as unobtrusive a manner as possible. If the defendant requests, the court shall excuse the defendant from the courtroom, shall permit the defendant to attend in another location, and shall afford the defendant a means of viewing the child's testimony and of communicating with the defendant's attorney throughout the proceedings. Upon request of the defendant or the defendant's attorney, the court shall permit a recess to allow them to confer. The court shall provide a means of communicating with the attorneys during the questioning of the child. Objections made by the attorneys to questions of a child witness may be resolved in the courtroom if the court finds it necessary.

(e) If the court determines under (a)(2) of this section that the testimony by the child victim or witness under normal court procedures would result in the child's inability to effectively communicate, the court may authorize the use of one-way mirrors in conjunction with the taking of the child's testimony. The attorneys may pose questions to the child and have visual contact with the child during questioning, but the mirrors shall be placed to provide a physical shield so that the child does not have visual contact with the defendant and jurors.

(f) If the court does not find under (a)(2) of this section that the testimony by the child victim or witness under normal court procedures will result in the child's inability to effectively communicate, the court may, after taking into consideration the factors specified in (b) of this section, supervise the spatial arrangements of the courtroom and the location, movement, and deportment of all persons in attendance so as to safeguard the child from emotional harm or stress. In addition to other procedures it finds appropriate, the court may

(1) allow the child to testify while sitting on the floor or on an appropriately sized chair;

(2) schedule the procedure in a room that provides adequate privacy, freedom from distractions, informality, and comfort appropriate to the child's developmental age; and

(3) order a recess when the energy, comfort, or attention span of the child warrants.

On appeal, Reutter contends that, on its face, AS 12.45.046 violates the confrontation clauses of the federal and Alaska constitutions. Alternatively, Reutter maintains that the application of this statute in his case resulted in a violation of his right to confrontation under both constitutions. Reutter lastly claims that the manner in which the ***1305** questioning of A.R. occurred separately violated his constitutional right to due process.

1. *Constitutionality of AS 12.45.046*

A. Applicable Constitutional Standard

The confrontation clause of the sixth amendment to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." [FN4] In *Coy v. Iowa,* 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), the United States Supreme Court held that the federal constitution's confrontation clause protects not only the right to effective cross-examination but also the right to a face-to-face confrontation between the accuser and the accused. *Coy* left open the question of

whether the right of face-to-face confrontation was absolute. *Id.* at 1021, 108 S.Ct. at 2803.

> FN4. The Alaska Constitution uses similar language to secure the right to confrontation. The Alaska Constitution, article I, section 11, provides, in relevant part: "In all criminal prosecutions, the accused.... is entitled ... to be confronted with the witnesses against him."

The Court answered this question two years later in *Maryland v. Craig,* 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). *Craig* holds that the right to literal confrontation is not absolute. Rather, in exceptional cases, the right may be required to yield in order to protect the state's vital interest in protecting the physical and psychological well-being of child abuse victims:

> In sum, we conclude that where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.

Id. at 857, 110 S.Ct. at 3170.

In reaching this conclusion, the Court in *Craig* set out the factors that trial courts must consider before finding it necessary to subordinate the accused's right of face-to-face confrontation to a child victim's need for protection:

> The requisite finding of necessity must of course be a case-specific one: the trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis, i.e.,* more than "mere nervousness or excitement or some reluctance to testify[.]"

Id. at 855-56, 110 S.Ct. at 3169 (citations omitted) (quoting *Wildermuth v. State,* 310 Md. 496, 530 A.2d 275, 289 (1987)).

The *Craig* Court did not specify the minimum level of emotional trauma that would justify a denial of confrontation. Instead, the Court found the Maryland statute that was at issue in the case to be clearly sufficient to meet constitutional standards. That statute required the trial court to determine that "testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." *See* Md.Cts. & Jud.Proc.Code Ann. § 9-102(a)(1)(ii) ***1306** (1989) (quoted in *Craig,* 497 U.S. at 841 n. 1, 110 S.Ct. at 3161 n. 1).

This court has read *Craig* to establish a rule premised on actual necessity:

> We are convinced that, at a minimum, the constitution forbids denying the accused face-to-face confrontation with an accuser in a criminal trial absent specific evidence and an express finding that the probable effect of the defendant's presence on the witness would significantly impair the substance of the witness's testimony. A mere

finding of some general, or *de minim[i]s* effect will not suffice. Likewise, generalized, subjective impressions or assumptions will not substitute for case-specific evidence.

Blume v. State, 797 P.2d 664, 674 (Alaska App.1990) (footnotes omitted).

B. AS 12.45.046's Compliance with the Constitutional Standard

[1] In the present case, Reutter correctly notes that AS 12.45.046 does not, on its face, comport with the minimal requirements of *Craig.* Although the statute does incorporate procedures aimed at maintaining the rigorously adversarial atmosphere that *Craig* demands in order to ensure effective cross-examination, it does not explicitly require a finding of necessity based on the likelihood of serious emotional distress. Nor does it explicitly address another *Craig* requirement: a finding that the child witness' emotional distress will be caused specifically by the presence of the defendant, rather than the general courtroom atmosphere.

In our view, however, although these requirements are not explicitly stated in AS 12.45.046, they should be deemed an implicit part of the statutory provision. Nothing in AS 12.45.046 is incompatible with or otherwise bars a reading of the provision to be consistent with *Craig.* Such a reading is in keeping with the legislature's intent to promote the state's vital interest in protecting the emotional well-being of child victims and witnesses. [FN5] Such a reading is also in keeping with the traditional preference for interpreting statutes in a manner that avoids constitutional problems.

FN5. The legislative intent behind AS 12.45.046 was stated as follows:

> It is the purpose of this Act that, in providing alternative methods for taking the testimony of a child in certain criminal proceedings in which that child was the victim or is to be a witness, the legislature is acting (1) to balance the need for the victim's or witness's testimony against the right of the defendant to confront witnesses; (2) to mitigate the mental and emotional distress that may arise as the child is required to testify; and (3) to minimize possible victim harassment by limiting the opportunities for unnecessary examination of the child by the parties' counsel.
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> CS for House Bill No. 323, section 1, ch. 92 SLA 1988 (Judiciary).

We have previously found AS 12.45.046 to be in "substantial accord" with *Craig* "as to the minimal requirements of the confrontation clause." *Blume,* 797 P.2d at 674. *See also Brandon v. State,* 839 P.2d 400, 409 & n. 6 (Alaska App.1992); *Renkel v. State,* 807 P.2d 1087, 1094 & n. 7 (Alaska App.1991). We have similarly found AS 12.45.046 in substantial accord with the Maryland statute that *Craig* upheld. *Blume,* 797 P.2d at 674. Like Alaska's statute, the Maryland provision upheld in *Craig* did not expressly require a finding that the child witness would suffer "serious emotional distress" as a result of the presence of the defendant. [FN6] Rather, the Maryland Court of Appeals had interpreted***1307** its statute to include this requirement, and the *Craig* Court ratified the Maryland court's interpretation. *See Craig,* 497 U.S. at 858, 110 S.Ct. at 3170. Other states have shown little reluctance to construe similar statutory provisions as being consistent with *Craig* 's requirements.[FN7]

FN6. *See* Section 9-102 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland (1989):

> (a)(1) In a case of abuse of a child as defined in § 5-701 of the Family Law Article or Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of a closed circuit television if:

(i) The testimony is taken during the proceeding; and

(ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

(2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.

(3) The operators of the closed circuit television shall make every effort to be unobtrusive.

(b)(1) Only the following persons may be in the room with the child when the child testifies by closed circuit televi- sion:

(i) The prosecuting attorney;

(ii) The attorney for the defendant;

(iii) The operators of the closed circuit television equipment; and

(iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.

(2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.

(3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.

(c) The provisions of this section do not apply if the defendant is an attorney pro se.

(d) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.

Quoted in Craig, 497 U.S. at 840-41 n. 1, 110 S.Ct. at 3161.

FN7. *See State v. Chisholm,* 250 Kan. 153, 825 P.2d 147, 151-52 (1992). *Accord Thomas v. People,* 803 P.2d 144, 149-51 (Colo.1990); *People v. Weninger,* 243 Ill.App.3d 719, 183 Ill.Dec. 224, 229-30, 611 N.E.2d 77, 82-83 (1993); *Brady v. State,* 575 N.E.2d 981, 986 (Ind.1991); *State v. Naucke,* 829 S.W.2d 445, 450 (Mo.1992) (en banc); *State v. Peters,* 133 N.H. 791, 587 A.2d 587, 590 (1991); *State v. Self,* 56 Ohio St.3d 73, 564 N.E.2d 446, 453-54 (1990); *Shipman v. State,* 816 P.2d 571, 574-75 (Okla.Crim.App.1991); *Gonzales v. State,* 818 S.W.2d 756, 764 (Tex.Crim.App.1991); *State v. Lomprey,* 173 Wis.2d 209, 496 N.W.2d 172, 175 (1992), *review denied* 497 N.W.2d 130. *Cf. Starnes v. State,* 307 S.C. 247, 414 S.E.2d 582 (1991).

[2] In short, we conclude that AS 12.45.046 must be construed to incorporate the requirements of *Craig.* In order to comply with *Craig,* a determination of "the child's inability to effectively communicate" under AS 12.45.046(a)(2) must be based on case-specific evidence establishing that (1) "the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant," *Craig,* 497 U.S. at 856, 110 S.Ct. at 3169; (2) confrontation would pose a threat of serious emotional harm to the child-in other words, "that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis,* "; and (3) the use of the special procedure authorized under AS 12.45.046 is therefore

"necessary to protect the welfare of the particular child witness who seeks to testify." *Id.* at 855, 110 S.Ct. at 3169.

One additional problem of interpretation remains. *Craig* did not determine the standard of proof governing these requirements. In *Blume v. State,* this court similarly found it unnecessary to decide the standard of proof required under *Craig.* We did acknowledge, however, that a finding of necessity under *Craig* would, at a minimum, have to be based on proof by a preponderance of the evidence. *Blume,* 797 P.2d at 674. The issue of standard of proof is squarely presented in Reutter's case and may no longer be avoided. Our decision on this point must be guided by the due process analysis specified in *Santosky v. Kramer,* 455 U.S. 745, 755, 102 S.Ct. 1388, 1395-96, 71 L.Ed.2d 599 (1982), which ties the applicable standard of proof to a consideration and balancing of three factors: "the private interests affected, the public interests, and a societal judgment about how the risk of error should be distributed between the litigants." *See W.M.F. v. State,* 723 P.2d 1298, 1300 (Alaska App.1986).

Given the constitution's express protection of confrontation as an individual right of the accused, and given further the traditional significance of that right, the private interest affected by AS 12.45.046 is of utmost significance. On the other side of the balance, however, the public unquestionably has a vital interest in promoting the well-being of children who are victims of or witnesses to acts of assault and sexual abuse. Yet the public also has a vital and undeniable interest ***1308** in protecting the innocent against conviction. Because of the integral role confrontation plays in the adjudication of innocence and guilt, and its direct bearing on the integrity of fact-finding at trial, *see Coy,* 487 U.S. at 1017-20, 108 S.Ct. at 2801-03, it would be difficult to maintain that the public's interest in securing the right of confrontation against unnecessary incursion should be deemed any less significant than its interest in protection of the child victim or witness of abuse.

[3] These considerations counsel that any risk of error in balancing the individual right against the countervailing public interest must fall on the side of protecting the innocent from an unjust conviction. In our view, the preponderance of the evidence standard cannot provide such protection, and no dilution of the right to confrontation should be permitted without an express finding that the requirements of AS 12.45.046, including the *Craig* requirements that are implicit therein, have been met by clear and convincing evidence. So construed, AS 12.45.046 is not constitutionally infirm. FN8

FN8. Reutter argues that we should construe the Alaska Constitution's confrontation clause to provide broader protections than those provided for by the federal constitution, as interpreted by the United States Supreme Court in *Craig.* However, Reutter points to nothing in the text, context, or history of the Alaska Constitution that would justify construing article I, section 11 more broadly than the sixth amendment under the circumstances presented here; nor has Reutter advanced any cogent argument to support the conclusion that we should reject, as unpersuasive, the United States Supreme Court's interpretation of the federal constitution's confrontation clause. *See Mitchell v. State,* 818 P.2d 1163, 1165 (Alaska App.1991) (broader interpretation of the Alaska Constitution justified only if United States Supreme Court's interpretation of the federal constitution is unpersuasive or if the text, context, or history of the Alaska Constitution justify departure). Under the circumstances presented here, we decline to construe article I, section 11, of the Alaska Constitution more broadly than the United States Supreme Court has interpreted the federal constitution.

2. *Constitutionality of AS 12.45.046 as Applied to this Case*

In applying AS 12.45.046 to the circumstances of Reutter's case, Judge Zervos interpreted the statute to incorporate the *Craig* requirements and found the clear and convincing evidence standard of proof to be applicable. Reutter nonetheless argues that the application of AS 12.45.046 to his case violated his right to confrontation. Reutter advances this argument in three prongs: (1) he contends that the trial court erred in allowing unqualified expert witnesses to testify and in admitting hearsay statements through their testimony; (2) he argues that the trial court's findings and conclusions are erroneous; and (3) he maintains that insufficient evidence was presented to support the conclusion that the applicable constitutional standards were met. We address each facet of Reutter's argument in turn.

A. Expert Qualifications and Hearsay

[4][5] Reutter argues that the trial court erroneously received expert testimony from three of the four witnesses who testified at the evidentiary hearing: DFYS Social Worker Sandra Beare-Spencer, child advocate Betsy Willis, and Assistant Attorney General Jan Rutherdale. He contends that the witnesses were asked questions that called for psychological education and expertise beyond their qualifications.

Reutter relies on Alaska Rule of Evidence 702(a):

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

This rule, however, gives the trial court broad latitude to allow a witness to testify as an expert when the court finds that the testimony will be helpful to the factfinder. There is no requirement that a witness possess a particular license or academic degree, provided that the factfinder can receive appreciable help from the witness' testimony. ***1309** *Handley v. State,* 615 P.2d 627, 630-31 (Alaska 1980); *Dymenstein v. State,* 720 P.2d 42, 45 (Alaska App.1986). The trial court's decision to allow a witness to testify as an expert is reviewable only for an abuse of discretion. *Handley,* 615 P.2d at 630; *New v. State,* 714 P.2d 378, 380 (Alaska App.1986).

[6] In the present case, all of the challenged witnesses had professional experiences that made their opinions helpful to the trial court, and all had considerable contact with A.R. While these witnesses did not possess expertise in the field of psychology, neither did they pretend to address deep psychological issues. The trial court did not abuse its discretion in finding the qualifications of these witnesses sufficient to allow them to testify as experts. *See, e.g., Kosbruk v. State,* 820 P.2d 1082, 1086-87 (Alaska App.1991); *see also Hilburn v. State,* 765 P.2d 1382, 1386 (Alaska App.1988).

[7] Moreover, although the testimony of the challenged witnesses was necessarily informed by their educational and professional backgrounds, their opinions were almost wholly based on reasonable inferences drawn from their own recent observations of A.R. In this regard, Alaska Rule of Evidence 701 provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Hence, even if the expertise of Beare-Spencer, Willis, and Rutherdale to some degree fell short of meeting the standard established for experts under Alaska Rule of Evidence 702, their opinions were properly admitted under Alaska Rule of Evidence 701's more permissive standard governing opinion testimony by lay witnesses. *See, e.g., In re D.J.A.,*

793 P.2d 1033, 1036 (Alaska 1990); *see also Callahan v. State,* 769 P.2d 444, 446 (Alaska App.1989). FN9

FN9. To the extent Reutter means to suggest that the testimony of a qualified psychologist or psychiatrist should be a prerequisite to a finding of necessity under AS 12.45.046, the suggestion is unwarranted under the peculiar circumstances of this case. Although there is much to be said for the proposition that psychological evidence will normally be necessary to meet the requirements of AS 12.45.046, *cf. Craig v. State,* 322 Md. 418, 588 A.2d 328, 335-36 (1991), Reutter disregards the fact that Judge Zervos had available and did consider the extensive written evaluation of A.R. submitted by Dr. Brems, a clinical psychologist. While Brems did not expressly address the *Craig* requirements, her evaluation of A.R. provided perspective for the court's assessment of the opinions of Beare-Spencer, Willis, and Rutherdale.

An even more significant flaw in Reutter's argument is his disregard of Judge Zervos' reliance on evidence of A.R.'s "shutdown" at the CINA proceeding-a virtual dry run of the situation that could have arisen had A.R. been called upon to testify in Reutter's presence at the criminal trial. Judge Zervos was able to review the tape recording of the CINA hearing, and the bulk of the testimony presented by the challenged witnesses was devoted to describing in greater detail the recorded events that Judge Zervos heard on the tape. The availability of this experiential base for predicting A.R.'s probable reaction to Reutter's presence at trial adds a unique dimension to Reutter's case and significantly reduces the need for speculation based on psychological prediction.

[8] Reutter also advances a conclusory argument that the state's witnesses were improperly allowed to introduce inadmissible hearsay. Reutter's claim pertains to testimony of the witnesses relating various statements made by A.R., primarily those in connection with her inability to testify at the CINA hearing.FN10 "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in ***1310** evidence to prove the truth of the matter asserted." Alaska Rule of Evidence 801(c). As correctly recognized by Judge Zervos, the bulk of the contested testimony was not introduced to prove the truth of the matter asserted and was therefore not hearsay; the limited statements arguably admitted to prove the truth of the matter they asserted were properly received under the hearsay exceptions governing present sense impression, excited utterance, and existing mental or emotional condition. Alaska Rule of Evidence 803(1), (2), & (3). We find no abuse of discretion. *Hawley v. State,* 614 P.2d 1349, 1361 (Alaska 1980); *Lipscomb v. State,* 700 P.2d 1298, 1306 (Alaska App.1985).FN11

FN10. The hearsay statements that Reutter contends were improperly admitted are as follows: (1) Beare-Spencer's recapitulation, in response to the prosecutor's inquiry into the basis of her opinion that A.R. would not be able to communicate effectively in Reutter's presence, of A.R.'s concern that her father would hurt her mother if she talked about what happened to her; (2) Willis' testimony, in response to the prosecutor's inquiry into the nature of her relationship with A.R., that A.R. had first disclosed to her that she had been sexually abused by Reutter; (3) Willis' testimony that some of the bases for her opinion that A.R. would not be able to communicate effectively in Reutter's presence were A.R.'s statements, "I can't talk when he's smiling at me[, h]e's staring at me [, h]e's whispering about me"; and (4) Rutherdale's testimony that one of the bases for her opinion

that A.R. would not be able to communicate effectively in Reutter's presence was A.R.'s whispered concern about her parents' talking to each other during her testimony.

FN11. Both parties have assumed, without discussing the issue, that the formal rules of evidence should apply to a finding of necessity under AS 12.45.046. The assumption is questionable. *See* A.R.E. 101(c)(1). Our conclusion that no hearsay violations occurred makes it unnecessary for us to decide the point.

B. Errors in Factual Findings and Legal Conclusions

[9] Reutter argues that the trial court made several erroneous factual findings in its written order that affected its decision to allow A.R. to testify via one-way closed-circuit television. This court will reverse factual findings only when they are clearly erroneous. *Matter of R.K.*, 851 P.2d 62, 66 (Alaska 1993). "Findings are clearly erroneous when the reviewing court is left with a definite and firm conviction after reviewing the entire record that a mistake has been made." *Id.* Having carefully reviewed the record, we conclude that Reutter's claims of erroneous fact findings are either unfounded or involve facts that were clearly inconsequential to the resolution of the disputed legal issues. The trial court's findings and conclusions are not clearly erroneous.

C. Sufficiency of the Evidence

[10] Reutter further contends that, even if no other error occurred, Judge Zervos could not have properly concluded, based on the evidence presented, that A.R.'s inability to testify at trial would be caused by Reutter's presence, rather than by the general courtroom setting. He argues that, while the witnesses at the evidentiary hearing all testified that A.R. would not be able to testify in front of her father, they also indicated that A.R. would likely not testify even if Reutter were not present. In effect, Reutter challenges the trial court's conclusions number five and six, which read:

5. The court recognizes that it may be that [A.R.] also has difficulty testifying in front of a room full of people. However, it is very clear, based on the CINA hearing, that [A.R.] does have great difficulty in testifying in front of her parents. The court concludes, based on what has gone on before, that if the child were brought into the courtroom in an attempt to have her testify in front of her father, that she would "shut down" as she did in the CINA hearing and not testify under any other circumstances after that.

6. It is clear that [A.R.] will not testify because of fear, guilt or severe psychological distress. It is also clear that [A.R.'s] failure to testify is due, in large part, to the presence of her father. Therefore, under the statutes and the case law the confrontation clause must give way in the most minimal way possible. Allowing the child's testimony to be taken outside of the defendant's presence may facilitate the child's ability to testify. Denying the request to take the testimony outside the defendant's presence, based in [sic] past attempts, guarantees the child's silence.

Reutter makes the mistake of viewing the evidence in the light most favorable to his case, rather than in light of the factual findings made by the trial court. Judge Zervos' findings were based on a careful consideration of the factors specified in AS 12.45.046(b). As directed by the statute, the judge considered A.R.'s chronological age, her developmental level, and the degree of ***1311** emotional and psychological injury that she had already suffered and would likely suffer if forced to testify in court. As we have already determined, Judge Zervos' factual findings are not clearly erroneous. In our view, these findings amply support the court's ultimate conclusions that "[A.R.] will not testify because of fear, guilt or severe psychological distress," and that requiring her to testify in Reutter's presence would virtually guarantee her silence.

Reutter's argument also overlooks the unique

significance of A.R.'s "shut down" at the prior CINA hearing and the central role of that event in Judge Zervos' determination. As Judge Zervos concluded, "Denying the request to take the testimony outside the defendant's presence, *based in [sic] past attempts,* guarantees the child's silence." (Emphasis added.) Even if the opinions expressed by the witnesses at the evidentiary hearing were fully discounted, their compelling testimony concerning A.R.'s demeanor and conduct at the CINA hearing provided strong support for the court's conclusion that A.R.'s inability to testify stemmed from Reutter's presence, not the generally stressful atmosphere prevailing in the courtroom.

We conclude that the evidence presented below was sufficient to support the trial court's finding of necessity under AS 12.45.046 and that application of the statute to Reutter's case did not result in a violation of his constitutional right to confrontation. FN12

FN12. Reutter separately alleges a violation of his right to procedural due process occasioned by the specific manner in which the court implemented A.R.'s questioning outside Reutter's presence. In particular, Reutter asserts that (1) A.R. refused to respond during the cross-examination; (2) his attorney was not able to gauge the reaction of the jury while he cross-examined A.R.; and (3) the jury was not able to view his interaction with A.R. during her testimony. However, Reutter did not complain to the trial court that he was unable to effectively cross-examine A.R.; from the record as a whole, it appears that Reutter's attorney did cross-examine A.R. effectively. Moreover, any difficulty that Reutter experienced in attempting to cross-examine appears to have been brought on, not by the closed-circuit television procedure, but by the inappropriate encounters between A.R. and her parents. *Cf. Brandon v. State,* 778 P.2d 221, 227-28 (Alaska App.1989) (no violation of defendant's right of confrontation when witness' absence results from conduct of the accused). With respect to the remaining assertions, it is sufficient to observe that, although Reutter continued throughout the trial to object to the taking of A.R.'s testimony by closed-circuit television generally, he specifically stated that he did not object to the procedure that the trial court implemented. Reutter's claims of interference with the jury's view of his interaction with A.R. are wholly unsubstantiated by the record.

The convictions are AFFIRMED.

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166 F.3d 75, 51 Fed. R. Evid. Serv. 1
(Cite as: 166 F.3d 75)

▷

United States Court of Appeals,
Second Circuit.
UNITED STATES of America, Appellee,
v.
Vincent GIGANTE, also known as "Chin," Defendant–Appellant.

Docket No. 98–1001.
Argued Oct. 20, 1998.
Decided Jan. 22, 1999.

Following jury trial, defendant was convicted in the United States District Court for the Eastern District of New York, Jack B. Weinstein, J., of violation of Racketeer Influenced and Corrupt Organizations Act (RICO), RICO conspiracy, conspiracy to murder, extortion conspiracy, and a labor payoff conspiracy, based on evidence including testimony of one witness via closed-circuit television, which District Court permitted, 971 F.Supp. 755. The District Court, 982 F.Supp. 140, later dismissed one count of conspiracy to murder. Defendant appealed. The Court of Appeals, John M. Walker, Jr., Circuit Judge, held that: (1) admission of ill witness's testimony via two-way, closed-circuit television from a remote location did not violate defendant's right of confrontation; (2) any errors in admitting statements under coconspirator exception to hearsay definition were harmless; and (3) finding that defendant was competent to stand trial was not clearly erroneous.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⚿662.65

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.65 k. Conduct of Trial. Most Cited Cases

Admission of witness' testimony via two-way, closed-circuit television from a remote location did not violate defendant's Sixth Amendment right of confrontation, where witness was fatally ill and was part of witness protection program, and defendant was too ill to participate in distant deposition; testimony preserved salutary effects of in-court testimony, and testimony afforded greater protection of defendant's rights than would have been provided by pretrial deposition, which also would have been permissible under the circumstances. U.S.C.A. Const.Amend. 6; Fed.Rules Cr.Proc.Rules 2, 15, 57(b), 18 U.S.C.A.

[2] Criminal Law 110 ⚿1158.9

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.8 Evidence
110k1158.9 k. In General. Most Cited Cases
(Formerly 110k1158(4))

District court's factual finding that witness could not appear in court due to illness would be reviewed for clear error.

[3] Criminal Law 110 ⚿662.1

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.1 k. In General. Most Cited Cases

The right to face-to-face confrontation of witnesses is not absolute. U.S.C.A. Const.Amend. 6.

[4] Criminal Law 110 ⚿1137(1)

110 Criminal Law
110XXIV Review

110XXIV(L) Scope of Review in General
110XXIV(L)11 Parties Entitled to Allege Error
110k1137 Estoppel
110k1137(1) k. In General. Most Cited Cases

Defendant waived any claim of error that he was deprived of right of confrontation because witness, who testified via two-way, closed-circuit television, allegedly could not see defendant himself on television monitor, where defendant explicitly declined the option of being viewed by witness. U.S.C.A. Const.Amend. 6.

[5] Criminal Law 110 ⚿543(1)

110 Criminal Law
110XVII Evidence
110XVII(U) Evidence from Prior Proceedings
110k540 Grounds for Admission of Former Testimony
110k543 Absence of Witness
110k543(1) k. In General. Most Cited Cases

Criminal Law 110 ⚿1153.10

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.10 k. Hearsay. Most Cited Cases
(Formerly 110k1153(1))

Decision to permit admission of a deposition in lieu of trial testimony on ground that witness is unavailable rests within the sound discretion of the trial court, and will not be disturbed absent clear abuse of discretion. Fed.Rules Cr.Proc.Rule 15(a, e), 18 U.S.C.A.

[6] Criminal Law 110 ⚿627.2

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k627.2 k. Depositions. Most Cited Cases

The exceptional circumstances required to justify the deposition of a prospective witness are present if that witness' testimony is material to the case and if the witness is unavailable to appear at trial. Fed.Rules Cr.Proc.Rule 15(a, e), 18 U.S.C.A.

[7] Criminal Law 110 ⚿662.65

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.65 k. Conduct of Trial. Most Cited Cases

Although closed-circuit television should not be considered a commonplace substitute for in-court testimony by a witness, two-way closed-circuit television testimony does not necessarily violate the Sixth Amendment, and, upon a finding of exceptional circumstances, a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice. U.S.C.A. Const.Amend. 6.

[8] Criminal Law 110 ⚿511.1(6.1)

110 Criminal Law
110XVII Evidence
110XVII(S) Testimony of Accomplices and Codefendants
110XVII(S)2 Corroboration
110k511 Sufficiency
110k511.1 In General
110k511.1(6) Particular Offenses
110k511.1(6.1) k. In General. Most Cited Cases

Although admission of coconspirator testimony, under exception to hearsay definition, could not be based solely on finding that there was general overriding conspiracy among various alleged or-

ganized crime groups, admission of statements suggesting defendant's involvement in specific conspiracies to murder two individuals was not clearly erroneous where defendant's involvement was corroborated by other evidence. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[9] Criminal Law 110 ⚿427(5)

110 Criminal Law
110XVII Evidence
110XVII(O) Acts and Declarations of Conspirators and Codefendants
110k427 Preliminary Evidence as to Conspiracy or Common Purpose
110k427(5) k. Weight and Sufficiency. Most Cited Cases

To admit a statement under the coconspirator exception to the hearsay definition, a district court must find two factors by a preponderance of the evidence: first, that a conspiracy existed that included the defendant and the declarant, and, second, that the statement was made during the course of and in furtherance of that conspiracy. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[10] Criminal Law 110 ⚿1158.14

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.8 Evidence
110k1158.14 k. Hearsay. Most Cited Cases
(Formerly 110k1158(4))

Criminal Law 110 ⚿1169.7

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.7 k. Acts, Declarations, and Admissions of Accomplices and Codefendants. Most Cited Cases

District court findings underlying admission of statement under coconspirator exception to the hearsay definition will not be disturbed unless they are clearly erroneous, and any improper admission of coconspirator testimony is subject to harmless error analysis. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[11] Criminal Law 110 ⚿422(1)

110 Criminal Law
110XVII Evidence
110XVII(O) Acts and Declarations of Conspirators and Codefendants
110k422 Grounds of Admissibility in General
110k422(1) k. In General. Most Cited Cases

Conspiracy between the declarant and the defendant need not be identical to any conspiracy that is specifically charged in the indictment, to admit statement under coconspirator exception to hearsay definition. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[12] Criminal Law 110 ⚿427(1)

110 Criminal Law
110XVII Evidence
110XVII(O) Acts and Declarations of Conspirators and Codefendants
110k427 Preliminary Evidence as to Conspiracy or Common Purpose
110k427(1) k. In General; Existence of Conspiracy. Most Cited Cases

While hearsay statement itself may be considered in establishing the existence of the conspiracy, for purpose of admitting statement under coconspirator exception to hearsay definition, there must be some independent corroborating evidence of the defendant's participation in the conspiracy. Fed.Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

[13] Criminal Law 110 ⚿427(1)

110 Criminal Law
110XVII Evidence

110XVII(O) Acts and Declarations of Conspirators and Codefendants
110k427 Preliminary Evidence as to Conspiracy or Common Purpose
110k427(1) k. In General; Existence of Conspiracy. Most Cited Cases

The identities of both the declarant and the witness who heard the hearsay evidence are non-hearsay evidence that may be considered in assessing the reliability of the statement and finding the existence of a conspiracy, for purpose of admitting statement under coconspirator exception to hearsay definition. Fed.Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

[14] Criminal Law 110 ⚿423(3)

110 Criminal Law
110XVII Evidence
110XVII(O) Acts and Declarations of Conspirators and Codefendants
110k423 Furtherance or Execution of Common Purpose
110k423(3) k. Character of Acts or Declarations. Most Cited Cases

Statements made during the course and in furtherance of a conspiracy must be such as to prompt the listener to respond in a way that promotes or facilitates the carrying out of a criminal activity, for purpose of admitting statement under coconspirator exception to hearsay definition, which can include those statements that provide reassurance, or seek to induce a coconspirator's assistance, or serve to foster trust and cohesiveness, or inform each other as to the progress or status of the conspiracy. Fed.Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

[15] Criminal Law 110 ⚿419(2.20)

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(2.20) k. Then-Existing State of Mind or Body. Most Cited Cases

Criminal Law 110 ⚿422(7)

110 Criminal Law
110XVII Evidence
110XVII(O) Acts and Declarations of Conspirators and Codefendants
110k422 Grounds of Admissibility in General
110k422(7) k. Admissibility of Declarations of Coconspirator as Affected by Acquittal of Declarant. Most Cited Cases

Criminal Law 110 ⚿423(3)

110 Criminal Law
110XVII Evidence
110XVII(O) Acts and Declarations of Conspirators and Codefendants
110k423 Furtherance or Execution of Common Purpose
110k423(3) k. Character of Acts or Declarations. Most Cited Cases

While idle chatter among conspirators does not satisfy the "in furtherance" requirement for admitting statement under coconspirator exception to hearsay definition, such statements may admissible as declarations against penal interest or under the state of mind hearsay exception. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[16] Conspiracy 91 ⚿23.1

91 Conspiracy
91II Criminal Responsibility
91II(A) Offenses
91k23 Nature and Elements of Criminal Conspiracy in General
91k23.1 k. In General. Most Cited

A conspiracy may involve only two or three individuals.

[17] Criminal Law 110 ⚿427(1)

110 Criminal Law
110XVII Evidence
110XVII(O) Acts and Declarations of Con-

spirators and Codefendants
110k427 Preliminary Evidence as to Conspiracy or Common Purpose
110k427(1) k. In General; Existence of Conspiracy. Most Cited Cases

Even in the context of organized crime, there is a limit to the proper use of the coconspirator exception to the hearsay definition to admit coconspirator testimony; the district court in each instance must find the existence of a specific criminal conspiracy beyond the general existence of the organized crime organization. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[18] Criminal Law 110 ⚿427(5)

110 Criminal Law
110XVII Evidence
110XVII(O) Acts and Declarations of Conspirators and Codefendants
110k427 Preliminary Evidence as to Conspiracy or Common Purpose
110k427(5) k. Weight and Sufficiency. Most Cited Cases

When a conspiracy is charged under the Racketeer Influenced and Corrupt Organizations Act (RICO), the defendant must be linked to an individual predicate act by more than hearsay alone before a statement related to that act is admissible against the defendant under coconspirator exception to the hearsay definition. 18 U.S.C.A. § 1961 et seq.; Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[19] Criminal Law 110 ⚿1169.7

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.7 k. Acts, Declarations, and Admissions of Accomplices and Codefendants. Most Cited Cases

Although statements of other individuals about alleged murder conspiracy in which defendant refused to get involved were not admissible under coconspirator exception to hearsay definition, in prosecution of defendant for other charged conspiracies, any error was harmless because some of statements would have been admissible on other grounds, and substantial direct and circumstantial evidence connected defendant to each of crimes for which he was convicted. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[20] Criminal Law 110 ⚿1158.23

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.20 Preliminary Proceedings
110k1158.23 k. Competency to Stand Trial. Most Cited Cases
(Formerly 110k1158(2))

Court of Appeals upholds a district court's finding of competence to stand trial unless that finding is clearly erroneous; under this highly deferential standard, where there are two permissible views of the evidence as to competency, the court's choice between them cannot be deemed clearly erroneous.

[21] Criminal Law 110 ⚿625.15

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k623 Separate Trial or Hearing on Issue of Insanity, Incapacity, or Incompetency
110k625.15 k. Evidence. Most Cited Cases

Finding that defendant was competent to stand trial was not clearly erroneous, despite testimony of four psychiatrists that defendant was incompetent, in view of testimony of witnesses, who were allegedly former organized crime associates of defendant's, that defendant was forceful and active leader of organized crime family who had put on a "crazy act" for many years in order to avoid apprehension by law enforcement, and fact that two of testifying psychiatrists later changed their opinions.

*78 Andrew Weissmann and Daniel Dorsky, As-

sistant United States Attorneys (Zachary W. Carter, United States Attorney, and David C. James and George A. Stamboulidis, Assistant United States Attorneys, E.D.N.Y., Brooklyn, N.Y., of counsel), for Appellee.

Steven R. Kartagener, New York, N.Y. (Michael A. Marinaccio, Culleton, Marinaccio & Foglia, White Plains, N.Y., on the brief), for Defendant–Appellant.

Before: OAKES and WALKER, Circuit Judges, and KNAPP, District Judge. FN*

FN* The Honorable Whitman Knapp, of the United States District Court for the Southern District of New York, sitting by designation.

JOHN M. WALKER, JR., Circuit Judge:

Defendant-appellant Vincent Gigante appeals from a judgment of conviction entered December 18, 1997, after a jury trial in the United States District Court for the Eastern District of New York (Jack B. Weinstein, *Judge*), convicting Gigante of racketeering in violation of the RICO statute, 18 U.S.C. § 1962(c); RICO conspiracy in violation of 18 U.S.C. § 1962(d); conspiracy to murder in violation of 18 U.S.C. § 1959(a)(5); an extortion conspiracy in violation of 18 U.S.C. § 1951; and a labor payoff conspiracy in violation of 18 U.S.C. § 371.

Gigante raises three challenges to his conviction. First, he contends that the district court violated his confrontation rights under the Sixth Amendment by allowing a government witness to testify via two-way closed-circuit television from a remote location. Second, he argues that the trial court improperly allowed testimony under the co-conspirator exception to the hearsay definition. Finally, Gigante argues that the district court erred in finding that he was competent to stand trial. For the reasons set forth below, we reject each of Gigante's arguments and affirm his conviction.

BACKGROUND

This case arises from the government's continuing efforts to thwart the criminal activity of La Cosa Nostra, also known as the Mafia. The New York Mafia is comprised of five organized crime families: the Bonnano, Colombo, Gambino, Lucchese and Genovese families, each spearheaded by a boss. *See United States v. Orena,* 32 F.3d 704, 708 (2d Cir.1994). The government asserted that Vincent Gigante was the boss of the Genovese family and supervised its criminal activity.

Gigante was charged with two major categories of crimes: murder and labor racketeering. The government alleged that Gigante was the ultimate authority behind the murders of many fellow members of the Mafia, which were generally intended to enforce the rules of the organization or to prevent cooperation with the authorities. The government also charged Gigante with conspiring to use extortion and kickbacks to effect the criminal infiltration of the window replacement industry in and around New York City. He followed a long line of other organized crime figures whom the government had already convicted for their participation in this "Windows" scheme. *See, e.g., United States v. Amuso,* 21 F.3d 1251, 1254 (2d Cir.1994) (describing progression of Windows prosecutions).

The government presented its case against Gigante in large part through the testimony of six former members of the Mafia who had become cooperating witnesses: Alphonso D'Arco, once the acting boss of the Lucchese ***79** family; Salvatore Gravano, the former Gambino family underboss; Peter Chiodo, who was a Lucchese captain; Phillip Leonetti and Gino Milano, past members of La Cosa Nostra in Philadelphia; and Peter Savino, a former associate of the Genovese family. The government also introduced a wealth of tapes recorded over many years of surveillance of Gigante and other Mafia figures, and supported this evidence with the testimony of law enforcement officers.

The cooperating witnesses testified at length about the structure and rules of La Cosa Nostra, described Gigante's place in the Mafia hierarchy, and detailed his efforts to hide his complicity through continuous public demonstrations of mental instability. The tapes and witnesses revealed Gigante's complicity in planning and approving murders within the Mafia and in assisting in the direction of the Windows extortion scheme.

The jury acquitted Gigante or failed to reach a verdict on all charges surrounding the murders of Jerry Pappa, Anthony Capongiro, Fred Salerno, John "Keys" Simone, Frank Sindone, Frank "Chickie" Narducci, Rocco "Rocky" Marinucci, and Enrico "Eddie" Carini. The jury found Gigante guilty of the more recent conspiracies to murder Peter Savino and John Gotti, although the court later dismissed the charge of conspiracy to murder Gotti as time-barred. *See United States v. Gigante,* 982 F.Supp. 140, 159 (E.D.N.Y.1997). Gigante was also convicted on all the extortion and labor payoff counts related to the Windows scheme. *See id.* at 177–81 (reprinting completed jury verdict sheet). Gigante was sentenced to twelve years in prison, five years of supervised release, and a fine of $1,250,000. This appeal followed.

DISCUSSION

I. *The Use of Two–Way Closed–Circuit Television Testimony*

[1] Gigante argues that the admission of Peter Savino's testimony via two-way, closed-circuit television testimony from a remote location violated his Sixth Amendment right "to be confronted with the witnesses against him." U.S. Const. amend. VI. Gigante maintains that no compelling government interest justified the deprivation of his constitutional right to a face-to-face confrontation with Savino.

Preliminarily, we note the government's argument that Gigante waived his right to confront Savino. The government asserts that by refusing to attend a deposition of Savino pursuant to Rule 15, Fed.R.Crim.P., Gigante waived his right to a face-to-face confrontation. More fundamentally, the government argues that Gigante waived his confrontation rights through his own misconduct, with protracted attempts to delay his own trial by feigning incompetence. We need not resolve these questions relating to possible waiver, however, because Gigante's claim fails on the merits: under the circumstances of this case, the procedures by which Savino testified did not violate Gigante's confrontation rights.

Peter Savino, a former associate of the Genovese crime family, was a crucial witness against Gigante, providing direct testimony of his involvement in the Windows scheme. As a cooperator with the government since 1987, Savino was a participant in the Federal Witness Protection Program. At the time of Gigante's trial in 1997, Savino was in the final stages of an inoperable, fatal cancer, and was under medical supervision at an undisclosed location.

The government made an application for an order allowing Savino to testify via closed-circuit television due to his illness and concomitant infirmity. Judge Weinstein held a hearing to determine whether Savino was able to travel to New York to testify at Gigante's trial. At this hearing, an emergency medicine physician employed by the Federal Witness Protection Program testified that he had examined Savino and that "it would be medically unsafe for [Savino] to travel to New York for testimony." Defense counsel cross-examined the government physician and then presented an oncologist of their own who testified that "it would not be life-threatening" for Savino to travel to New York.

[2] Judge Weinstein held in a published opinion that "[m]edical reports and testimony ***80** for the government and defendant fully supported the government's contention, by clear and convincing proof, that the witness could not appear in court." *United States v. Gigante,* 971 F.Supp. 755, 756 (E.D.N.Y.1997). Although Gigante attacks this determination, we review this factual finding for clear error. Judge Weinstein's holding was supported by evidence in the record and was not clearly erro-

neous.

Because of Savino's illness, Judge Weinstein permitted him to testify via two-way, closed-circuit television, basing his decision upon his "inherent power" under Fed.R.Crim.P. 2 and 57(b) to structure a criminal trial in a just manner. *Gigante,* 971 F.Supp. at 758–59. During his testimony, Savino was visible on video screens in the courtroom to the jury, defense counsel, Judge Weinstein and Gigante. Savino could see and hear defense counsel and other courtroom participants on a video screen at his remote location.

Gigante's argument that this procedure deprived him of his right to confront Savino amounts to the argument that his Sixth Amendment right could only be preserved by a face-to-face confrontation with Savino *in the same room.* We disagree. While the use of remote, closed-circuit television testimony must be carefully circumscribed, Judge Weinstein's order in this case adequately protected Gigante's confrontation rights.

[3] The Supreme Court has declared that "the Confrontation 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, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988). In *Coy,* the Court reversed the defendant's conviction for sexual assault after a 13–year–old alleged victim was permitted to testify out of sight of the defendant. *See id.* at 1022, 108 S.Ct. 2798. However, the right to face-to-face confrontation is not absolute; in *Maryland v. Craig,* 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), the Court held that one-way closed-circuit television testimony by a child witness in an abuse case may be permissible upon a case-specific finding of necessity. *See id.* at 857, 110 S.Ct. 3157.

The Supreme Court explained that "[t]he 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." *Id.* at 845, 110 S.Ct. 3157. The salutary effects of face-to-face confrontation include 1) the giving of testimony under oath; 2) the opportunity for cross-examination; 3) the ability of the fact-finder to observe demeanor evidence; and 4) the reduced risk that a witness will wrongfully implicate an innocent defendant when testifying in his presence. *See id.* at 845–46, 110 S.Ct. 3157.

[4] The closed-circuit television procedure utilized for Savino's testimony preserved all of these characteristics of in-court testimony: Savino was sworn; he was subject to full cross-examination; he testified in full view of the jury, court, and defense counsel; and Savino gave this testimony under the eye of Gigante himself.[FN1] Gigante forfeited none of the constitutional protections of confrontation.

> FN1. There is some dispute over whether Savino could see Gigante himself in the background of his monitor. However, it is clear that Judge Weinstein afforded defense counsel the opportunity to place Gigante's televised visage squarely before Savino (Mr. Culleton was to cross-examine Savino):
>
> > THE COURT: Is this where you wish the camera—
> >
> > MR. CULLETON: Exactly. He can look at me and I'll be looking at him.
> >
> > THE COURT: You don't want him to look at the defendant?
> >
> > MR. CULLETON: Not necessary.
> >
> > THE COURT: And you don't want the defendant to look directly eye to eye?
> >
> > MR. CULLETON: We don't need it. Absolutely not, Judge.
>
> Gigante, having explicitly declined the option of being viewed by Savino, has waived any claim of error based on that

deprivation.

In *Craig,* the Supreme Court indicated that confrontation rights "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." *Craig,* 497 U.S. at 850, 110 S.Ct. 3157. Gigante ***81** seeks to hold the government to this standard, and challenges the government to articulate the important public policy that was furthered by Savino's testimony. However, the Supreme Court crafted this standard to constrain the use of one-way closed-circuit television, whereby the witness could not possibly view the defendant. Because Judge Weinstein employed a two-way system that preserved the face-to-face confrontation celebrated by *Coy,* it is not necessary to enforce the *Craig* standard in this case.

A more profitable comparison can be made to the Rule 15 deposition, which under the Federal Rules may be employed "[w]henever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial." Fed.R.Crim.P. 15(a). That testimony may then be used at trial "as substantive evidence if the witness is unavailable." Fed.R.Crim.P. 15(e). Unavailability is defined by reference to Rule 804(a) of the Federal Rules of Evidence, which includes situations in which a witness "is unable to be present or to testify at the hearing because of ... physical or mental illness or infirmity." Fed.R.Evid. 804(a)(4).

[5][6] The decision to permit a deposition under Rule 15 "rests within the sound discretion of the trial court, and will not be disturbed absent clear abuse of discretion." *United States v. Johnpoll,* 739 F.2d 702, 708 (2d Cir.1984) (internal citations omitted). "It is well-settled that the 'exceptional circumstances' required to justify the deposition of a prospective witness are present if that witness's testimony is material to the case and if the witness is unavailable to appear at trial." *Id.* at 709. Under the circumstances of this case, Judge Weinstein could have admitted Savino's testimony pursuant to Rule 15 without offending the confrontation clause. *See United States v. Salim,* 855 F.2d 944, 954–55 (2d Cir.1988); *Johnpoll,* 739 F.2d at 710.

Judge Weinstein considered the utility of a Rule 15 deposition for preserving Savino's testimony, and noted that the government was "able to make the threshold showing entitling it to a [Rule 15] deposition." *Gigante,* 971 F.Supp. at 758. Had Judge Weinstein allowed a deposition, this would not have been an abuse of discretion, given the medical evidence of Savino's poor health. However, due to the joint exigencies of Savino's secret location and Gigante's *own* ill health and inability to travel, Judge Weinstein concluded that "deposing the witness is not appropriate," and that "contemporaneous testimony via closed circuit televising affords greater protection of [Gigante's] confrontation rights than would a deposition." *Id.* at 758–59.

We agree that the closed-circuit presentation of Savino's testimony afforded greater protection of Gigante's confrontation rights than would have been provided by a Rule 15 deposition. It forced Savino to testify before the jury, and allowed them to judge his credibility through his demeanor and comportment; under Rule 15 practice, the bare transcript of Savino's deposition could have been admitted, which would have precluded any visual assessment of his demeanor. Closed-circuit testimony also allowed Gigante's attorney to weigh the impact of Savino's direct testimony on the jury as he crafted a cross-examination.

[7] Closed-circuit television should not be considered a commonplace substitute for in-court testimony by a witness. There may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony. However, two-way closed-circuit television testimony does not necessarily violate the Sixth Amendment. Because this procedure may provide

at least as great protection of confrontation rights as Rule 15, we decline to adopt a stricter standard for its use than the standard articulated by Rule 15. Upon a finding of exceptional circumstances, such as were found in this case, a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice.

The facts of Savino's fatal illness and participation in the Federal Witness Protection Program, coupled with Gigante's own inability to participate in a distant deposition, satisfy this exceptional circumstances requirement,***82** and Judge Weinstein did not abuse his discretion by allowing Savino to testify in this manner. Savino's testimony did not deprive Gigante of his right to confront his accuser under the Sixth Amendment.

II. *The Admission of Coconspirator Testimony*

[8] Gigante contends that Judge Weinstein admitted substantial prejudicial testimony by misconstruing the proper scope of Fed.R.Evid. 801(d)(2)(E), which provides that "a statement is not hearsay if ... [it] is offered against a party and is ... a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Gigante argues that these evidentiary rulings constituted reversible error.

[9][10] To admit a statement under the coconspirator exception to the hearsay definition, a district court must find two factors by a preponderance of the evidence: first, that a conspiracy existed that included the defendant and the declarant; and second, that the statement was made during the course of and in furtherance of that conspiracy. *See Orena,* 32 F.3d at 711; *United States v. Maldonado–Rivera,* 922 F.2d 934, 958 (2d Cir.1990) (citing *Bourjaily v. United States,* 483 U.S. 171, 175, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987)). We will not disturb a district court's findings on these issues unless they are clearly erroneous. Moreover, any improper admission of coconspirator testimony is subject to harmless error analysis. *See Orena,* 32 F.3d at 711.

[11][12][13] The conspiracy between the declarant and the defendant need not be identical to any conspiracy that is specifically charged in the indictment. *See id.* at 713. In addition, while the hearsay statement itself may be considered in establishing the existence of the conspiracy, "there must be some independent corroborating evidence of the defendant's participation in the conspiracy." *United States v. Tellier,* 83 F.3d 578, 580 (2d Cir.1996); *see also* Fed.R.Evid. 801(d)(2). The identities of both the declarant and the witness who heard the hearsay evidence, however, are non-hearsay evidence that may be considered in assessing the reliability of the statement and finding the existence of a conspiracy. *See Tellier,* 83 F.3d at 580 n. 2; Fed.R.Evid. 801(d)(2) advisory committee's note to 1997 Amendment.

[14][15] As to the second requirement, statements made during the course and in furtherance of a conspiracy "must be such as to prompt the listener ... to respond in a way that promotes or facilitates the carrying out of a criminal activity." *Maldonado–Rivera,* 922 F.2d at 958. This can include those statements "that provide reassurance, or seek to induce a coconspirator's assistance, or serve to foster trust and cohesiveness, or inform each other as to the progress or status of the conspiracy." *Id.* at 959. In addition, while idle chatter among conspirators does not satisfy the "in furtherance" requirement of Rule 801(d)(2)(E), often these statements are admissible as declarations against penal interest or under the state of mind hearsay exception. *See United States v. Paone,* 782 F.2d 386, 390–91 (2d Cir.1986).

[16] A conspiracy may involve only two or three individuals. In the context of a RICO prosecution of organized criminals, however, the relevant conspiracy may grow quite large. For example, the Windows conspiracy, of which Gigante was a part, was a sprawling criminal enterprise involving both the Genovese and Colombo crime families and enveloping an entire industry. *See United States v. Gigante,* 39 F.3d 42, 44 (2d Cir.1994) (describing

Windows scheme). The conspiratorial ingenuity of La Cosa Nostra expands the normal boundaries of a criminal enterprise, and Rule 801(d)(2)(E) must expand accordingly to encompass the full extent of the conspiracy.

[17][18] However, even in the context of organized crime, there is a limit to the proper use of Rule 801(d)(2)(E) to admit coconspirator testimony. The district court in each instance must find the existence of a specific criminal conspiracy beyond the general existence of the Mafia. And when a RICO conspiracy is charged, the defendant must be linked to an individual predicate act by more than hearsay alone before a statement related to that act is admissible against ***83** the defendant under Rule 801(d)(2)(E). *See Tellier,* 83 F.3d at 581.

Early in Gigante's trial, Judge Weinstein announced his finding that "there is a general overriding conspiracy among all of these alleged Mafia groups." He then admitted some evidence under Rule 801(d)(2)(E) based solely on this finding of a general conspiracy. This was error. The district court's rationale would allow the admission of any statement by any member of the Mafia regarding any criminal behavior of any other member of the Mafia. This is not to say that there can never be a conspiracy comprising many different Mafia families; however, it must be a conspiracy with some specific criminal goal in addition to a general conspiracy to be members of the Mafia. It is the unity of interests stemming from a specific shared criminal task that justifies Rule 801(d)(2)(E) in the first place—organized crime membership alone does not suffice.

Although we find that Judge Weinstein construed Rule 801(d)(2)(E) too broadly, many of the statements contested by Gigante were properly admitted. For example, Gigante contends that it was error to admit Alphonse D'Arco's testimony that Jimmy Ida (of the Genovese Family) told D'Arco that Gigante wanted him to help locate and murder Savino in Hawaii. Similarly, Gigante contests the district court's admission of D'Arco's testimony that Vittorio Amuso (his boss in the Lucchese family) told D'Arco that Gigante was aware of and approved of the plot to murder John Gotti. Gigante argues that there was no independent corroborating evidence of his involvement in a conspiracy to murder either Savino or Gotti. However, there was substantial corroborating evidence that could support findings by Judge Weinstein that Gigante was boss of the Genovese family, that the Genovese family was involved in the conspiracies to murder Savino and Gotti, and that Gigante, as boss, was necessarily involved in these conspiracies. The admission of these statements was not clearly erroneous.

[19] On other occasions, the district court erred in admitting evidence under Rule 801(d)(2)(E). Gigante argues that Judge Weinstein improperly admitted a tape recording of Gotti, Gravano and John D'Amato (street boss of a New Jersey family) discussing a conspiracy to murder Corky Vastola, and stating that they needed to secure Gigante's permission to utilize a particular person to kill Vastola. The evidence indicated that Gigante refused this permission. The discussions between Gotti, Gravano and D'Amato should have been excluded, because there was no evidence that Gigante ever joined in a conspiracy with those figures to murder Vastola. The government argues that these discussions reveal Gigante's role in a general process and network of criminal conspiracy and activity. However, these discussions were not "in furtherance of" a specific criminal purpose, and the fact that Gigante might have conspired with Gotti and Gravano to commit other crimes on other occasions is irrelevant.

Nonetheless, to the extent that these or any other statements were erroneously admitted under Rule 801(d)(2)(E), they did not "effect actual prejudice resulting in 'substantial and injurious effect or influence in determining the jury's verdict.' " *Ayala v. Leonardo,* 20 F.3d 83, 92 (2d Cir.1994) (quoting *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). Several admitted statements would have been properly admissible

either as declarations against penal interest or under the state of mind exception to the hearsay rule. The jury acquitted Gigante on some of the charges against him, convicted him on other charges, and were unable to reach a verdict on still other allegations. This demonstrates that the jury was able to distinguish among the charges against Gigante and weigh the evidence on each separate count. There was substantial direct and circumstantial evidence connecting Gigante to each of the crimes for which he was convicted. Having considered all of Gigante's evidentiary arguments, we hold that any errors by the district court were harmless.

III. *Competency to Stand Trial*

[20] Gigante also challenges the trial court's determination that he was competent to stand trial. We uphold a district court's finding of competence unless that finding is ***84** clearly erroneous. *See United States v. Morrison,* 153 F.3d 34, 46 (2d Cir.1998). Under this highly deferential standard, " '[w]here there are two permissible views of the evidence as to competency, the court's choice between them cannot be deemed clearly erroneous.' " *United States v. Nichols,* 56 F.3d 403, 411 (2d Cir.1995) (quoting *United States v. Villegas,* 899 F.2d 1324, 1341 (2d Cir.1990)).

[21] Judge Weinstein was not the first judge to make a finding regarding Gigante's competency. Gigante's trial had been previously assigned to Judge Eugene Nickerson, who conducted the first hearings to determine whether Gigante was competent to stand trial. Four separate psychiatrists testified that Gigante was incompetent, although reservations were expressed that he might be malingering. *See United States v. Gigante,* 925 F.Supp. 967, 968 (E.D.N.Y.1996).

Judge Nickerson then received testimony from former members of the Mafia (many of whom later testified at Gigante's trial), and made the factual findings that "Gigante was a forceful and active leader of the Genovese family from at least 1970 on" and that Gigante had put on a "crazy act" for many years in order "to avoid apprehension by law enforcement." *Id.* at 976. After being presented with these findings, two of the examining psychiatrists changed their opinion, indicating that they now thought Gigante was malingering; one said Gigante was competent to stand trial, and the other said it was quite possible that Gigante was competent. The remaining psychiatrists held to their earlier findings of incompetence. *See United States v. Gigante,* 987 F.Supp. 143, 146 (E.D.N.Y.1996). Judge Nickerson found "the weight of medical opinion to show that Gigante is mentally competent to stand trial." *Id.* at 147.

When Gigante renewed his claim of incompetence due to Alzheimer's disease, Judge Nickerson recused himself, and the case was reassigned to Judge Weinstein. *See Gigante,* 982 F.Supp. at 146. Gigante presented new evidence of incompetence in the form of a Positron Emission Tomography (PET) scan of Gigante's brain and the results of a battery of tests designed to identify malingering. The defense experts who presented this evidence testified that Gigante was incompetent to be tried. The government then presented a witness who testified that it was possible that the results of these tests were due to the drugs Gigante was receiving. *See id.* at 147. Judge Weinstein held that Gigante was competent and ordered that the trial proceed. *See id.* at 148.

Judge Nickerson and Judge Weinstein, after conducting separate hearings, reached the identical conclusion that Gigante was malingering, and that he was competent to stand trial. This was a permissible conclusion in light of the expert testimony and extensive evidence of Gigante's attempts to elude prosecution, and we do not find it to be clearly erroneous.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

C.A.2 (N.Y.),1999.
U.S. v. Gigante
166 F.3d 75, 51 Fed. R. Evid. Serv. 1

166 F.3d 75, 51 Fed. R. Evid. Serv. 1
(Cite as: 166 F.3d 75)

END OF DOCUMENT

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: February 22, 2012 **FURTHER REFERRALS: Finance**

Date of Committee Action: 3/19/12

The JUDICIARY Committee considered: **HB 359**

HOUSE BILL NO. 359
"An Act relating to conspiracy to commit human trafficking in the first degree or sex trafficking in the first degree; relating to the crime of furnishing indecent material to minors, the crime of online enticement of a minor, the crime of prostitution, and the crime of sex trafficking; relating to forfeiture of property used in prostitution offenses; relating to sex offender registration; relating to testimony by video conference; adding Rule 38.3, Alaska Rules of Criminal Procedure; and providing for an effective date."

HB 359-SEX CRIMES; TESTIMONY BY VIDEO CONFERENCE

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 359 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
DHS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES**
*FN# is assigned by Chief Clerk's Office

*FN#	List by Dept(s):	Fiscal	Indet.	Zero
	CRT		X	
	LEG(H)JUD			X

***PREVIOUS* FISCAL NOTES**

FN#	List by Dept(s):	Fiscal	Indet.	Zero
1	LAW			X
2	DPS			X
3	ADM(POA)		X	
4	ADM(OPA)		X	
5	COR		X	

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	LYNN	X			
	Gruenberg	✓			
	Holmes	X			
	Keller	X			
	Pruitt	X			
Chair:	THOMPSON	X			
Chair:					

VC

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MEMORANDUM March 18, 2012

SUBJECT: Online Enticement and Prostitution Provisions in CSHB 359(JUD)
(Work Order No. 27-GH2627\M)

TO: Representative Carl Gatto
Chair of the House Judiciary Committee
Attn: Melanie Lesh

FROM: Doug Gardner
Director

There are two matters that I want to bring to your attention regarding the CS for HB 359 you requested.

1. Section 19. The way the bill is currently drafted with regard to online enticement in the first degree in section 19 of the bill, online enticement that is B felony conduct and online enticement that is A felony conduct would both be serious felonies. It would appear that the intention of the committee is for the A felony offense of online enticement provided for in AS 11.41.452(e) to be a serious felony, but not online enticement that is a B felony (online enticement is an A felony when the offender is a registered sex offender). Given that in other situations, such as sexual assault in the second degree, which is a B felony, the legislature has not included a class B felony as a serious felony, I suggest that citation to AS 11.41.452(e) should be included to clarify this situation.

2. Section 6. The language as currently drafted in (c)(1) of this section uses the term "patronizes" to refer to the conduct of the defendant who commits the offense of prostitution under AS 11.66.100(a). While some might describe this as "nit-picking," patronizes may include conduct that is not necessarily criminal, and read literally, has a vague meaning in describing the conduct in AS 11.66.100(a). The use of the term "patron" is the correct term to use in this context to describe the relationship the statute intends to cover, and the term "patron" is also consistent with AS 11.66.130(a)(2), where the same type of relationship between a prostitute and a "patron" is being described. Given that time was of the essence, we made this change and included it in the draft you were sent to try and assist in expediting this matter. Please confer with the committee and determine if this change is acceptable.

DDG:med
12-105.med

Enclosure

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MEMORANDUM March 20, 2012

SUBJECT: Approved Change to Final of CSHB 359(JUD)
(Work Order No. 27-GH2627\B)

TO: Representative Carl Gatto
Chair of the House Judiciary Committee
Attn: Melanie Lesh

FROM: Doug Gardner
Director

During final review of Amendment M.3 to CSHB 359(JUD), in preparation for creating a final of the bill passed out of committee on March 19, 2012, an error was discovered on page 7, line 5. The amendment should have been drafted as an "or" and not "and." The draft that you are receiving, with Ms. Lesh's permission, was drafted with an "or" in place of "and" so that forfeiture of property under AS 11.66.145 can be ordered if a defendant is found to have violated **AS 11.66.100(c) or 11.66.110 - 11.66.135**. Please review this change to make sure that this change conforms to the intent of the committee.

DDG:ljw
12-215.ljw

Enclosure

27-GH2627\M
Gardner
3/17/12

CS FOR HOUSE BILL NO. 359(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to conspiracy to commit human trafficking in the first degree or sex trafficking in the first degree; relating to the crime of distribution of indecent material to minors, the crime of online enticement of a minor, the crime of prostitution, and the crime of sex trafficking; relating to forfeiture of property used in prostitution offenses; relating to testimony by video conference; adding Rule 38.3, Alaska Rules of Criminal Procedure; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 04.06.110 is amended to read:

Sec. 04.06.110. Peace officer powers. The director and the persons employed for the administration and enforcement of this title may, with the concurrence of the commissioner of public safety, exercise the powers of peace officers when those powers are specifically granted by the board. Powers granted by the board under this section may be exercised only when necessary for the enforcement of the criminally

punishable provisions of this title, regulations of the board, and other criminally punishable laws and regulations, including investigation of violations of laws against prostitution and **sex trafficking** [PROMOTING PROSTITUTION] described in **AS 11.66.100 - 11.66.135** [AS 11.66.100 - 11.66.130] and laws against gambling, promoting gambling, and related offenses described in AS 11.66.200 - 11.66.280.

*** Sec. 2.** AS 04.11.370(a) is amended to read:

(a) A license or permit shall be suspended or revoked if the board finds

(1) misrepresentation of a material fact on an application made under this title or a regulation adopted under this title;

(2) continuation of the manufacture, sale, or service of alcoholic beverages by the licensee or permittee would be contrary to the best interests of the public;

(3) failure on the part of the licensee to correct a defect that constitutes a violation of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or other laws after receipt of notice issued by the board or its agent;

(4) conviction of a licensee of a violation of this title, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010;

(5) conviction of an agent or employee of a licensee of a violation of this title, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010, if the licensee is found by the board to have either knowingly allowed the violation or to have recklessly or with criminal negligence failed to act in accordance with the duty prescribed under AS 04.21.030 with the result that the agent or employee violates a law, regulation, or ordinance;

(6) failure of the licensee to comply with the public health, fire, or safety laws and regulations in the state;

(7) use of the licensed premises as a resort for illegal possessors or users of narcotics, prostitutes, or **sex traffickers** [PROMOTERS OF PROSTITUTION]; in addition to any other legally competent evidence, the character of the premises may be proved by the general reputation of the premises in the community as a resort for illegal possessors or users of narcotics, prostitutes, or **sex**

traffickers [PROMOTERS OF PROSTITUTION];

(8) occurrence of illegal gambling within the limits of the licensed premises;

(9) the licensee permitted a public offense involving moral turpitude to occur on the licensed premises;

(10) violation by a licensee of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010; or

(11) violation by an agent or employee of a licensee of a provision of this title, a condition or restriction imposed by the board, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010, if the licensee is found by the board to have either knowingly allowed the violation or to have recklessly or with criminal negligence failed to act in accordance with the duty prescribed under AS 04.21.030 with the result that the agent or employee violates the law, condition or restriction, regulation, or ordinance.

* **Sec. 3.** AS 11.31.120(h)(2) is amended to read:

(2) "serious felony offense" means an offense

(A) against the person under AS 11.41, punishable as an unclassified or class A felony;

(B) involving controlled substances under AS 11.71, punishable as an unclassified, class A, or class B felony;

(C) that is criminal mischief in the first degree under AS 11.46.475; [OR]

(D) that is terroristic threatening in the first degree under AS 11.56.807**;**

(E) that is human trafficking in the first degree under AS 11.41.360; or

(F) that is sex trafficking in the first degree under AS 11.66.110.

* **Sec. 4.** AS 11.61.128(a) is amended to read:

(a) A person commits the crime of distribution of indecent material to minors

if

(1) the person, being 18 years of age or older, **intentionally** [KNOWINGLY] distributes **or possesses with intent to distribute any material described in (2) and (3) of this subsection to either**

(A) a child that the person knows is under 16 years of age; or

(B) another person that the person believes is a child under 16 years of age;

(2) the material is [TO ANOTHER PERSON ANY] material that **the person knows** depicts the following actual or simulated conduct:

(A) sexual penetration;

(B) the lewd touching of a person's genitals, anus, or female breast;

(C) masturbation;

(D) bestiality;

(E) the lewd exhibition of a person's genitals, anus, or female breast; or

(F) sexual masochism or sadism; **and**

(3) [(2)] the material is harmful to minors [; AND

(3) EITHER

(A) THE OTHER PERSON IS A CHILD UNDER 16 YEARS OF AGE; OR

(B) THE PERSON BELIEVES THAT THE OTHER PERSON IS A CHILD UNDER 16 YEARS OF AGE].

*** Sec. 5.** AS 11.66.100(b) is amended to read:

(b) **Except as provided in (c) of this section, prostitution** [PROSTITUTION] is a class B misdemeanor.

*** Sec. 6.** AS 11.66.100 is amended by adding new subsections to read:

(c) Prostitution is a class C felony if

(1) the defendant violates (a) of this section as a patron of a prostitute;

(2) the prostitute is under 18 years of age; and

(3) the defendant is over 18 years of age and at least three years older than the prostitute.

(d) In a prosecution under (c) of this section, it is an affirmative defense that, at the time of the alleged offense, the defendant

(1) reasonably believed the prostitute to be 18 years of age or older; and

(2) undertook reasonable measures to verify that the prostitute was 18 years of age or older.

*** Sec. 7.** AS 11.66.110(a) is amended to read:

(a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the first degree if the person

(1) induces or causes a person to engage in prostitution through the use of force;

(2) as other than a patron of a prostitute, induces or causes a person under 18 years of age to engage in prostitution; or

(3) induces or causes a person in that person's legal custody to engage in prostitution.

*** Sec. 8.** AS 11.66.110(c) is amended to read:

(c) Except as provided in (d) of this section, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree is a class A felony.

*** Sec. 9.** AS 11.66.120 is amended to read:

Sec. 11.66.120. Sex trafficking [PROMOTING PROSTITUTION] in the second degree. (a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the second degree if the person

(1) manages, supervises, controls, or owns, either alone or in association with others, a prostitution enterprise other than a place of prostitution;

(2) procures or solicits a patron for a prostitute; or

(3) offers, sells, advertises, promotes, or facilitates travel that includes commercial sexual conduct as enticement for the travel; in this paragraph, "commercial sexual conduct" means sexual conduct for which anything of value is given or received by any person.

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the second degree is a class B felony.

* **Sec. 10.** AS 11.66.130 is amended to read:

Sec. 11.66.130. Sex trafficking [PROMOTING PROSTITUTION] in the third degree. (a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the third degree if, with intent to promote prostitution, the person

(1) manages, supervises, controls, or owns, either alone or in association with others, a place of prostitution;

(2) as other than a patron of a prostitute, induces or causes a person 18 years of age or older to engage in prostitution;

(3) as other than a prostitute receiving compensation for personally rendered prostitution services, receives or agrees to receive money or other property **under** [PURSUANT] to an agreement or understanding that the money or other property is derived from prostitution; or

(4) engages in conduct that institutes, aids, or facilitates a prostitution enterprise.

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the third degree is a class C felony.

* **Sec. 11.** AS 11.66.135 is amended to read:

Sec. 11.66.135. Sex trafficking [PROMOTING PROSTITUTION] in the fourth degree. (a) A person commits the crime of **sex trafficking** [PROMOTING PROSTITUTION] in the fourth degree if the person engages in conduct that institutes, aids, or facilitates prostitution under circumstances not proscribed under AS 11.66.130(a)(4).

(b) **Sex trafficking** [PROMOTING PROSTITUTION] in the fourth degree is a class A misdemeanor.

* **Sec. 12.** AS 11.66.140 is amended to read:

Sec. 11.66.140. Corroboration of certain testimony not required. In a prosecution under **AS 11.66.110 - 11.66.135** [AS 11.66.110 - 11.66.130], it is not necessary that the testimony of the person whose prostitution is alleged to have been

compelled or promoted be corroborated by the testimony of any other witness or by documentary or other types of evidence.

* **Sec. 13.** AS 11.66.145 is amended to read:

Sec. 11.66.145. Forfeiture. Property used to institute, aid, or facilitate, or received or derived from, a violation of **AS 11.66.100 - 11.66.135** [AS 11.66.110 - 11.66.135] shall be forfeited.

* **Sec. 14.** AS 11.81.250(a) is amended to read:

(a) For purposes of sentencing under AS 12.55, all offenses defined in this title, except murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), and kidnapping, are classified on the basis of their seriousness, according to the type of injury characteristically caused or risked by commission of the offense and the culpability of the offender. Except for murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), and kidnapping, the offenses in this title are classified into the following categories:

(1) class A felonies, which characteristically involve conduct resulting in serious physical injury or a substantial risk of serious physical injury to a person;

(2) class B felonies, which characteristically involve conduct resulting in less severe violence against a person than class A felonies, aggravated offenses against property interests, or aggravated offenses against public administration or order;

(3) class C felonies, which characteristically involve conduct serious enough to deserve felony classification but not serious enough to be classified as A or

B felonies;

(4) class A misdemeanors, which characteristically involve less severe violence against a person, less serious offenses against property interests, less serious offenses against public administration or order, or less serious offenses against public health and decency than felonies;

(5) class B misdemeanors, which characteristically involve a minor risk of physical injury to a person, minor offenses against property interests, minor offenses against public administration or order, or minor offenses against public health and decency;

(6) violations, which characteristically involve conduct inappropriate to an orderly society but which do not denote criminality in their commission.

* **Sec. 15.** AS 11.81.250(b) is amended to read:

(b) The classification of each felony defined in this title, except murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, **sex trafficking in the first degree under AS 11.66.110(a)(2),** and kidnapping, is designated in the section defining it. A felony under **the** [ALASKA] law **of this state** defined outside this title for which no penalty is specifically provided is a class C felony.

* **Sec. 16.** AS 12.47.100 is amended by adding a new subsection to read:

(h) In a hearing to determine competency under this section, the court may, at the court's discretion, allow a witness, including a psychiatrist or psychologist who examined the defendant, to testify concerning the competency of the defendant by contemporaneous two-way video conference if the witness is in a place from which people customarily travel by air to the court and the procedure allows the parties a fair opportunity to examine the witness. The video conference technician shall be the only person in the presence of the witness unless the court, at the court's discretion, determines that another person may be present. Any person present with the witness must be identified on the record. In this subsection, "contemporaneous two-way video

conference"

(1) means a conference among people at different places by means of transmitted audio and video signals;

(2) includes all communication technologies that allow people at two or more places to interact by two-way video and audio transmissions simultaneously.

*** Sec. 17.** AS 12.55.035(b) is amended to read:

(b) Upon conviction of an offense, a defendant who is not an organization may be sentenced to pay, unless otherwise specified in the provision of law defining the offense, a fine of **not** [NO] more than

(1) $500,000 for murder in the first or second degree, attempted murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, kidnapping, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), or misconduct involving a controlled substance in the first degree;

(2) $250,000 for a class A felony;

(3) $100,000 for a class B felony;

(4) $50,000 for a class C felony;

(5) $10,000 for a class A misdemeanor;

(6) $2,000 for a class B misdemeanor;

(7) $500 for a violation.

*** Sec. 18.** AS 12.55.125(i) is amended to read:

(i) A defendant convicted of

(1) sexual assault in the first degree, sexual abuse of a minor in the first degree, or **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) less than 13 years of age, 25 to 35 years;

(ii) 13 years of age or older, 20 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 30 to 40 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 35 to 45 years;

(E) if the offense is a third felony conviction and the defendant is not subject to sentencing under (F) of this paragraph or (*l*) of this section, 40 to 60 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(2) unlawful exploitation of a minor under AS 11.41.455(c)(2), online enticement of a minor under AS 11.41.452(e), or attempt, conspiracy, or solicitation to commit sexual assault in the first degree, sexual abuse of a minor in the first degree, or **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) under 13 years of age, 20 to 30 years;

(ii) 13 years of age or older, 15 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 25 to 35 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 30 to 40 years;

(E) if the offense is a third felony conviction, the offense does not involve circumstances described in (F) of this paragraph, and the defendant is not subject to sentencing under (*l*) of this section, 35 to 50 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(3) sexual assault in the second degree, sexual abuse of a minor in the second degree, online enticement of a minor under AS 11.41.452(d), unlawful exploitation of a minor under AS 11.41.455(c)(1), or distribution of child pornography under AS 11.61.125(e)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, five to 15 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, 10 to 25 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 15 to 30 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 20 to 35 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years;

(4) sexual assault in the third degree, incest, indecent exposure in the first degree, possession of child pornography, distribution of child pornography under AS 11.61.125(e)(1), or attempt, conspiracy, or solicitation to commit sexual assault in the second degree, sexual abuse of a minor in the second degree, unlawful exploitation of a minor, or distribution of child pornography, may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, two to 12 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, eight to 15 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 12 to 20 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 15 to 25 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years.

* **Sec. 19.** AS 12.55.185(10) is amended to read:

(10) "most serious felony" means

(A) arson in the first degree, **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110(a)(2), **online enticement of a minor,** or any unclassified or class A felony prescribed under AS 11.41; or

(B) an attempt, or conspiracy to commit, or criminal solicitation under AS 11.31.110 of, an unclassified felony prescribed under AS 11.41;

* **Sec. 20.** AS 15.80.010(9) is amended to read:

(9) "felony involving moral turpitude" includes those crimes that are immoral or wrong in themselves such as murder, manslaughter, assault, sexual assault, sexual abuse of a minor, unlawful exploitation of a minor, robbery, extortion, coercion, kidnapping, incest, arson, burglary, theft, forgery, criminal possession of a forgery device, offering a false instrument for recording, scheme to defraud, falsifying business records, commercial bribe receiving, commercial bribery, bribery, receiving a bribe, perjury, perjury by inconsistent statements, endangering the welfare of a minor, escape, promoting contraband, interference with official proceedings, receiving a bribe by a witness or a juror, jury tampering, misconduct by a juror, tampering with physical evidence, hindering prosecution, terroristic threatening, riot, criminal possession of explosives, unlawful furnishing of explosives, **sex trafficking** [PROMOTING PROSTITUTION], criminal mischief, misconduct involving a controlled substance or

an imitation controlled substance, permitting an escape, promoting gambling, possession of gambling records, distribution of child pornography, and possession of child pornography;

*** Sec. 21.** AS 28.15.046(c) is amended to read:

(c) The department may not issue a license under this section to an applicant who has been convicted of any of the following offenses within 20 years of the time of application:

(1) sexual abuse of a minor in any degree under AS 11.41.434 - 11.41.440;

(2) sexual assault in any degree under AS 11.41.410 - 11.41.425;

(3) incest under AS 11.41.450;

(4) unlawful exploitation of a minor under AS 11.41.455;

(5) contributing to the delinquency of a minor under AS 11.51.130;

(6) a felony involving possession of a controlled or imitation controlled substance under AS 11.71 or AS 11.73;

(7) a felony or misdemeanor involving distribution of a controlled or imitation controlled substance under AS 11.71 or AS 11.73;

(8) **sex trafficking** [PROMOTING PROSTITUTION] in the first or second degree under AS 11.66.110 or 11.66.120;

(9) indecent exposure in the first or second degree under AS 11.41.458 or 11.41.460.

*** Sec. 22.** AS 47.12.110(d) is amended to read:

(d) Notwithstanding (a) of this section, a court hearing on a petition seeking the adjudication of a minor as a delinquent shall be open to the public, except as prohibited or limited by order of the court, if

(1) the department files with the court a motion asking the court to open the hearing to the public, and the petition seeking adjudication of the minor as a delinquent is based on

(A) the minor's alleged commission of an offense, and the minor has knowingly failed to comply with all the terms and conditions required of the minor by the department or imposed on the minor in a court

order entered under AS 47.12.040(a)(2) or 47.12.120;

(B) the minor's alleged commission of

(i) a crime against a person that is punishable as a felony;

(ii) a crime in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the crime;

(iii) arson under AS 11.46.400 - 11.46.410;

(iv) burglary under AS 11.46.300;

(v) distribution of child pornography under AS 11.61.125;

(vi) **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110; or

(vii) misconduct involving a controlled substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or 11.71.050; or

(C) the minor's alleged commission of a felony and the minor was 16 years of age or older at the time of commission of the offense when the minor has previously been convicted or adjudicated a delinquent minor based on the minor's commission of an offense that is a felony; or

(2) the minor agrees to a public hearing on the petition seeking adjudication of the minor as a delinquent.

* **Sec. 23.** AS 47.12.315(a) is amended to read:

(a) Notwithstanding AS 47.12.310, when an agency takes action under AS 47.12.040(a)(1) to adjust a matter, or when, under AS 47.12.040(a)(2), the court directs the agency to adjust the matter, the agency

(1) shall, for a minor who is at least 13 years of age at the time of commission of the offense, disclose to the public the name of the minor, the name or names of the parent, parents, or guardian of the minor, the action required by the agency to be taken by the minor under AS 47.12.060 to adjust the matter, and

information about the offense exclusive of information that identifies the victim of the offense, if the minor was, under AS 47.12.020, previously alleged to be a delinquent minor on the basis of the minor's commission of at least one offense and, on the basis of that allegation, a state agency has, under AS 47.12.040(a), been asked to make a preliminary inquiry to determine if any action on that matter is appropriate, and, if the minor is alleged to be a delinquent minor on the basis of the minor's commission of another offense, exercise of agency jurisdiction is based on the minor's alleged commission of that other offense, and that other offense is one of the following:

(A) a crime against a person that is punishable as a felony;

(B) a crime in which the minor employed a deadly weapon, as that term is defined in AS 11.81.900(b), in committing the crime;

(C) arson under AS 11.46.400 - 11.46.410;

(D) burglary under AS 11.46.300;

(E) distribution of child pornography under AS 11.61.125;

(F) **sex trafficking** [PROMOTING PROSTITUTION] in the first degree under AS 11.66.110; or

(G) misconduct involving a controlled substance under AS 11.71 involving the delivery of a controlled substance or the possession of a controlled substance with intent to deliver, other than an offense under AS 11.71.040 or 11.71.050; and

(2) may, for a minor who is at least 13 years of age at the time of commission of the offense, disclose to the public the name of the minor, the name or names of the parent, parents, or guardian of the minor, the action required by the agency to be taken by the minor under AS 47.12.060 to adjust the matter, and information about the offense exclusive of information that identifies the victim of the offense if the minor has knowingly failed to comply with all terms and conditions required of the minor by the agency to adjust the matter under AS 47.12.060(b).

*** Sec. 24.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. The Alaska Rules of Criminal Procedure are amended by adding a new section to read:

Rule 38.3. Video Conference Testimony. (a) **In General.** In every trial, the testimony of witnesses shall be taken in open court, unless otherwise provided by statute or rule.

(b) **Testimony by Video Conference.** The parties may agree to take testimony from a witness by contemporaneous two-way video conference presented in open court. Absent the parties' agreement, the court may, at the court's discretion, authorize the contemporaneous two-way video conference testimony at trial of a witness only if

(1) the requesting party establishes that testimony by two-way video conference is necessary to further an important public policy;

(2) the requesting party establishes that the witness is unavailable; and

(3) the testimony is given under oath and subject to cross-examination.

(c) **Procedures for Taking Video Conference Testimony.** If the trial court authorizes video conference testimony under (b) of this rule, it shall determine the procedures for taking the contemporaneous two-way video conference testimony. The parties, the court, the trier of fact, and the public must be able to see and hear the witness; and the witness must see and hear the courtroom proceedings, including the defendant, as if the witness were sitting in the courtroom's witness stand. The video conference technician shall be the only person in the presence of the witness unless the court, at the court's discretion, determines that another person may be present. Any person present with the witness must be identified.

(d) **Definitions.**

(1) Contemporaneous Two-Way Video Conference. Contemporaneous two-way video conference means a conference among people at different places by means of transmitted audio and video signals. It includes all communication technologies that allow two or more places to interact by two-way video and audio transmissions simultaneously.

(2) Unavailable. In this rule, a witness is unavailable if

(A) by clear and convincing evidence the court finds under Rule 804(a)(4) or (5), Alaska Rules of Evidence, or Rule 15(e)(4), Alaska Rules of Criminal Procedure, that the witness is unavailable;

(B) by clear and convincing evidence the court finds that under the circumstances the witness is unavailable; or

(C) the parties agree that the witness is unavailable.

*** Sec. 25.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) Sections 1, 2, 7 - 11, 14, and 17 - 23 of this Act apply to offenses committed before, on, or after the effective date of the Act.

(b) Sections 3 - 6, 12, 13, 16, and 24 of this Act apply to offenses committed on or after the effective date of this Act.

*** Sec. 26.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S INSTRUCTION. The revisor of statutes is instructed to change the heading of AS 11.66.110 from "Promoting prostitution in the first degree" to "Sex trafficking in the first degree."

*** Sec. 27.** This Act takes effect July 1, 2012.

3/19
Jeg./Lori

27-GH2627\M.1
Gardner
3/19/12

AMENDMENT #16

OFFERED IN THE HOUSE

TO: CSHB 359(JUD), Draft Version "M"

M OK

Page 12, line 14, following "**minor**":

Insert "**under AS 11.41.452(e)**"

pg. 1 of
Gardner memo
3/18/12
incorporate
by memorandum

27-GH2627\M.2
Gardner
3/19/12

AMENDMENT #13 OK

OFFERED IN THE HOUSE

TO: CSHB 359(JUD), Draft Version "M"

Page 4, lines 9 - 10:

Delete "**material is** [TO ANOTHER PERSON ANY] material that **the person knows**"

Insert "**person knows that the material** [TO ANOTHER PERSON ANY MATERIAL THAT]"

27-GH2627\M.3
Gardner
3/19/12

AMENDMENT #14 m OK

OFFERED IN THE HOUSE

TO: CSHB 359(JUD), Draft Version "M"

Page 7, line 5:

Delete "**AS 11.66.100 - 11.66.135**"

Insert "**AS 11.66.100(c) and 11.66.110 - 11.66.135**"

((~or'
3/20 per Doug G. - suggested changing to 'or'))

#15 m OK

pg. 8, ln. 27

after court 1

- Rick Svodney
- Anne Carpeneti

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
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477 F. 3rd
- Garcia dec.
- Berkeland 5th

MEMORANDUM March 19, 2012

SUBJECT: Confrontation Clause Issues Regarding Video Testimony in Mental Competency Hearings; U.S. and Alaska Constitutions (HB 359; Work Order No. 27-GH2627\A)

- Nguyen
- Burhoe

TO: Representative Lindsey Holmes
Attn: James Waldo

FROM: Doug Gardner
Director

The question you asked is whether the following provision in HB 359 violates the Confrontation Clause of the United States Constitution, Amendment VI, and Alaska Constitution, article I, § 11 ("In all criminal prosecutions, the accused shall have the right . . . to be confronted with the witnesses against him"):

> *** Sec. 16.** AS 12.47.100 is amended by adding a new subsection to read:
> (h) In a hearing to determine competency under this section, the court may allow the testimony of a witness, including the psychiatrist or psychologist who examined the defendant, to testify concerning the competency of the defendant by contemporaneous two-way video conference if the witness would be required to travel more than 50 miles to the court or lives in a place from which people customarily travel by air to the court. In this subsection, "contemporaneous two-way video conference"
> (1) means a conference among people at different places by means of transmitted audio and video signals;
> (2) includes all communication technologies that allow two or more places to interact by two-way video and audio transmissions simultaneously.

The U.S. Supreme Court, in *Crawford v. Washington*, 541 U.S. 36, 43 (2004), held that the Confrontation Clause is essentially a trial right, and not a right of the accused during pre-trial hearings. The Alaska Supreme Court has held that, while the Confrontation Clause in the Sixth Amendment applies to the states, the court is not bound by the United States Supreme Court's interpretation of the Confrontation Clause, suggesting that the Alaska Supreme Court may be *more* protective of a defendant's right to confrontation as provided in article I, § 11 of the Alaska Constitution, and require a face-to-face

confrontation during a competency hearing. So, there is some risk that the above-proposed legislation will be challenged as violative of the defendant's right to confrontation.

With the limited time available to respond to your opinion request, the purpose of this memorandum is to spot issues regarding application of the Confrontation Clause to a pre-trial mental competency evaluation under AS 12.47.100, in a criminal case. I did not have time to evaluate whether video teleconferencing might be considered by a court as a constitutionally acceptable procedure in place of a "face-to-face" hearing, under a Confrontation Clause analysis.

Comparison to Grand Jury Rule; Criminal Rule 6(u)

Proposed section 16 of HB 359 provides for video, rather than merely telephonic participation by witnesses at a competency hearing under AS 12.47.100. My understanding from you is that a suggestion was made that the bill is similar to Criminal Rule 6(u), which allows telephonic participation, and does not require video teleconferencing at a grand jury proceeding, if the conditions of the rule are met, primarily that the witness would be required to travel more than 50 miles to testify. As a practical matter, there may be some similarity between HB 359 and Criminal Rule 6(u). However, from a constitutional perspective, grand jury proceedings have long been recognized as ex parte proceedings, where the defendant does not have a right to be present and confront witnesses. *Cassell v. State*, 645 P.2d 219 (1982). It is likely that the comparison of section 16 of the bill to Criminal Rule 6(u) was a practical one only, since the confrontation clause issues at grand jury are different from a competency hearing in accordance with proposed section 6 of the bill.

Confrontation Clause Does Not Apply to "Pre-trial" Proceedings

The United States Supreme Court in *Crawford v. Washington*, *supra*, made clear that the right of confrontation was a trial right, not a pre-trial right. *Crawford*, 541 U.S. at 68. The following passage from *State v. Rivera*, 192 P.3d 1213 (N.M. 2008), does a good job of summarizing the vast majority of state courts that have analyzed whether the right to confrontation applies to a pretrial hearing regarding suppression of evidence:

> The distinction follows from the difference in focus between pretrial hearings and trials on the merits. A trial focuses on the ultimate issue of an accused's guilt or innocence, whereas in a pretrial hearing the focus is generally on the admissibility of evidence. Thus, "the interests at stake in a suppression hearing are of a lesser magnitude than those in the criminal trial itself. At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial." *United States v. Raddatz*, 447 U.S. 667, 679, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980); *Brinegar v. United States*, 338 U.S. 160, 173, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949) ("There is a large difference between the

> two things to be proved, as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them.").
>
> * * *
>
> Nothing in the Supreme Court's recent pronouncements suggests that the Court has changed its interpretation of the Confrontation Clause. Instead, recent cases continue to focus on the protections afforded a defendant *at trial.* For example, in *Giles v. California*, 554 U.S. 353, ——, 128 S.Ct. 2678, 2682, 171 L.Ed.2d 488 (2008), the Court noted that "[t]he [Sixth] Amendment contemplates that a witness who makes testimonial statements admitted against a defendant will ordinarily be present *at trial* for cross-examination, and that if the witness is unavailable, his prior testimony will be introduced only if the defendant had a prior opportunity to cross-examine him." (Emphasis added.) Similarly, in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Court emphasized a defendant's right to confront a witness against him at trial. The Court concluded that, "[w]here testimonial evidence is at issue [at trial], the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68, 124 S.Ct. 1354.
>
> Recently, other states have rejected an interpretation of *Crawford* that would require confrontation of witnesses at pre-trial hearings. *See, e.g., People v. Felder*, 129 P.3d 1072, 1073 (Colo.Ct.App. 2005) ("Nothing in *Crawford* suggests that the Supreme Court intended to alter its prior rulings allowing hearsay at *pretrial* proceedings, such as a hearing on a suppression motion challenging the sufficiency of a search warrant."); *Sheriff v. Witzenburg*, 122 Nev. 1056, 145 P.3d 1002, 1006 (2006) ("We conclude that the Sixth Amendment Confrontation Clause and *Crawford* do not apply to a preliminary examination."); *State v. Wolnarowicz*, 720 N.W.2d 635, 641 (N.D. 2006) ("In *Crawford*, the United States Supreme Court did not indicate it intended to change the law and apply the Confrontation Clause to pretrial hearings. . . . . The Sixth Amendment right to confrontation is a trial right, which does not apply to pretrial suppression hearings."); *State v. Rhinehart*, 153 P.3d 830, 834–35 (Utah Ct.App. 2006) ("The Confrontation Clause pertains to a criminal defendant's right to confront and cross-examine the witnesses against the defendant at trial; it does not afford the right to confront and cross-examine witnesses at a preliminary hearing, and *Crawford* does not alter the Court's previous holdings with respect to this matter.").

Most of the case law interpreting *Crawford* has developed in the context of pretrial evidentiary suppression hearings, as can be seen from the above passage, which is fairly

typical of courts considering confrontation clause issues, and represents the majority opinion in this area. However, as Mr. Mittman noted in the March 4, 2012, memorandum submitted by the ACLU to the committee regarding confrontation clause concerns with section 16 of HB 359, while no court has ruled that the Confrontation Clause applies to a mental competency hearing, there may be reasons why the Alaska Supreme Court might do so.

Mr. Mittman referred the committee to the holding in *State v. Gary F.*, 432 S.E.2d 793, 800 (W.Va. 1993), where the court ruled that the Confrontation Clause applied to a pre-trial hearing involving a decision about whether a case should be transferred from juvenile to adult court. Reference to this decision should not be minimized, as the same issues present in *State v. Gary F.* are very similar to the inquiry under AS 12.47.100, where a court must determine whether a defendant is mentally competent to stand trial. Like the inquiry in *Gary F.*, the inquiry under AS 12.47.100 regarding the competency of a witness to stand trial is an issue that once decided in a pre-trial context, is not an issue that will be later litigated at trial.

Unlike the issues discussed by *Crawford*, and the other cases interpreting *Crawford* in the context of application of the Confrontation Clause to suppression hearings, where the defendant will ultimately have the right to confront the evidence at trial in front of a jury, mental competency to stand trial under AS 12.47.100 is not an issue that will be litigated before a jury. In other words, once a finding is made under AS 12.47.100, the defendant doesn't have a subsequent opportunity to confront, in person, the witnesses the court relied on at the pre-trial hearing since the issue will not be before the jury.

The considerations of application of the Confrontation Clause to pre-trial suppression hearings in *Crawford*, where the Court was aware that, after a pre-trial hearing, the defendant would have a confrontation right at trial to confront essentially the same evidence, may be distinguishable in the context of AS 12.47.100. In the context of a hearing under AS 12.47.100, the Alaska Supreme Court may extend the Confrontation Clause to a hearing conducted pursuant to AS 12.47.100, as a narrow exception to *Crawford*, and heightened protection for a criminal defendant in a competency hearing for the reasons discussed above. Please note, I did not have time to address the sufficiency of video teleconferencing to preserve a defendant's Confrontation Clause right. I would note, as Mr. Mittman has in the ACLU's memorandum, that video teleconferencing may be subject to close scrutiny in this context in a criminal case. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Blume v. State*, 797 P.2d 664, 674 (Alaska App. 1990).

DDG:ljw
12-213.ljw

Leg.Legal 465-2029

27G-2-C
3/15/2012
(3:03 pm)
Carpeneti

AMENDMENT #3 OK

OFFERED IN THE HOUSE JUDICIARY COMMITTEE

BY _____

TO: HB 359

Page 4, line 29 through page 5, line 3:

Delete all material and insert:

"(c) Prostitution is a class C felony if

(1) the defendant ~~is a patron of~~ patronizes a prostitute;

(2) the prostitute is under 18 years of age; and

(3) the defendant is over 18 years of age and at least three years older than the prostitute.

(d) In a prosecution for a felony under this section that provides that the prostitute be under 18 years of age, it is an affirmative defense that, at the time of the alleged offense, the defendant

(1) reasonably believed the prostitute to be 18 years of age or older; and

(2) undertook reasonable measures to verify that the prostitute was that age or older."

27G-2-A
3/15/2012
(3:01 pm)
Carpeneti

AMENDMENT #4

OFFERED IN THE HOUSE JUDICIARY COMMITTEE BY OK

TO: HB 359

Page 8, lines 21 - 22, following "witness":

Delete "would be required to travel more than 50 miles to the court or"

Page 8, line 23, following "court":

Insert "; and the procedure allows the parties a fair opportunity to examine the witness. The video conference technician shall be the only person in the presence of the witness unless the court, in its discretion, determines that another person may be present. Any person present with the witness must be identified on the record"

27G-2-B
3/15/2012
(2:24 pm)
Carpeneti

AMENDMENT #5

OFFERED IN THE HOUSE JUDICIARY COMMITTEE

BY OK

TO: HB 359

Page 17, line 1, following "testimony":

Insert "at trial"

Page 17, line 11, following "stand.", through line 15:

Delete all material.

Insert "The video conference technician shall be the only person in the presence of the witness unless the court, in its discretion, determines that another person may be present. Any person present with the witness must be identified."

27G-2-C
3/15/2012
(3:03 pm)
Carpeneti

AMENDMENT #3 3/16/12

OFFERED IN THE HOUSE JUDICIARY COMMITTEE
TO: HB 359

M BY Gruenberg
lyn
no obj. OK

Page 4, line 29 through page 5, line 3:

Delete all material and insert: (amdt. to amdt. #3)

"(c) Prostitution is a class C felony if

(1) the defendant ~~is a patron of~~ patronizes a prostitute;

(2) the prostitute is under 18 years of age; and ok.

(3) the defendant is over 18 years of age and at least three years older than the prostitute.

(d) In a prosecution for a felony under this section that provides that the prostitute be under 18 years of age, it is an affirmative defense that, at the time of the alleged offense, the defendant

(1) reasonably believed the prostitute to be 18 years of age or older; and

(2) undertook reasonable measures to verify that the prostitute was that age or older."

27G-2-A
3/15/2012
(3:01 pm)
Carpeneti

AMENDMENT #4

OFFERED IN THE HOUSE JUDICIARY COMMITTEE

BY Rep. Gruenberg and Rep. Holmes

TO: HB 359

no objection. OK

Page 8, lines 21 - 22, following "witness":

Delete "would be required to travel more than 50 miles to the court or"

Page 8, line 23, following "court":

Insert "; and the procedure allows the parties a fair opportunity to examine the witness. The video conference technician shall be the only person in the presence of the witness unless the court, in its discretion, determines that another person may be present. Any person present with the witness must be identified on the record"

#1 delete Sec. 20

#2 f.n.

#3-5 fax

27G-2-B
3/15/2012
(2:24 pm)
Carpeneti

AMENDMENT #15

OFFERED IN THE HOUSE JUDICIARY COMMITTEE
TO: HB 359

M BY Holmes
— no objection
OK

Page 17, line 1, following "testimony":
Insert "at trial"

Page 17, line 11, following "stand.", through line 15:
Delete all material.
Insert "The video conference technician shall be the only person in the presence of the witness unless the court, in its discretion, determines that another person may be present. Any person present with the witness must be identified."

memo for HFIN

Amt. #6 (~~conceptual~~)

M Rep. Gruenberg
— pg 17, ln. 1

insert word 'only'
(between witness + if)

('only if')
Q.

no obj;
OK

M
Peggy

M Rep. Gruenberg

Amdt. 7

pg. 8, ln. 22 "lives" → is

no obj.

OK

Amdt. 8

Pg. 8, line 18

M Rep. Gruenberg (Keller) follow 'may' ln. 18

(travel by air))

for good cause shown,

in its discretion,

OK

Conceptual

Wtd

Amdt 9
Rep. Keller
Rep. Gruenberg

Rick Sv. eg. delay of competency hearing (cost) raises issues..

is not a consideration

RS - Bethel → Anchorage.

define "good cause shown"

3/16 Amdt. 10 HB 359

pg 5, ln. 19, except the defend,

w/d following 'witness'

Amdt. 11

M pg. 5, ln. 19 Δ the to 'a'

Rep. Greenberg no obj OK.

Amdt. 12

M pg. 16, ln. 31 the court may

Rep. Holmes in its discretion, auth.

no obj. OK.

27G-2-C
3/15/2012
(3:03 pm)
Carpeneti

AMENDMENT

OFFERED IN THE HOUSE JUDICIARY COMMITTEE

BY _____

TO: HB 359

Page 4, line 29 through page 5, line 3:

Delete all material and insert:

"(c) Prostitution is a class C felony if

(1) the defendant is a patron of a prostitute;

(2) the prostitute is under 18 years of age;

(3) the defendant is over 18 years of age and at least three years older than the prostitute.

(d) In a prosecution for a felony under this section that provides that the prostitute be under 18 years of age, it is an affirmative defense that, at the time of the alleged offense, the defendant

(1) reasonably believed the prostitute to be 18 years of age or older; and

(2) undertook reasonable measures to verify that the prostitute was that age or older."

Sec. 11.81.640. Application of AS 11.81.600 — 11.81.630. AS 11.81.600 — 11.81.630 apply only to this title. (§ 10 ch 166 SLA 1978)

NOTES TO DECISIONS

Stated in Neitzel v. State, 655 P.2d 325 (Alaska Ct. App. 1982).
Cited in Brown v. State, 739 P.2d 182 (Alaska Ct. App. 1987); Cole v. State, 828 P.2d 175 (Alaska Ct. App. 1992); Alvarez v. Ketchikan Gateway Borough, 91 P.3d 289 (Alaska Ct. App. 2004).

Article 7. Definitions.

Section
900. Definitions

Sec. 11.81.900. Definitions. (a) For purposes of this title, unless the context requires otherwise,

(1) a person acts "intentionally" with respect to a result described by a provision of law defining an offense when the person's conscious objective is to cause that result; when intentionally causing a particular result is an element of an offense, that intent need not be the person's only objective;

(2) a person acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when the person is aware that the conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist; a person who is unaware of conduct or a circumstance of which the person would have been aware had that person not been intoxicated acts knowingly with respect to that conduct or circumstance;

(3) a person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; a person who is unaware of a risk of which the person would have been aware had that person not been intoxicated acts recklessly with respect to that risk;

(4) a person acts with "criminal negligence" with respect to a result or to a circumstance described by a provision of law defining an offense when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

(b) In this title, unless otherwise specified or unless the context requires otherwise,

(1) "access device" means a card, credit card, plate, code, account number, algorithm, or identification number, including a social security number, electronic serial number, or password, that is capable of being used, alone or in conjunction with another access device or identification document, to obtain property or services, or that can be used to initiate a transfer of property;

(2) "affirmative defense" means that

(A) some evidence must be admitted which places in issue the defense; and

(B) the defendant has the burden of establishing the defense by a preponderance of the evidence;

(3) "animal" means a vertebrate living creature not a human being, but does not include fish;

(4) "benefit" means a pre
third person pursuant to th
(5) "building", in additio
structure adapted for overn
when a building consists of
rooms, each unit is consider
(6) "cannabis" has the me
(7) "conduct" means an a
(8) "controlled substance'
(9) "correctional facility"
confinement of persons und
(10) "credit card" means
credit plate, courtesy card,
without fee by an issuer for
credit;
(11) "crime" means an off
crime is either a felony or a
(12) "crime involving dom
(13) "criminal street gang
(A) who have in common
marking, style of dress, or
(B) who, individually, joi
commit, within the precedi
association with the group, t
following:
(i) AS 11.41;
(ii) AS 11.46; or
(iii) a felony offense;
(14) "culpable mental sta
"criminal negligence", as th
(15) "dangerous instrume
(A) any deadly weapon or
attempted to be used, or th
physical injury; or
(B) hands or other object
blood by applying pressure
(16) "deadly force" means
under circumstances that th
serious physical injury; "de
firearm in the direction of a
believed to be and intentio
physical injury by means of
(17) "deadly weapon" me
causing death or serious phy
or an explosive;
(18) "deception" means to
(A) create or confirm anot
be true, including false im
intention or other state of m
(B) fail to correct another'
or confirmed;
(C) prevent another from
property or service involved;