The Judiciary, State of Hawai‘i

Testimony to the House Committee on Judiciary
Representative Karl Rhoads, Chair
Representative Maile S. L. Shimabukuro, Vice Chair

Friday, February 21, 2014, 1:00 p.m.
State Capitol, Conference Room 325

By

Judge Glenn J. Kim, Chair
Supreme Court Standing Committee on the Hawai‘i Rules of Evidence

Bill No. and Title: House Bill No. 2574, Relating to Evidence.

Purpose: Amends the Hawai‘i Rules of Evidence to authorize nonresident property crime victims to testify in criminal proceedings by a live two-way video connection.

Judiciary's Position:

The Hawai‘i Supreme Court’s Committee on Rules of Evidence opposes H.B. No. 2574, which would authorize “video testimony of [a] nonresident in a [prosecution for a] felony property offense.” The measure would allow a Hawai‘i court to receive testimony by live, two-way closed circuit television from a property crime victim located outside Hawai‘i. The procedure would violate the Confrontation Clauses of the U.S. and Hawa‘i Constitutions.

The proponents of H.B. No. 2574 apparently recognize the applicability of the rule of Maryland v. Craig, 497 U.S. 836, 860 (1990)(approving closed circuit broadcast of testimony given by a child sexual abuse victim at a remote location out of the accused’s presence), requiring a “case-specific finding of necessity” to satisfy the Sixth Amendment’s Confrontation Clause. They claim, in the preamble to this measure, that the denial of face-to-face confrontation “is necessary to further an important public policy of ensuring public safety for visitors and residents.” But there are no case-specific findings of necessity contemplated, other than (1) “the crime is a felony” and (2) the victim-witness is a nonresident of this state. These findings are not case-specific, and the link between this procedure and the stated goal of ensuring public safety is not stated, not apparent, and not inferable.

We invite the Committee's attention to United States v. Yates, 438 F.3d 1307 (11th Cir. 2006)(en banc), where the testimony of two witnesses located in Australia was broadcast into an Alabama courtroom by means of a two-way, closed circuit television procedure. The witnesses were unwilling to travel to the United States, and they were beyond the federal district court's subpoena power. Yates holds:

> The district court made no case-specific findings of fact that would support a conclusion that this case is different from any other criminal prosecution in which the Government would find it convenient to present testimony by two-way video conference. All criminal prosecutions include at least some evidence crucial to the Government's case, and there is no doubt that many criminal cases could be more expeditiously resolved were it unnecessary for witnesses to appear at trial. If we were to approve introduction of testimony in this manner, on this record, every prosecutor wishing to present testimony from a witness overseas would argue that providing crucial prosecution evidence and resolving the case expeditiously are important public policies that support the admission of testimony by two-way video conference. . . . In this case, there simply is no necessity of the type Craig contemplates. When one considers that Rule 15 (which provides for depositions in criminal cases) supplied an alternative, this lack of necessity is strikingly apparent.

The Yates court added that Fed. R. Crim. P. 15 allows the Government to depose witnesses and guarantees "the defendant's right to physical face-to-face confrontation by specifically providing for his presence at the deposition." 438 F.3d at1317. The court reasoned: "On this record, there is no evidentiary support for a case-specific finding that the witnesses and defendants could not be placed in the same room for the taking of pretrial deposition testimony pursuant to Rule 15." Id.

We have presented Yates in some detail for several reasons. To begin with, it is a proper application of Maryland v. Craig. Secondly, it closely parallels any record that would be developed in a court adopting the HB 2574 procedure. And it shows that necessity is absent whenever a deposition procedure like that furnished by Fed. R. Crim. P. is available to the prosecutor. We note that the deposition procedure of HRPP (Hawai'i Rule of Penal Procedure) 15, our state counterpart of the federal deposition rule, permits depositions under the same conditions as does the federal rule, and both rules are far superior to a two-way closed circuit telecast because the defendant is entitled to be present at the deposition.

Why is the accused's presence with the witness when testimony is taken so critical?

Isn't two way TV, where the witness can see the defendant, and vice versa, just as good as physical presence? For the answer we go back to Coy v. Iowa, 487 U.S. 1012 (1988), which posited physical, face-to-face confrontation as the "core" value of the Confrontation Clause. The Yates court also addressed this question: "The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation. As our sister circuits have recognized, the two are not constitutionally equivalent. . . . The Sixth Amendment's guarantee of the right to confront one's accuser is most certainly compromised when the confrontation occurs through an electronic medium." Id.

HB 2574 should be disapproved because it is unnecessary and violative of the Constitution.

Thank you for the opportunity to testify on House Bill 2574.