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TO ASSEMBLY JUDICIARY COMMITTEE MEMBERS
The Honorable Bernie Anderson
The Honorable John Oceguera
The Honorable Barbara Buckley
The Honorable Jerry Claborn
The Honorable Marcus Conklin
The Honorable William Horne
The Honorable Harry Mortenson
The Honorable Genie Ohrenschall
The Honorable Sharron Angle
The Honorable David Brown
The Honorable John Carpenter
The Honorable Jason Geddes
The Honorable Donald Gustavson
The Honorable R. Garn Mabey, Jr. M.D.
The Honorable Roderick Sherer

RE: COMMENTS ABOUT SB-43 (BDR 4-378)

"ADOPTS UNIFORM CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT"

FROM: DEPUTY CLARK COUNTY PUBLIC DEFENDER AMY A. COFFEE AND LISA A. RASMUSSEN, ESQ., DIXON AND TRUMAN

This bill proposes adoption of what has been titled the "Uniform Child Witness Testimony by Alternative Methods Act." (I am not aware that this "Act" has been adopted by any state, and hence, the title may be a bit misleading.)

In essence, this bill proposes a law which appears to be for the protection of child witnesses in criminal proceedings by allowing them to be separated from the accused while testifying.

I believe that this bill is unnecessary and will ultimately lead to extensive litigation over its Constitutionality.

The serious Constitutional problems with this proposed Act are: 1) It goes further than current law allows, as set forth in the United States Supreme Court opinion of Maryland v. Craig; and 2) It codifies a practice that has been looked at with disfavor by our Supreme Court. Besides the associated problems mentioned, the bill is unnecessary as Nevada already has in place a law that allows a child victim to have a support person with them while testifying.

Briefly I will elaborate these thoughts:

The Sixth Amendment of the United States Constitution, provides that "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him."

ASSEMBLY JUDICIARY
DATE: 4/15/03 ROOM: 3138 EXHIBIT C
SUBMITTED BY: LISA RASMUSSEN

This right has always been interpreted as meaning the defendant has the right to look his accuser in the eye. Historically, as our founding fathers were aware, this has been thought as the best way to test the truthfulness of an accuser or witness, forcing the accuser or hostile witness to face the accused and be subject to cross examination, in front of the jury.

At some point, with trials of child molestation gaining more notoriety, victim's advocates became concerned with the trauma to the child by testifying in front of the defendant. Maryland instituted a procedure whereby a child would testify by closed circuit t.v. in a separate room. The defendant could communicate with his attorney while the examination was going on, but the defendant was in the courtroom with the judge and jury, with the child witness in the next room. The U.S. Supreme court upheld this practice, but only in a narrow set of circumstances in Maryland v. Craig, 497 U.S. 836 (1990).

In Maryland v. Craig, the U.S. Supreme Court held that while the right of confrontation is very important and essential to a fair trial, the practice used by Maryland was able to withstand challenge, if and only if the judge determined that the child would suffer serious emotional distress such that the child cannot reasonably communicate. According to the court, this must be more than mere nervousness or excitement or some reluctance to testify.

While Section 10(a) of this bill says that a similar finding must be made, it also allows the hearing where this finding is made to be done without the child present. It allows hearsay to be introduced. With this procedure, the judge is put in a position of determining that there is serious emotional trauma and that this trauma would impair the child to a degree the child could not testify without so much as having the child present.

Worse, the law would allow the state to come in with a police report or a Child Protective Services (CPS) report alone, in order to make this finding, since hearsay would be allowed. CPS workers and police officers, who both work together in these cases have a natural bias toward an alleged victim and a natural bias against a defendant. This practice will no doubt be challenged in court, as I foresee litigation over this procedure of relying on hearsay that may not be objective, as well as litigation over the finding itself, since the judge is hardly an expert on child trauma.

The Nevada Supreme Court has consistently been hostile to this practice, for the simple reason that it takes away an essential tool in ferreting out the false accuser. In Felix v. State, case, in 1993, (109 Nev. 151), the court said that you could use the procedures in Maryland v. Craig, but that if you used them, they must apply at preliminary hearing as well as at trial. In other words, a specific finding of the trauma is necessary if the state want to use these procedures at preliminary hearing or at trial. Therefore, a completely separate hearing would be necessary prior to any preliminary hearing, causing yet more litigation.

In another case, (Smith v. State, 111 Nev. 499 (1995)), there was a different situation with a similar result. A prosecutor positioned himself in such a way to block the victim's view of the defendant. The court reversed the conviction in this case. While the case did not involve the state trying to use alternative procedures, the court did express it's hostility to the idea of denying the right of confrontation. As the court pointed out:

"It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' In the former context, even if a lie is told, it will often be told less convincingly." ...."It is difficult enough for adults to look another individual in the face and accuse [him or her] of serious misconduct or of a crime......while 'face to face presence may, unfortunately, upset the truthful rape victim or abused child...by the same token it may confound and undo the false accuser or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs." (Smith, at 502-503).

This bill is clearly broader than the narrower scheme upheld in Maryland v. Craig by the United States Supreme Court. It is also broader than any procedure approved by the Nevada Supreme Court. Clearly it takes away constitutional rights of a defendant to confront their accuser, a right that is vitally important, particularly in child cases where false accusations and convictions can and do happen with devastating consequences.

This bill would allow what may already be a flawed process where many innocents are accused, to be further dominated by those with agenda's other than the search for the truth. While most who work with child victims have the best interest of the child at heart, they can lose their objectivity on occasion and become one those "malevolent adults" referred to by the U.S. Supreme Court.

Currently in place is a Nevada law (NRS 178.571) which is intended to protect child victims. This law allows for an attendant to be with the child during their testimony, even at the witness stand. The law even allows for physical contact between attendant and child witness if the judge determines this is appropriate or necessary. This can and is used to alleviate any trauma felt by a child in testifying.

I have had personal experience cross examining children of all ages. Often, it is the parents that are more traumatized than the children. Children understand answering questions. Often the defendant in these cases is a family member or friend, someone they knew. Most often, they are not "scared" of that person, though they may be traumatized by what happened. I have never seen a child so traumatized by being in a courtroom with a defendant that they could not answer questions, so one must ask is this bill necessary.

In order to preserve confrontation, which is designed to get at the truth and ultimately justice, I request that this bill not be passed.

Thank you for your consideration.

AMY A. COFFEE
Deputy Clark County Public Defender

LISA A. RASMUSSEN, ESQ.
DIXON & TRUMAN, P.C.

(The views expressed in this e-mail are those of the senders and are not the official views of the office of the Clark County Public Defender).