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1 **FOR PUBLICATION**

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4 **IN THE SUPERIOR COURT**
5 **FOR THE**
6 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

6 **COMMONWEALTH OF THE**
7 **NORTHERN MARIANA ISLANDS,**

8 **Plaintiff,**

9 **v.**

10 **HO JIN YOON,**

11 **Defendant.**

) **CRIM. CASE NO. 13-0085**
)
)

) **ORDER GRANTING DEFENDANT'S**
) **MOTION FOR EXPERT TESTIMONY**
) **BY SKYPE**
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)
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12 **THIS MATTER** came before the Court on July 31, 2013 at 9:00 a.m. on Defendant's
13 motion. Defendant Ho Jin Yoon was represented by Richard W. Pierce. The Commonwealth was
14 represented by Assistant Attorney General Chemere K. McField. Based on a review of the filings,
15 oral argument and applicable law, the Defendant's motion is granted subject to the conditions
16 specified in this order.

17 **I. INTRODUCTION**

18 Defendant Yoon has been charged with the following counts: sexual abuse of a minor in the
19 first degree, in violation of 6 CMC § 1306(a)(1)(2); incest, in violation of 6 CMC § 1311(a)(1);
20 assault and battery, in violation of 6 CMC § 1202(a); child abuse, in violation of 6 CMC
21 § 5312(a)(3); and disturbing the peace, in violation of 6 CMC 3101(a). Information at 1-3. On July
22 19, 2013, Defendant filed this motion requesting that the Court allow testimony by "video
23 presentation from a distant location," to enable Defendant to present testimony of an expert witness
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1 located in the mainland United States. Def.'s Mot. at 1-2. The Commonwealth did not file a
2 written opposition, but orally opposed the motion at the hearing on July 31, 2013. The jury trial for
3 this matter is set for September 9, 2013.

4 **II. LEGAL STANDARD**

5 Rule 26 of the Commonwealth Rules of Criminal Procedure requires that witness testimony
6 take place "orally in open court, unless otherwise provided . . . by any rule adopted by this court."
7 Rule 30 of the Rules of Practice for the Commonwealth Superior Court provides such an exception,
8 granting the court discretion to allow testimony to be taken by closed circuit television. Pursuant
9 to Rule 30, a request for testimony by closed circuit television may be made if counsel or a party
10 "deem[s] it necessary that a witness' testimony in a . . . criminal . . . matter be taken by closed
11 circuit television . . . to facilitate the taking of testimony because of the nature of the claim, charge
12 or defense." NMI R. Prac. Rule 30(1). The procedure for filing such a request is laid out in the rule
13 and requires the requesting party to provide: (1) the name of the witness; (2) the general content of
14 the proposed testimony; and (3) the reasons why the witness should not testify personally in court.
15 NMI R. Prac. Rule 30(2). The rule also requires that such a request be filed no later than 14 days
16 prior to the trial, and any opposition must be filed no later than 4 days thereafter. NMI R. Prac.
17 Rule 30(3).

18 In addition to complying with the requirements of Rule 30, video testimony in a criminal
19 trial is limited by a defendant's right to confrontation.¹ NMI Const. art. I, § 4(b); *see also* U.S.
20 Const. amend. VI; *see e.g.*, *Commonwealth v. Tababa*, Crim. No. 11-0144 (NMI Super. Ct. Sept.
21 11, 2012) (Order Granting the Commonwealth's Motion to Call Trial Witnesses by Way of Video
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24 ¹ We look to the U.S. Supreme Court's interpretation of the federal Confrontation Clause to interpret the CNMI's
Confrontation Clause. *Commonwealth v. Condino*, 3 NMI 501, 501 (1993).

1 Conference). However, the right to confrontation does not limit the evidence a criminal defendant
2 may introduce. *Giles v. California*, 554 U.S. 353, 375 n.7 (2008).

3 **III. DISCUSSION**

4 The Commonwealth Superior Court recently allowed the introduction of video testimony by
5 an expert witness for the prosecution in *Commonwealth v. Tababa*. *Tababa*, Crim. No. 11-0144.

6 There the court stated:

7 The expense and delay in securing the presence of expert witnesses at trial are
8 particularly frequent and serious concerns for the CNMI due to its geographical size
9 and location. Experts are often located in the United States mainland or a foreign
10 country outside the subpoena powers of the CNMI. Also, off-island experts demand
11 substantial travel expenses to testify in the CNMI, which is suffering exceptional
12 financial hardship. These concerns do not simply implicate the convenience of
13 witnesses, but rather, they impede the fair administration of justice by hindering the
14 Commonwealth's ability to effectively prosecute cases.

15 *Tababa*, Crim. No. 11-0144 at 6-7.

16 The concerns raised by the *Tababa* court also apply to criminal defendants seeking
17 to introduce expert testimony. Criminal defendants generally have even more limited
18 resources than the government. And the fair administration of justice depends not only on
19 the Commonwealth's ability to prosecute, but also on the ability of the accused to present a
20 defense.

21 The *Tababa* court described the process used to submit testimony remotely as "live
22 video conferencing," and recognized that such a process would allow the expert witness to
23 be placed under oath, open her testimony up to live cross-examination, and allow the jury to
24 observe her demeanor. *Tababa*, Crim. No. 11-0144 at 7. The holding of the *Tababa* court
was narrow, stating that the court did not "purport to make the video conferencing
procedure commonplace," and that "[t]he instant case presents a very rare and limited
circumstance in which this procedure is constitutionally permissible." *Tababa*, Crim. No.
11-0144 at 8. However, the *Tababa* court dealt with a situation in which the defendant's

1 constitutional rights were at issue. In a case such as this one, where there are no
2 confrontation issues because the expert witness is presented by the defendant, live video
3 testimony from a remote location is available at the court's discretion.

4 Defendant Yoon requests remote testimony because the cost of having an expert
5 travel to the CNMI is prohibitively expensive and there are no experts of the type Defendant
6 is seeking on-island. Defendant Yoon argues that in order to defend himself against the
7 charges in this case, alleged sexual abuse of a child, he needs to introduce an expert witness
8 to counter the testimony of the Commonwealth's experts. Defendant Yoon reports that the
9 proposed testimony will explain that it is not possible to tell whether penetration took place
10 based on the specific examination conducted by the physician who treated the alleged
11 victim. The proposed testimony of the expert witness will also include information about
12 the success rates of specialized child abuse pediatricians in accurately diagnosing abuse
13 compared to the accuracy of general pediatricians. Defendant Yoon has not, however,
14 provided the name of the witness. At the hearing, counsel for Defendant Yoon explained
15 that, because of potentially prohibitive costs, the Defendant was unwilling to retain the
16 expert until the issue of remote video testimony was resolved.

17 The Commonwealth did not submit a written opposition to Defendant's request, but
18 the Commonwealth opposed the request orally during the hearing on July 31, 2013. The
19 Commonwealth stated it opposes the motion because Defendant's expert's testimony would
20 be cumulative, and that the Commonwealth's expert is neutral. The Commonwealth urged
21 the Court to distinguish between an expert offering testimony concerning the results of
22 scientific testing, as in the *Tababa* case, and an expert offering testimony concerning
23 whether the results of an examination are reliable, as is proposed in this case. Finally, the
24 Commonwealth suggested that the Defendant should be required to pay the costs,

1 approximately \$19,000, of having the expert witness travel to Saipan. The Court is not
2 convinced that any of these arguments has legal merit.

3 Finally, the Court considers whether the phrase “closed circuit television” in Rule 30
4 limits the technology used to effectuate real-time video conferencing. The American Law
5 Reports database of cases involving testimony by closed circuit television notes that the
6 manner of remote examination varies, but “generally it involves the instantaneous
7 transmission of images and voices over the television cameras and monitors, with parties at
8 either end of the circuit able to hear and be heard, see and be seen by each other.” American
9 Law Reports 4th, Annotation, *Closed-circuit television witness examination*, 61 A.L.R.4th
10 1155, *2 n.2 (2013). Technological advances have made it possible for parties on either end
11 of a video conference to be seen and heard simultaneously in a variety of ways. This Court
12 takes the view that because technology is constantly progressing, the reference to “closed
13 circuit television” in Rule 30 encompasses any secure and reliable method of instantaneous
14 audio/visual transmission between the courtroom and the witness.

15 The Defendant in this case suggests two options for presenting the remote testimony:
16 (1) holding a portion of the trial in the Federal District Court, using that court’s video
17 conferencing technology; or (2) using Skype to allow the video conference testimony to take
18 place in the Superior Court. Other trial courts in the United States have allowed witnesses
19 to testify remotely via Skype in criminal cases. *See, e.g., Rivera v. State*, 381 S.W.3d 710,
20 711 n.2 (Tex. Crim. App. 2012); and Martha Neil, *Judge Nixes Motion to Compel Witnesses*
21 *in Drug Case, But OKs Unusual Alternative: Skype*, ABA JOURNAL, Feb. 24, 2011,
22 <http://www.abajournal.com>. The Court sees no reason to require the jurors, parties and
23 court staff to travel to the federal courthouse. Instead, in the spirit of eliminating any
24 unjustifiable expense or delay during trial, this Court is open to having the video conference

1 via Skype as a manner of “testimony by closed circuit television.” See NMI R. Prac.
2 Rule 30.

3 Accordingly, this Court finds that it is necessary for Defendant Yoon to be able to present
4 the testimony of an expert witness by video conference, and that the most efficient manner of doing
5 so is to utilize Skype in Courtroom 220A.

6 **IV. CONCLUSION**

7 In accordance with the above discussion, the Defendant’s motion for testimony by video is
8 **GRANTED**, and the Court orders the following:

- 9 1. Defendant shall notify the Court and the Commonwealth of the name of the expert
10 witness no later than 7 calendar days following this Order.
- 11 2. Defendant’s counsel shall arrange a demonstration of the video-conferencing technology
12 to be used no later than 7 calendar days prior to trial. This demonstration shall take
13 place in courtroom 220A with the Court and the Commonwealth present.

14 **IT IS SO ORDERED** this 6 day of August, 2013.

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20 JOSEPH N. CAMACHO
21 Associate Judge
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