FOR PUBLICATION

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, **Plaintiff,** **vs.** **PETERKIN FLORESCA TABABA,** **Defendant.**	**CRIMINAL CASE NO. 11-0144A** **ORDER GRANTING THE COMMONWEALTH'S MOTION TO CALL TRIAL WITNESS BY WAY OF VIDEO CONFERENCE**

I. INTRODUCTION

THIS MATTER came before the Court on July 27, 2012 at 9:30 a.m. in Courtroom 202A. Assistant attorney general, Margo A. Brown, appeared on behalf of the Commonwealth of the Northern Mariana Islands ("the Commonwealth"). Steven P. Pixley, private counsel, appeared on behalf of the defendant, Peterkin Floresca Tababa ("Defendant"). The Commonwealth brought a motion to permit its expert witness, Lesa Nelson ("Ms. Nelson"), to testify telephonically or by way of video conference in lieu of testifying in person at the jury trial.

Based on the papers submitted and oral arguments of counsel, the Court hereby **GRANTS** the Commonwealth's motion.

II. BACKGROUND

Defendant is charged with three counts of sexual assault of a minor in the first degree, in violation of 6 CMC § 1306(a)(1). Defendant allegedly raped and impregnated the minor victim, R.G.S. On April 17, 2010, at the age of thirteen years old, R.G.S. gave birth to a daughter, J.M.S. In March 2011, Affiliated Genetics Lab, Inc. ("Lab"), an accredited lab

located in Salt Lake City, Utah, collected a DNA sample from Defendant and J.M.S. in order to conduct a paternity test. On April 22, 2012, the Lab completed a Summary of Findings, stating in pertinent part: "Based on the results of the Fifteen genetic systems listed above, [Defendant] cannot be excluded as the biological father of [J.M.S.] . . . . The relative chance of Paternity, assuming a 50% prior chance, is 99.9999% as compared to an untested, unrelated man in the General Population population [sic]." (Commonwealth's Ex. B.)

On July 11, 2012, the Commonwealth filed a motion to permit the Lab's Chief Operations Officer, Ms. Nelson, to testify via telephonically or video conferencing as to the results of the paternity test she performed.[1] Ms. Nelson performed the DNA paternity test to determine whether Defendant is the biological father of J.M.S. On July 12, 2012, Defendant filed an objection to the Commonwealth's motion, raising the issue of the Confrontation Clause of the Sixth Amendment to the U.S. Constitution.

III. LEGAL STANDARD

The Commonwealth Rule of Criminal Procedure 26 provides: "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of the Commonwealth Legislature **or by any rule adopted by this court**." (Emphasis added). The Commonwealth Rule of Practice 30 allows counsel to request the use of closed circuit television in a criminal case "to facilitate the taking of the testimony" as long as counsel includes the necessary information in the request within the prescribed time limit. The court has discretion to grant or deny the request, with or without a hearing. *Id.* Other courts similarly possess discretion to permit a witness to testify by video conference in a criminal case. *See United States v. Gigante*, 166 F.3d 75, 82 (2d Cir. 1999)[2]; *Kramer v. State*, 277 P.3d

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[1] At the July 27, 2012 hearing, the Commonwealth stated that video conferencing would be an acceptable alternative to telephonic testimony. The Court finds that video conferencing better preserves the safeguards of the Confrontation Clause than telephonic testimony by allowing the defendant and trier of fact to visually observe the testifying witness. Therefore, the Court analyzes the Commonwealth's motion as seeking to admit Ms. Nelson's testimony via video conferencing.

[2] NMI R. Crim P. 26 is analogous to its federal counterpart. When "the NMI Rules of Criminal Procedure are based upon their federal counterpart, . . . the Court will principally look to the federal rules of criminal procedure when interpreting the NMI Rules of Criminal Procedure." *Commonwealth v. Laniyo*, 2012 MP 1 ¶ 15 (citing *Commonwealth Dev. Auth. v. Camacho*, 2010 MP 19 ¶ 16).

88, 93 (Wyo. 2012) ("To some extent, a trial court's decision to allow a witness to testify by video conference is left to the reasonable discretion of the court.") (citation omitted).

The court's discretion to admit telephonic or video testimony in a criminal case, however, is limited by the Sixth Amendment to the U.S. Constitution, which guarantees a defendant's right "to be confronted with the witnesses against him." [3] U.S. Const. amend. VI. The Confrontation Clause "reflects a **preference** for face-to-face confrontation at trial." *Maryland v. Craig*, 497 U.S. 836, 849 (1990) (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (emphasis in original)). However, the court may dispense with the preference for face-to-face confrontation if necessary to further an important public policy or state interest, and where the reliability of the testimony is otherwise assured. *Id.* at 850; *see also Mattox v. United States*, 156 U.S. 237, 243 (1895) (noting that the right to confrontation "must occasionally give way to considerations of public policy and necessities of the case."). Nevertheless, "the use of remote, closed-circuit television testimony must be carefully circumscribed." *United States v. Gigante*, 166 F.3d 75, 80 (2d Cir. 1999).

IV. DISCUSSION

In all criminal prosecutions, "[t]he accused has the right to be confronted with adverse witnesses." NMI Const. art. I, § 4(b); *see also* U.S. Const. amend. VI. The U.S. Supreme Court first analyzed the Confrontation Clause in *Mattox*, observing:

> 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.

[3] "Because the CNMI Constitution's Confrontation Clause is patterned after the U.S. Constitution's Confrontation Clause (Sixth Amendment), [the court] resort[s] to the U.S. Supreme Court's interpretation of the federal Confrontation Clause in interpreting the CNMI's Confrontation Clause." *Commonwealth v. Condino*, 3 NMI 501, 507 (1993).

Id. at 242-43. Subsequently, the Court reinforced the importance of face-to-face confrontation, noting that a witness is less likely to distort or misstate the facts when forced to face the defendant who may be directly harmed by the testimony. *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988) ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"). Face-to-face confrontation assists in serving the truth-seeking goal of the Confrontation Clause, along with the other elements of "oath, cross-examination, and observation by the trier of fact." *Craig*, 497 U.S. at 846.

Although physical presence of a witness is central to the Confrontation Clause, a defendant is not always entitled to face-to-face confrontation. *Id.* at 847. "[I]n certain narrow circumstances, 'competing interests, if closely examined, may warrant dispensing with confrontation at trial.'" *Id.* at 849 (quoting *Roberts*, 448 U.S. at 64). Before a court may dispense with the face-to-face preference of the Confrontation Clause, the trial court must "make case-specific findings that the procedure is necessary to further a public policy or state interest important enough to outweigh the defendant's constitutional right of confrontation and that it preserves all the other elements of the Confrontation Clause." *People v. Buie*, 775 N.W.2d 817, 825 (Mich. Ct. App. 2009) (citing *Craig*, 497 U.S. at 851-52, 855).

A. ADMITTING THE EXPERT TESTIMONY VIA VIDEO CONFERENCING IS NECESSARY TO FURTHER THE IMPORTANT PUBLIC POLICY OF THE FAIR ADMINISTRATION OF JUSTICE.

The Court left open the question whether certain public policies or state interests may **warrant a deviation from the Confrontation Clause's preference for face-to-face confrontation.** *Coy*, 487 U.S. at 1021 ("We leave for another day, however, the question whether any exceptions [to face-to-face confrontation] exist. Whatever they may be, they would surely be allowed only when necessary to further an important public policy."). Two years later, the Court answered its pending question, holding that the public policy of protecting child victims from the trauma of testifying in view of the defendant warrants using a one-way closed circuit television.[4] *Craig*, 497 U.S. at 853.

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[4] A one-way closed circuit television allows the defendant and others present in the courtroom to view the testifying witness, but the witness cannot see anyone in the courtroom. *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999). A two-way closed circuit television, or video conferencing, allows the witness and all present in the courtroom to instantaneously view and hear each other during the testimony.

The majority of courts interpreted *Craig* as creating a general rule that a public policy or state interest may be important enough to outweigh a defendant's right to confront adverse witnesses face-to-face in court. *See, e.g., Horn v. Quarterman*, 508 F.3d 306, 317, 319-20 (5th Cir. 2007). Thus, *Craig* does not create merely an exception to the Confrontation Clause limited to protecting child victims of sexual assault from the trauma of testifying in a defendant's presence. *Id.* Many courts have found good cause to allow a witness to testify telephonically or by video conference at trial when the witness was unable to travel due to illness or old age. *See, e.g., United States v. Gigante*, 166 F.3d 75, 81-82 (2d Cir. 1999); *People v. Wrotten*, 923 N.E.2d 1099, 1103 (N.Y. Sup. Ct. 2009); *Horn*, 508 F.3d at 320. The issue before this Court is whether an expert witness may testify by video conference where the witness is located in a foreign jurisdiction outside the subpoena power of the CNMI, and the witness is unwilling to travel to the CNMI to testify. There is a split of authority in answering this question. *United States v. Yates*, 438 F.3d 1307 (11th. Cir. 2006); *Harrell v. State*, 709 So. 2d 1364 (Fla. 1998).

In *Yates*, the Eleventh Circuit held that "the prosecutor's need for the video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the Defendants' rights, to confront their accusers face-to-face." 438 F.3d at 1316. There, two witnesses resided in Australia and were unwilling to travel to the United States to testify at trial. *Id.* at 1310. The government moved the court to admit their testimony via video conferencing to further the "important public polic[ies] of providing the fact-finder with crucial evidence," (citation omitted) "expeditiously and justly resolving the case," (citation omitted) and "ensuring that foreign witnesses can so testify" (citation omitted). *Id.* at 1315-16. The court found these public policies insufficient to override the defendants' right to confront their accusers face-to-face. *Id.* at 1316. The court also found video conferencing unnecessary to admit the witness' testimony due to the availability of a Rule 15 pre-trial deposition.[5] *Id.*

[5] Rule 15 of the Commonwealth Rules of Criminal Procedure is analogous to its federal counterpart. In "exception circumstances," a prospective witness's testimony may be preserved for use at trial via a deposition. NMI R. Crim. P. 15; Fed. R. Crim. P. 15.

Conversely, in *Harrell*, the Florida Supreme Court upheld the admission of video testimony from two witness victims because they "lived beyond the subpoena power of the court" and "it is clearly in [the] state's interest to expeditiously and justly resolve criminal matters that are pending in the state court system." *Id.* at 1369-70. There, a married couple was robbed while on vacation near the Miami airport. *Id.* at 1367. After the couple returned to their home in Argentina, they were called to testify regarding the robbery. *Id.* However, the couple was unwilling to attend the trial due to the distance and some health issues so they testified by video conference. *Id.* The court upheld this procedure, noting that one of the witnesses was in poor health, the witnesses were absolutely essential to the case, and the video conferencing procedure furthered the "important state interest in resolving criminal matters in a manner which is both expeditious and just." *Id.* at 1370. Additionally, the court found the procedure analogous to, and even more constitutionally sound than, a Rule 15 deposition.[6] *Id.*

This Court adopts the analysis and legal conclusion set forth *Harrell*. The Commonwealth Rules of Criminal Procedure "shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay." NMI R. Crim. P. 2. The expense and delay in securing the presence of expert witnesses at trial are particularly frequent and serious concerns for the CNMI due to its geographical size and location. Experts are often located in the United States mainland or a foreign country outside the subpoena powers of the CNMI. Also, off-island experts demand substantial travel expenses to testify in the CNMI, which is suffering exceptional financial hardship. These concerns do not simply implicate the convenience of witnesses,[7] but rather, they impede the

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[6] The Court agrees that video testimony need not yield to a Rule 15 deposition when available. Video testimony preserves more of the Confrontation Clause's safeguards than a Rule 15 deposition. *Gigante*, 166 F.3d at 81 ("[T]he closed-circuit presentation of [the witness's] testimony afforded greater protection of [the defendant's] confrontation rights than would have been provided by a Rule 15 deposition."); Hadley Perry, *Virtually Face-to-Face: The Confrontation Clause and the Use of Two-Way Video Testimony*, 13 Roger Williams U.L. Rev. 565, 593 (2008) ("Two-way video testimony . . . complies more fully with the Confrontation Clause than current methods – such as Rule 15 depositions – used by courts, [and] is also more effective and efficient in today's world.").

[7] *Contra Gonsoir v. People*, 793 P.2d 1165, 1166 (Col. 1990) ("[C]onvenience of a witness . . . [cannot] override a defendant's sixth amendment right of face-to-face confrontation."); *contra State v. Almanza*, 160 P.3d 932, 935 (N.M. Ct. App. 2007) ("[M]ere inconvenience to the witness is not sufficient to dispense with face-to-face confrontation.").

fair administration of justice by hindering the Commonwealth's ability to effectively prosecute cases. Judicial expediency is an important public policy that may serve as a basis for overriding Defendant's right to face-to-face confrontation.

B. DEFENDANT'S RIGHT IN HAVING A FACE-TO-FACE CONFRONTATION WITH THE EXPERT WITNESS, MS. NELSON, IS OUTWEIGHED BY THE IMPORTANT PUBLIC POLICY OF THE FAIR ADMINISTRATION OF JUSTICE.

"Although face-to-face confrontation forms 'the core of the values furthered by the Confrontation Clause,' [the Court] [has] nevertheless recognized that it is not the *sine qua non* of the confrontation right." *Craig*, 497 U.S. at 847[8] (quoting *Cal. v. Green*, 399 U.S. 149, 157 (1970)) (citing cases). Substantial compliance with the purposes behind the Confrontation Clause, which assures the reliability of the testimony, is sufficient to satisfy the contours of the Sixth Amendment. *See id.* (quoting *Green*, 399 U.S. at 166). The Commonwealth's proposed use of live video conferencing assures that Ms. Nelson will be aptly placed under oath, subject to cross-examination, and her demeanor will be observed by the jury. These three elements impress upon the witness the seriousness of the matter, subject the witness to the possibility of the penalty of perjury, allow opposing counsel to probe the witness for the truth, and place the credibility of the witness under the jury's scrutiny. *Id.* at 845-46. In viewing the specific circumstances of this case, the Court determines that the use of video conferencing substantially complies with the purposes behind the Confrontation Clause.

Defendant would enjoy very little, if any, benefit from confronting Ms. Nelson face-to-face. Ms. Nelson will be testifying as to the results of a neutral scientific test - a paternity test. Thus, Ms. Nelson's testimony will be almost completely void of subjective observations, presenting little opportunity for any manipulation of the facts. Any concerns that Defendant may have regarding Ms. Nelson's qualifications as an expert or the testing procedure and equipment she used in reaching her results can be easily ferreted out in cross-examination. Furthermore, there is very little danger of fraud or fabrication surrounding Ms. Nelson's testing

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[8] In upholding the use of the one-way circuit television procedure in a criminal case, the Supreme Court elaborated extensively on the well-established principle that "the [Confrontation] Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial." *Id.* at 847-48.

and anticipated testimony. According to the Commonwealth, she is unaware of the facts and legal implications surrounding the paternity test, which are not inherently apparent as in a drug test. *But cf. Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318-19 (2009).

In light of the substantial compliance with the Confrontation Clause through the use of video conferencing technology and the minimal cost in denying Defendant face-to-face confrontation with Ms. Nelson, the Court holds that the Commonwealth may introduce her testimony remotely. *cf. Harrell*, 709 So. 2d at 1372 (holding that the approved video-conferencing technique "will advance both the access to and the efficiency of the justice system, without compromising the expectation of the safeguards that are secured to criminal defendants."). This holding does not purport to make the video conferencing procedure commonplace.[9] The instant case presents a very rare and limited circumstance in which this procedure is constitutionally permissible. The witness is unavailable because she is outside the subpoena powers of the CNMI judiciary and the Commonwealth has unsuccessfully requested her voluntary presence at trial. Furthermore, she will be testifying as to the results of a technical DNA test rather than based on her perception or subjective opinion.

This holding is consistent with the Court's recent order, relied exclusively upon by Defendant, in which the Court denied allowing medical professionals to testify by telephone or video conference concerning a victim's physical injuries. *Commonwealth v. Pendergrass*, Crim. No. 11-0140R (NMI Super. Ct. March 19, 2012) (Order Denying Plaintiff's Motion in Limine to Allow Telephonic Testimony of Medical Professional Witnesses at 4). There, the expert witnesses resided in Saipan and were unwilling to appear at trial in Rota because of their busy schedules. *Id.* at 3. Also, they intended to testify as to their subjective observations

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[9] This Court agrees with the majority of jurisdictions that hold the video-conferencing procedure is not equivalent to physical, face-to-face confrontation. *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2011); *United States v. Beaman*, 322 F. Supp. 2d 1033-34 (D. N.D. 2004); *People v. Buie*, 775 N.W.2d 817, 823 (Mich. Ct. App. 2009); *Harrell*, 709 So. 2d at 1368. A minority of jurisdictions hold that when a witness simply has an ordeal with testifying in a courtroom, video testimony may be admitted without violating the Sixth Amendment. *Gigante*, 166 F.3d at 81 (finding that the *Craig* standard "constrain[s] the use of ***one-way*** closed-circuit television," but not two-way closed-circuit television, or video conferencing) (emphasis added); *People v. Algarin*, 498 N.Y.S.2d 977, 981 (NY Sup. Ct. 1986) ("[I]nstantaneous closed-circuit television can surely satisfy the dictates of the confrontation clause.").

of the cause and severity of the victim's physical injuries. *See id.* at 1. Unlike *Pendergrass*, the instant case involves an unavailable witness and proposed testimony concerning neutral scientific testing. The cases are easily distinguishable and, thus, *Pendergrass* is of no help to Defendant.

Lastly, the Court does not contend that neutral scientific testing, like a DNA or drug test, is per se reliable and admissible without substantially complying with the elements of the Confrontation Clause. In *Melendez-Diaz*, the U.S. Supreme Court found a violation of the Sixth Amendment when the government introduced into evidence an affidavit containing drug test results without calling the lab technician to testify. 557 U.S. at 318-20. The Court dismissed the government's argument that cross-examining the lab technician is unnecessary because a drug test is completely neutral and reliable. *Id.* at 318-19. Cross-examination is necessary to explore the medical professional's potential lack of proper training, deficiency in judgment, or improper testing methodology. *Id.* at 320. Similarly here, the Commonwealth could not simply admit the paternity test results into evidence without calling Ms. Nelson, who performed the test, to testify as a witness subject to cross-examination.

Based on the specific circumstances of this case, the Court holds that Ms. Nelson may testify via video conferencing without violating the Confrontation Clause. *See Gigante*, 166 F.3d at 80. Two-way video testimony fulfills the elements of the Confrontation Clause, and has the advantage of being "convenient, cost-effective, efficient, and comports with modern notions of globalization and technological advancements." Hadley Perry, *Virtually Face-to-Face: The Confrontation Clause and the Use of Two-Way Video Testimony*, 13 Roger Williams U.L. Rev. 565, 590 (2008). The tool of video conferencing is particularly valuable for taking testimony of key foreign witnesses beyond the subpoena power of the trial court. *Id.* at 592-93. "Because of these advantages, the technique is likely to become more widespread in the future and courts will be required to develop rules and guidelines governing its use." American Law Reports, Annotation, *Closed-Circuit Television Witness Examination*, 61 A.L.R. 1155 (2012); *see also Harrell*, 709 So. 2d at 1372.

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IV. CONCLUSION

For the foregoing reasons, the Court hereby **GRANTS** the Commonwealth's motion.[10]

IT IS SO ORDERED this 11th day of September, 2012.

ROBERT C. NARAJA, Presiding Judge

[10] It is the Commonwealth's burden to coordinate with the CNMI District Cout in advance to reserve: (1) a courtroom at the District Court for at least two days, and (2) video conferencing equipment to be used in conducting Ms. Nelson's examination. The Commonwealth shall notify all parties of the dates when the courtroom and video equipment is reserved.