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BY
SUPERIOR COURT

1 **FOR PUBLICATION**

2
3 **IN THE SUPERIOR COURT**
4 **FOR THE**
5 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

5 **COMMONWEALTH OF THE**) **CRIM. CASE NO. 14-0143**
6 **NORTHERN MARIANA ISLANDS,**)
7 **Plaintiff,**)
8 **v.**) **ORDER GRANTING**
9 **TAITANO, HANK KENNEY PEREDO**) **COMMONWEALTH'S MOTION TO**
10 **Defendant.**) **CALL WITNESS BY WAY OF**
) **ELECTRONIC VIDEOCONFERENCING**
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11 **I. INTRODUCTION**

12 This matter came before the Court on June 8, 2015 at 9:00 a.m. in Courtroom 220A. The
13 Defendant, Hank Kenney Peredo Taitano, was present in custody and represented by Assistant
14 Public Defender Matthew Meyer. The Commonwealth was represented by Assistant Attorney
15 General Shannon Foley. On May 27, 2015, the Commonwealth filed its Motion to Call Witness by
16 Way of Electronic Videoconferencing. The Defendant filed his Reply to Government Motion to
17 Allow Teleconference Testimony on June 1, 2015.¹ The Commonwealth filed its Response to
18 Defendant's Reply to Government Motion to Allow Teleconference Testimony on June 5, 2015.

19 Based on a review of the filings, oral argument, and applicable law, the Court **GRANTS** the
20 Commonwealth's Motion to Call Witness by Way of Electronic Videoconferencing.

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¹ The Defendant titled his opposition as a reply.

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II. BACKGROUND

The Defendant is charged with Sexual Abuse of a Minor in the First Degree under 6 CMC § 1306(a). The jury trial in this case is set for June 15, 2015. The alleged victim gave birth to a baby, and after the baby was born, samples were secured from the child to conduct a paternity test. These samples were sent to LabCorp, a paternity testing facility often used by the CNMI family court. LabCorp is located in Burlington, North Carolina. LabCorp emailed the Commonwealth the results of the paternity test on May 15, 2015, and the results were received via mail on May 26, 2015. The Commonwealth disclosed the test results to the Defendant on May 18, 2015.

The Commonwealth plans on calling Gary Stuhlmiller, a laboratory technician with LabCorp, as a witness to testify as to the paternity test results. Mr. Stuhlmiller lives and works in North Carolina. The Commonwealth is moving to have Mr. Stuhlmiller testify at the June 15, 2015 jury trial via a two-way electronic videoconferencing system (“Skype”), and the Defendant opposes this motion.

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III. DISCUSSION

Commonwealth Rule of Criminal Procedure 26 requires that “[i]n 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.”² Commonwealth Rule of Practice 30 allows for testimony by “closed circuit television” when necessary “to facilitate the taking of the

² There is a vast difference between a witness testifying via videoconference (i.e. Skype) and a Star Chamber proceeding, where the witnesses are examined in secret. When a witness is examined via videoconference, the witness is still in full view of the jury, attorneys, and defendant. Effectively, the testimony is taken in open court – a far cry from a secretive and arbitrary Star Chamber proceeding, where witnesses do not testify in open court. *See Star Chamber*, http://en.wikipedia.org/wiki/Star_Chamber.

1 testimony.”³ Skype is considered to be a type of closed circuit television, as “‘closed circuit
2 television’ in Rule 30 encompasses any secure and reliable method of instantaneous audio/visual
3 transmission between the courtroom and witness.” *Commonwealth v. Yoon*, Crim. No. 13-0085
4 (NMI Super. Ct. Aug 6, 2013) (Order Granting Defendant’s Motion for Expert Testimony by Skype
5 at 5).

6 A court’s ability to hear testimony via video conferencing in a criminal case is limited by
7 the Confrontation Clause of the Sixth Amendment of the U.S. Constitution. Under the Sixth
8 Amendment, a defendant has the right “to be confronted with the witnesses against him.” U.S.
9 Const. amend. VI. There is a “**preference** for face-to-face confrontation at trial” under the
10 Confrontation Clause. *Commonwealth v. Tababa*, Crim. No. 11-0144A (NMI Super. Ct. Sept. 11,
11 2012) (Order Granting the Commonwealth’s Motion to Call Trial Witness By Way of
12 Videoconference at 3) (citing *Maryland v. Craig*, 497 U.S. 836, 849 (1990)) (emphasis in original).
13 Despite this, a court “may dispense with the preference for face-to-face confrontation if necessary
14 to further an important public policy or state interest, and where the reliability of the testimony is
15 otherwise assured.” *Id.* (citing *Craig*, 497 U.S. at 850).

16 **1. There is a Public Policy Interest in Allowing the Witness to Testify Via Skype**

17 The Commonwealth argues that Mr. Stuhlmiller should be allowed to testify remotely via
18 Skype as to the results of the paternity test, as “Mr. Stuhlmiller’s testimony will aid the finder of
19 fact in understanding the paternity test results obtained in an effort to corroborate the allegations
20 against the Defendant.” Commonwealth’s Mot. to Call Witness 4:6-4:9. In particular, since Mr.

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23 ³ The CNMI Legislature has addressed this issue by allowing the Defendant and witness to be in different rooms while
24 the witness is testifying in certain circumstances. *See* 6 CMC § 1318 *et seq* (allowing children under the age of 16 to
testify in another room, via closed circuit television or one way mirrors in certain circumstances, as well as allowing the
defendant to be excused from the courtroom).

1 Stuhlmiller “lives on the mainland and outside the subpoena powers of the CNMI,” allowing him to
2 testify via Skype would serve an important public policy interest. *Id.* at 4:9-4:12.

3 In *Commonwealth v. Tababa*, the Honorable Presiding Judge Naraja allowed for expert
4 testimony via video conferencing. *Tababa*, Crim. No. 11-0144A at 6. The *Tababa* court
5 acknowledged that there is a split of authority in addressing whether a witness located in a foreign
6 jurisdiction, beyond the subpoena power of the CNMI and unwilling to travel to the CNMI, could
7 testify via video conference. *Id.* (citing *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006);
8 *Harrell v. State*, 709 So. 2d 1364 (Fla. 1998)).

9 In *Yates*, two prosecution witnesses resided in Australia and were unwilling to travel to the
10 United States to testify. *Yates*, 438 F.3d at 1310. The court held that “the prosecutor’s need for the
11 video conference testimony to make a case and to expeditiously resolve it are not the type of public
12 policies that are important enough to outweigh the Defendant’s rights, to confront their accusers
13 face-to-face.” *Id.* at 1316.

14 In *Harrell*, on the other hand, the Florida Supreme Court held that two victim witnesses,
15 residing in Argentina, were properly allowed to testify via a satellite video transmission, as the two
16 witnesses “lived beyond the subpoena power of the court” and it was “in [the] state’s interest to
17 expeditiously and justly resolve criminal matters that are pending in the state court system.”
18 *Harrell*, 709 So. 2d at 1369-70. Presiding Judge Naraja elected to follow the *Harrell* court,
19 especially because of the difficulties in securing expert testimony in a jurisdiction as small and
20 remote as the CNMI. *Tababa*, Crim. No. 11-0144A at 6.

21 The Defendant is urging the Court to follow the standard applied in *Yates*, and thus to
22 distance itself from the approach taken in *Tababa*. The Defendant argues that, despite the approach
23 taken by Presiding Judge Naraja in *Tababa*, the Court should “find that expeditiousness and lack of
24 subpoena power, essentially convenience and cost, should never be sufficient to outweigh a

1 defendant's right to confront witnesses live, in person, as is required in *Craig*." Def. Reply to
2 Gov't. Mot. 3:22-3:24.

3 The Commonwealth Superior Court has on multiple occasions allowed for remote testimony
4 by expert witnesses in criminal cases when requested by the prosecution, not only in *Tababa*, but
5 also more recently in *Commonwealth v. Crisostomo*, Crim. No. 13-0049 (NMI Super. Ct. Feb. 11,
6 2014) (Order Denying Commonwealth's Motion for Deposition; Granting Commonwealth's
7 Motion for Online Videoconferencing Testimony). The proposed defense expert in *Crisostomo* also
8 testified remotely.⁴ The Commonwealth Superior Court also allowed remote testimony in a criminal
9 case when requested by the defense in *Commonwealth v. Yoon*, Crim. No. 13-0085 (NMI Super. Ct.
10 Aug. 6, 2013) (Order Granting Defendant's Motion for Expert Testimony by Skype). Both
11 *Crisostomo* and *Yoon* were heard by the undersigned judge, the Honorable Judge Camacho.

12 The Court elects to continue to follow the approach taken in *Tababa* and *Crisostomo*, in part
13 because of the very valid logistical concerns raised by Presiding Judge Naraja in his order in
14 *Tababa*. "Experts are often located in the United States mainland or a foreign country outside the
15 subpoena powers of the CNMI. Also, off-island experts demand substantial travel expenses to
16 testify in the CNMI, which is suffering exceptional financial hardship." *Tababa*, Crim. No. 11-
17 0144A at 6. Since the CNMI is so small and remote, these challenges "impede the fair
18 administration of justice by hindering the Commonwealth's ability to effectively prosecute cases."
19 *Id.* at 6-7.

20 In *Crisostomo*, this Court noted that off-island professionals are essential to ensuring the
21 administration of justice in the CNMI. *Crisostomo*, Crim. No. 13-0049 at 7. Rather than merely
22 accommodating an expert's preference not to travel, allowing Skype testimony from experts allows

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24 ⁴ The Court conducted a *Daubert* hearing to determine if the proposed defense expert would qualify as an expert. The Court eventually determined that the witness did not meet the qualifications to testify as an expert.

1 both the Commonwealth and Defendant the opportunity to call upon experts who may otherwise be
2 unavailable in the CNMI. *Id.* In the CNMI, Skype testimony by experts goes far beyond simply
3 making trials more convenient for the parties – it ensures that the parties have access to a wide
4 range of experts, who would not ordinarily be available in the CNMI, thus allowing for the
5 expedient and efficient administration of justice.

6 In addition, the Court notes that the circumstances in *Tababa* are very similar to those in the
7 present case.⁵ In *Tababa*, the Commonwealth sought to have an expert witness testify via video
8 conference as to the results of a paternity test in a sexual abuse case. *Tababa*, Crim. No. 11-0144A
9 at 1-2. Likewise, in the present case, the Commonwealth is asking that the Court allow a lab
10 technician to testify via Skype as to the results of a paternity test in a sexual abuse case. As Mr.
11 Stuhlmiller is located in North Carolina, beyond this Court’s subpoena power, there is a strong
12 public policy interest in allowing him to testify via Skype.

13 **2. The Witness’s Testimony Will Be Sufficiently Reliable When Heard Via Skype**

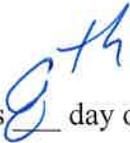
14 The Court finds that Mr. Stuhlmiller’s testimony will be sufficiently reliable, even if it is
15 conducted via Skype. “The central concern of the Confrontation Clause is to ensure the reliability of
16 the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an
17 adversar[ial] proceeding before the trier of fact.” *Craig*, 497 U.S. at 845. The Confrontation Clause
18 ensures that the testimony is under oath, subject to cross, and is observed by the jury. *Id.* at 845-
19 846. Here, Mr. Stuhlmiller’s testimony about the results of the paternity test will be under oath and

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22 ⁵ Even in 2012, when *Tababa* was issued, videoconferencing technology such as Skype was reliable and widely used,
23 with Skype reporting 35 million people concurrently online. *35 Million People Concurrently Online on Skype*,
24 <http://blogs.skype.com/2012/03/05/35-million-people-concurrently/>. The technology behind videoconferencing
services, like Skype, has only improved since 2012. In a jurisdiction as small and remote as the CNMI, technology that
allows the Court to hear from experts thousands of miles away aids the Court in hearing cases on the merits in a timely
manner. This is especially important in criminal cases, where otherwise defendants may find themselves languishing in
custody awaiting their day in court.

1 subject to cross. Jurors will be able to hear Mr. Stuhlmiller's testimony and observe him testifying
2 in real time.⁶ Thus, the Court will allow Mr. Stuhlmiller to testify via Skype.

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4 **IV. CONCLUSION**

5 Accordingly, the Commonwealth's Motion to Call Witness by Way of Electronic
6 Videoconferencing is **GRANTED**.

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8 **IT IS SO ORDERED** this  day of June, 2015.

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13 JOSEPH N. CAMACHO
14 Associate Judge

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24 ⁶ While testifying via Skype, the witness will be visible to the jurors from the chest up, in a seated position. Jurors will be able to observe his mannerisms and body language. The view that the jurors would have of the witness would be the same as the view that the jurors would have if the witness was testifying on the witness stand in court.