

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,

Plaintiff,

vs.

MASTER HALBERT,

Defendant.

CRIMINAL CASE NO. 2014-501

MEMORANDUM AND ORDER

Cyprian J. Manmaw
Temporary Justice

Hearing: April 13, 2015

Decided: April 29, 2015

APPEARANCES:

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HEADNOTES

Criminal Law and Procedure – Right to Confront Witnesses

The FSM Rules of Criminal Procedure are silent about the admissibility of Skype testimony at trial and Congress has not legislated on this issue. Therefore it is left to the court's sound discretion to determine whether to allow Skype testimony at trial as FSM Criminal Rule 26 does not act to preclude the admissibility of Skype testimony because testimony offered via Skype would be taken orally in open court as the Rule requires. FSM v. Halbert, 20 FSM R. 42, 45 & n.1 (Pon. 2015).

Criminal Law and Procedure – Right to Confront Witnesses

Since live televised testimony is certainly not the equivalent of in-person testimony, the decision to excuse a witness's presence in the courtroom should be weighed carefully. FSM v. Halbert, 20 FSM R. 42, 45-46 (Pon. 2015).

Criminal Law and Procedure – Right to Confront Witnesses

Allowing testimony over Skype in exceptional circumstances is essential to vindicate the policy

expressed in FSM Criminal Rule 2, which requires that the Rules be construed to provide "fairness in administration and the elimination of unjustifiable expense and delay" in criminal proceedings. FSM v. Halbert, 20 FSM R. 42, 46 (Pon. 2015).

Criminal Law and Procedure – Right to Confront Witnesses

When, in light of the witness's refusal to travel to the FSM, the court is faced with three flawed options: 1) The witness's testimony could be excluded entirely; 2) trial could be continued to allow the parties to travel to the United States to depose the witness; and 3) the witness could testify over Skype, the court may exercise its discretion to allow the witness to testify over Skype when his testimony is necessary to further the important public policy in favor of justly resolving criminal cases. FSM v. Halbert, 20 FSM R. 42, 46 (Pon. 2015).

Criminal Law and Procedure – Right to Confront Witnesses

The confrontation clause requires the defendant to cross examine the adverse witness face-to-face, thereby permitting the finder of fact to evaluate the witness' credibility. However, the right to confrontation is not an absolute right. FSM v. Halbert, 20 FSM R. 42, 46 (Pon. 2015).

Constitutional Law – Declaration of Rights; Criminal Law and Procedure – Right to Confront Witnesses

The FSM Declaration of Rights was modeled after the U.S. Bill of Rights, and so the court may look to U.S. sources for guidance in interpreting similar Declaration of Rights provisions, such as the right to confrontation, found in the FSM Constitution's Declaration of Rights in Article IV, section 6, and in the U.S. Constitution in its Sixth Amendment. FSM v. Halbert, 20 FSM R. 42, 46 n.3 (Pon. 2015).

Criminal Law and Procedure – Right to Confront Witnesses; Evidence – Witnesses

Testimony may be admissible so long as it contains the essential indicia of reliability, including 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. FSM v. Halbert, 20 FSM R. 42, 46 (Pon. 2015).

Criminal Law and Procedure – Right to Confront Witnesses

Confrontation rights may be satisfied absent a physical, face-to-face confrontation at trial only when there is an individualized determination that denial of physical face-to-face confrontation is necessary to further an important public policy, and only when the testimony's reliability is otherwise assured. Since the reliability of Skype testimony is safeguarded by the traditional indicia of reliability, the deciding question is whether, under the circumstances of this case, allowing a witness to testify via Skype is necessary to further an important public policy. FSM v. Halbert, 20 FSM R. 42, 47 (Pon. 2015).

Criminal Law and Procedure

Public policy supports justly resolving criminal cases while allocating resources efficiently within the criminal justice system. FSM v. Halbert, 20 FSM R. 42, 47 (Pon. 2015).

Public Officers and Employees

The Public Service System Act is designed to further the public interest in hiring the most qualified employees, and the public and the government are the losers and public policy is violated when the public service system procedures, which are designed to obtain the best qualified public employees, are not followed. FSM v. Halbert, 20 FSM R. 42, 47 (Pon. 2015).

Criminal Law and Procedure – Right to Confront Witnesses

In all cases that allowed televised testimony it was not practicable for a material witness to appear at trial so as to facilitate physical face-to-face confrontation. Similar circumstances are extant when a material witness for the government is unable to secure permission from his employer to travel to the FSM and the court is powerless to compel his presence via a subpoena. In such circumstances, and where the reliability of testimony is otherwise ensured, allowing a witness to testify via Skype does not violate the defendant's right under the FSM Constitution to confront witnesses against him. FSM v. Halbert, 20 FSM R. 42, 47-48 (Pon. 2015).

Criminal Law and Procedure – Right to Confront Witnesses

A two-way video platform, such as Skype, preserves the face-to-face confrontation that is at the center of the right to confrontation, and thus, a more profitable comparison can be made to the Rule 15 deposition, which may be employed whenever due to the 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." FSM v. Halbert, 20 FSM R. 42, 48 (Pon. 2015).

Constitutional Law – Judicial Guidance Clause; Criminal Law and Procedure – Right to Confront Witnesses

Since the FSM Constitution requires that court decisions be consistent with the social and geographical configuration of Micronesia; since the geographical configuration of Micronesia is such that its population is scattered amongst numerous islands, and transportation between the distant islands of the FSM can be expensive, time consuming and unreliable, and since travel to and from the United States can be especially expensive and time consuming due to the vast distances involved and one commercial airline carrier's monopoly over transportation in the FSM, the FSM's unique geographical configuration generates a public policy impetus in favor of remote testimony by Skype that is lacking in the United States. FSM v. Halbert, 20 FSM R. 42, 48-49 (Pon. 2015).

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COURT'S OPINION

CYPRIAN J. MANMAW, Temporary Justice:

This matter came before the Court on the Government's April 9, 2015 motion in limine, Defendant's April 10, 2015 opposition, and the Government's April 13, 2015 supplement to its motion. The Court convened a hearing on the motion on April 13, 2015, and after hearing arguments from both sides granted the motion. This order reduces the Court's reasoning to writing.

I. BACKGROUND

The FSM initiated this action by filing a criminal information charging the Defendant with the crimes of aggregated criminal mischief and aggregated theft. These charges are based on the Defendant's alleged misrepresentation to the Government that he held a University degree from the University of Washington, and on Defendant's alleged submission of a falsified degree. The purpose of these alleged misrepresentations by the Defendant was to create the impression that he held the requisite qualifications required for a promotion to the position of Assistant Secretary for Aviation with the Department of TC&I, a position held by Defendant from March, 2010 until June, 2014.

To prove the falsity of Defendant's university credentials, the Government arranged for University of Washington Assistant Registrar Tina Miller to travel to the FSM to testify at trial. However, a mere few days before trial, the Government was informed that Tina Miller does not have a passport to travel

to the FSM, and that the University was unwilling to provide replacement staff to fly to the FSM despite the Government's willingness to pay for travel expenses. In lieu of securing Tina Miller's physical presence in the courtroom at trial, the Government filed its motion in limine to introduce testimony via Skype from Mr. Eric Chace, Assistant Registrar for the University of Washington. Skype is a platform for communication that allows for real time audio-visual communication.

During the hearing on the motion in limine, the Government arranged for Mr. Chace to testify over Skype in order to demonstrate that such testimony was technologically and logistically feasible. The Court observed that the Government connected its computer to a projector, and that the image generated was clear and visible throughout the courtroom. The Court further observed that the witness was able to identify the Defendant and the Court was able to examine the demeanor of the witness. The Court was also satisfied that the quality of the audio was sufficient for the witness to understand the questions asked of him, and for the people present in the courtroom to hear and understand the witness' testimony. The connection was also sufficiently reliable to enable the prosecutor and the witness to have a free-flowing conversation, without material interruption or disruption.

II. DISCUSSION

A crucial witness for the prosecution is unavailable to testify and is outside the reach of this Court's subpoena power. The prosecution seeks to introduce his testimony at trial over Skype. The Skype communication platform permits the witness to view and hear counsel and defendant, while simultaneously allowing counsel, defendant and judge to view and hear the witness. Whether to allow testimony at trial over Skype appears to raise an issue of first impression in the courts of the FSM. The defendant contends that admitting Skype testimony is impermissible under the FSM Criminal Rules, and would violate his constitutional protected right to confront the witnesses against him. These arguments will be examined in turn.

A. Under the FSM Rules of Criminal Procedure the Court has Discretion to Allow Skype Testimony.

The FSM Rules of Criminal Procedure are silent with regards to the admissibility of Skype testimony at trial.¹ Similarly, Congress has yet to legislate on this issue. Therefore it is left to the court's sound discretion to determine whether to allow Skype testimony at trial. See FSM Crim. R. 57(b); cf. United States v. Hastings, 461 U.S. 499, 505, 103 S. Ct. 1974, 1978, 76 L. Ed. 2d 96, 104 (1983) ("federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or Congress"); People v. Wrotten, 923 N.E.2d 1099, 1101-02 (N.Y. 2009) (trial court has inherent power to exercise its discretion to allow two-way televised transmission of testimony in the absence of statutory authority evincing legislative policy proscribing televised testimony); United States v. Gigante, 166 F.3d 75, 80 (2d Cir. 1999) (upholding order permitting testimony via two-way closed circuit television based on court's inherent power under Fed. R. Crim. P. 2 and 57(b) to structure a trial in a just manner).²

In applying its discretion to the circumstances of this case the Court is mindful that live televised

¹ FSM Criminal Rule 26 does not act to preclude the admissibility of Skype testimony, because testimony offered via Skype would be taken orally in open court as required by the Rule.

² FSM Criminal Rules 2 and 57(b) are drawn from and similar to Fed. R. Crim. P. 2 and 57(b). Since the court has yet to interpret the FSM rules with regards to their applicability to Skype testimony, it is appropriate to look to U.S. sources in interpreting these rules. See e.g., Zhang Xiaohui v. FSM, 15 FSM Intrm. 162, 167 n.3 (App. 2007); Andohn v. FSM, 1 FSM Intrm. 433, 441 (App. 1984).

testimony is certainly not the equivalent of in-person testimony, and the decision to excuse a witness's presence in the courtroom should be weighed carefully. Wrotten, 923 N.E.2d at 1103. The optimal way of conducting a trial is for the witness in person in court to face the defendant and the trier, and to be subject to immediate cross-examination in their presence. See e.g., Maryland v. Craig, 497 U.S. 836, 849, 110 S. Ct. 3157, 3165, 111 L. Ed. 2d 666, 681 (1990) (historic preference for in-person encounters between accused persons and their accusers). However, the Court is also guided by FSM Criminal Rule 2 which requires that the Rules be construed to provide "fairness in administration and the elimination of unjustifiable expense and delay" in criminal proceedings. Allowing testimony over Skype in exceptional circumstances is essential if the policy expressed in FSM Criminal Rule 2 is to be vindicated. United States v. Gigante, 971 F. Supp. 755 (E.D.N.Y. 1997), *aff'd*, 166 F.3d 75 (2d Cir. 1999); cf. Harrell v. State, 689 So. 2d 400 (Fla. Dist. Ct. App. 1997) (Satellite testimony enhances the efficiency of our legal system in case where Argentinean residents testified as witnesses in a Florida criminal trial).

The exceptional circumstances of this case support the Court's determination that it is necessary for Mr. Eric Chace to testify in court over Skype, and allowing him to do so is in the interests of justice. Mr. Chace's testimony is critical to the Government's efforts to prove that the defendant misrepresented his university qualifications. Despite the Government's offer to pay for his travel expenses, Mr. Chace refuses to travel to the FSM to testify at this trial because his employer refuses to grant him leave to travel to the FSM. Since Mr. Chace resides in the U.S., he is outside the reach of the Court's subpoena power and cannot be compelled to appear. In light of Mr. Chace's refusal to travel to the FSM, the Court had to choose between three flawed options: (1) Mr. Chace's testimony could be excluded entirely; (2) trial could be continued to allow the parties to travel to the United States to depose Mr. Chace; and (3) Mr. Chace could testify over Skype. Faced with these options, the Court exercised its discretion to allow Mr. Chace to testify over Skype because his testimony is necessary to further the important public policy in favor of justly resolving criminal cases, see Wrotten, 923 N.E.2d at 1103, and because contemporaneous testimony via Skype more closely resembles traditional in-person testimony at trial and is therefore preferable to a deposition. See Gigante, 166 F.3d at 81.

B. Skype Testimony is Consistent with Right of Confrontation Guaranteed by FSM Const. art. IV, § 6.

Halbert contends that permitting testimony via Skype would violate his right to confront the witnesses against him. The confrontation clause requires the defendant to cross examine the adverse witness face-to-face, thereby permitting the finder of fact to evaluate the witness' credibility. Maryland v. Craig, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990).³ However, the right to confrontation is not an absolute right. FSM v. Tipingeni, 19 FSM R. 439, 449 (Chk. 2014) (allowing deposition under FSM Criminal Rule 15 because right to confrontation in FSM Constitution does not always require a physical confrontation before the fact finder); Craig, 497 U.S. at 848, 110 S. Ct. at 3165, 111 L. Ed. 2d at 680 (stating that if the right to confrontation were absolute it would nullify most of the hearsay exceptions). The United States Supreme Court does not require actual face-to-face testimony in all trials. Testimony may be admissible so long as it contains the essential indicia of reliability, including (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. at 3163, 111 L. Ed. 2d at 678.

³ The FSM Declaration of Rights was modeled after the U.S. Bill of Rights, and so the court may look to U.S. sources for guidance in interpreting similar Declaration of Rights provisions, such as the right to confrontation, found in the FSM Constitution's Declaration of Rights in Article IV, section 6, and in the U.S. Constitution in its Sixth Amendment. FSM v. Wainit, 10 FSM Intrm. 618, 621 n.1 (Chk. 2002).

The Skype platform utilized for Mr. Chace's testimony preserved all of these characteristics of in-court testimony; he was sworn;⁴ he was subject to full cross examination; he testified in full view of the fact finder and defense counsel; and Mr. Chace gave his testimony under the eye of Halbert himself. Halbert forfeited none of the constitutional protections of confrontation.

In Craig the Supreme Court indicated that confrontation rights may be satisfied absent a physical, face-to-face confrontation at trial only where there is an individualized determination that denial of physical face-to-face confrontation is necessary to further an important public policy, and only where the reliability of testimony is otherwise assured." Craig, 497 U.S. at 850, 110 S. Ct. at 3166, 111 L. Ed. 2d at 682. As discussed *supra*, the reliability of Skype testimony is safeguarded by the traditional indicia of reliability. Therefore, the deciding question under Craig, is whether, under the circumstances of this case, allowing Mr. Chace to testify via Skype is necessary to further an important public policy.

Public policy supports justly resolving criminal cases while allocating resources efficiently within the criminal justice system. See Harrell, 689 So. 2d at 404. Furthermore, Halbert is charged with offenses stemming from an alleged misrepresentation made for the purpose of securing a national public service system position without the requisite qualifications. The Public Service System Act is designed to further the public interest in hiring the most qualified employees. "The public and the state are the losers and public policy is violated when the public service system procedures, which are designed to obtain the best qualified public employees, are not followed." Robert v. Simina, 14 FSM Intrm. 438, 445 (Chk. 2006).

United States courts have found that satellite testimony is necessary to further an important public interest in a variety of circumstances. See Wrotten, 923 N.E.2d 1099 (N.Y. 2009) (permitting live televised testimony where crucial witness too unwell to travel); Harrell, 689 So. 2d 400 (permitting live televised testimony via satellite where victims of an offense committed in Florida resided in a foreign country outside the subpoena power of the court); Gigante, 971 F. Supp. 755 (permitting live testimony from an undisclosed location via closed circuit television where the witness was in the Federal Witness Protection Program); Horn v. Quarterman, 508 F.3d 306, 317-18 (5th Cir. 2007) (denying habeas relief where state court admitted two-way video testimony of witness too ill to travel); *but see* United States v. Yates, 391 F.3d 1182 (11th Cir. 2004) (Public interest in expeditiously and justly resolving cases not an interest of sufficient importance to outweigh a defendant's right to confront an accuser face-to-face).

The common denominator in all those cases that allowed televised testimony is that it was not practicable for a material witness to appear at trial so as to facilitate physical face-to-face confrontation. Similar circumstances are extant here, where a material witness for the Government is unable to secure permission from his employer to travel to the FSM, and the Court is powerless to compel his presence via a subpoena. In such circumstances, and where the reliability of testimony is otherwise ensured, allowing Mr. Chace to testify via Skype does not violate the defendant's right under the FSM

⁴ Defendant argues that the oath administered by the clerk did not subject the witness to perjury charges, and so is not sufficiently binding to ensure the reliability of testimony. This argument is flawed because an oath is sufficiently binding where it conveys the seriousness of the proceeding to the witness and assures the truthfulness of the testimony. See FSM Evid. R. 603. This standard is met here, where the oath was administered by the clerk of court live over Skype. See Harrell, 689 So. 2d at 403. Moreover, courts have upheld the admissibility of depositions taken without an oath or affirmation in foreign countries which were subsequently used against criminal defendants in the United States. See, e.g., United States v. Casamento, 887 F.2d 1141 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990); United States v. Salim, 855 F.2d 944 (2d Cir. 1988).

Constitution to confront witnesses against him.

Although the Skype testimony at issue here satisfies the demanding requirements of Craig, it is worthwhile to discuss whether a more permissive standard should apply to two-way televised testimony over Skype. In Craig the Supreme Court held that the confrontation clause of the U.S. constitution did not categorically prohibit a child witness from testifying at trial, outside defendant's physical presence, by one-way closed circuit television wherein the witness could not see or hear the defendant. In contrast, the Skype platform at issue here allows the witness to view the defendant during the course of the testimony. The Second Circuit in Gigante recognized that a two-way video platform, such as Skype, preserves the face-to-face confrontation that is at the center of the right to confrontation. Since a two-way system preserves the defendant's right to a face-to-face confrontation, a more profitable comparison can be made to the Rule 15 deposition, which under the Rules may be employed "[w]henever due to the 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." FSM Crim R. 15(a); Gigante, 166 F.3d at 81. 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.*; Tipingeni, 19 FSM R. at 450. Under the circumstances of this case, the Court could have exercised its broad discretion to admit Mr. Chace's testimony pursuant to FSM Criminal Rule 15 without offending the confrontation clause. See United States v. Johnpoll, 739 F.2d 702, 708 (2d Cir. 1984); United States v. Dillman, 15 F.3d 384, 389 (5th Cir. 1994), *cert denied*, 513 U.S. 866 (1994). Indeed, such testimony could even take the form of a bare written transcript that precludes visual assessment of the witness' demeanor. Gigante, 166 F.3d at 81; see United States v. McKeeve, 131 F.3d 1, 10 (1st Cir. 1997) (videotaping of depositions preferred but not required).

The Gigante Court held that since two-way television testimony provides at least as great protection of confrontation rights as Rule 15, the standard for its use should be no stricter than the standard articulated by Rule 15. However, that court also recognized that there may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony. For this reason the Gigante court also instructed that two-way televised testimony should not be considered a commonplace substitute for in-court testimony by a witness. Gigante, 166 F.3d at 81.

Although the reasoning of the Gigante decision is compelling, the Second Circuit stands alone in U.S. jurisprudence in foregoing the stricter Craig standard in favor of a standard that is no more strict (but potentially less strict) than that of Rule 15. All the other courts to squarely address the question of which standard should prevail have required strict application of the Craig standard, even for two-way televised testimony. See State v. Rogerson, 855 N.W.2d 495, 501 (Iowa 2014) (adopting Craig standard and noting that the Second Circuit is the only court to adopt a standard other than Craig in determining the constitutionality of two-way video testimony); United States v. Bordeaux, 400 F.3d 548, 554 (8th Cir. 2005) (video testimony not constitutionally equivalent to face-to-face testimony because the former is less likely to lead a witness to tell the truth).

While the Gigante court is in the minority in the United States, its reasoning is particularly compelling in the context of the FSM. The FSM constitution requires that court decisions be consistent with the social and geographical configuration of Micronesia. FSM Const. art. XI, § 11. The geographical configuration of Micronesia is such that its population is scattered amongst numerous islands, and transportation between the distant islands of the FSM can be expensive, time consuming and unreliable. Furthermore, travel to and from the United States can be especially expensive and time consuming due to the vast distances involved and the monopoly enjoyed by one commercial airline carrier over transportation in the FSM. The unique geographical configuration of the FSM generates

4 F.S.M.C. 124(2) by its own terms serves to disqualify a temporary justice only when the