

material to proving he lacked intent in his convicted crimes because of a mental disorder. The state appealed to the Ninth Circuit Court of Appeals.

Ruling and Reasoning

The Ninth Circuit Court of Appeals reversed the district court’s decision to grant *habeas* relief, stating that the conditions placed on Mr. Jones’ testimony did not constitute a violation of his rights. The Ninth Circuit highlighted constitutional rights of a defendant to “present a complete defense,” and noted that restrictions on a defendant’s testimony cannot be “arbitrary or disproportionate.” But the court also emphasized that limits on a defendant’s right to testify exist and are subject to standard rules of evidence.

The Ninth Circuit affirmed the role of the trial court in establishing evidentiary rules, which can be applied to exclude evidence likely to confuse the matter, among others. The court explained that the relevance of Mr. Jones’ testimony would be unclear and confusing without expert contextualization to explain the “nexus” between his history and his specific intent in the crimes.

The Ninth Circuit also clarified that Mr. Jones’ testimony was not restricted but rather conditioned on a third-party testimony. The court emphasized a court’s right to impose a condition on testimony, which could still be subject to constitutional scrutiny to determine whether it is arbitrary or disproportionate. The condition on Mr. Jones’ testimony was not arbitrary because he would not have been able to independently explain how his extensive mental health and childhood history was directly linked to his ability to form intent in the index case years later. The court found that the evidentiary ruling was not disproportionate because it was a carefully considered means to serve a specific purpose; the court admitted Mr. Jones’ testimony about his emotional and cognitive state on the day of the murder, considering it independently relevant to the case, and only required expert testimony for “evidence whose relevance it reasonably worried would not have been apparent without expert testimony” (*Jones*, p 1038).

The Ninth Circuit also noted that the evidentiary rule was not onerous because an already appointed expert witness was readily available to testify for the defense. Although the defense’s decision to not introduce expert witness testimony during the guilt phase of the trial was likely a difficult one, it did not mean that the consequence of evidentiary ruling was disproportionate to the interest it served.

Discussion

The right to present a complete defense is implicitly embedded in the Compulsory Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. But, it wasn’t until 1967 in *Specht v. Patterson*, 386 U.S. 605 (1967), that the U.S. Supreme Court clearly recognized this right in criminal trials. It later started defining the extent to which states could impose limitations on this right with procedures and evidentiary rules (Robinette J. *Montana v. Egelhoff*: Abandoning a defendant’s fundamental right to present a defense. *Cath U L Rev.* 1997; 46:1349). In *Taylor v. Illinois*, 484, U.S. 400 (1988), the Court stated that “the accused does not have an unfettered right to offer testimony that is . . . inadmissible under standard rules of evidence” (p 409). But it had also established in *Rock* that the restrictions on a defendant’s ability to present a defense should not be “arbitrary or disproportionate.”

As courts try to strike a balance between legitimate state interests and defendants’ rights, admissible evidence is filtered based on various laws and evidentiary rules, including that of not confusing the factfinder. Thus, evidence may be excluded unless it infringes upon a weighty constitutional interest of the accused. This was exemplified in *Jones v. Davis*, confirming that the defendant’s right to present a complete defense is “not without limit.” This reflects the judges’ gatekeeping role in admitting evidence, which forensic psychiatrists commonly encounter as expert witnesses. Judges attempt to strike a balance between due process protections for the defendant and ensuring relevant and reliable testimony that minimizes undue risk of prejudice or confusion.

## Right to Confront Witnesses in Person During Civil Commitment Hearings

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## It is Error Under State Law to Admit Video Testimony from a State Witness in Civil Commitment Hearing Upon Objection

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**Key words:** Sixth Amendment; remote testimony; confrontation clause; electronic communication; involuntary commitment; legislative intent

In *In re N.A.*, 495 P.3d 45 (Mont. 2021), the Supreme Court of Montana reviewed a decision made by the district court to civilly commit N.A. after allowing a state's witness to testify via two-way electronic audio-video communication over objection by the defendant.

### Facts of the Case

On October 1, 2019, N.A. reported to her psychiatrist increased symptoms of depression with suicidal ideation and auditory hallucinations. N.A. was given the diagnosis of unspecified schizophrenia and, upon recommendation from her psychiatrist, sought treatment at St. Peter's Hospital in Helena, Montana. N.A. was voluntarily admitted to Hays Morris House in Butte, Montana, from October 1 through October 4. During her discharge on October 4, 2019, N.A. reported to staff her intent to die by suicide by cutting her wrists if she departed the facility. That same day, the state filed a petition for N.A.'s involuntary commitment because of her imminent risk of self-harm based on her suicidal statements.

On October 11, 2019, the district court held an evidentiary hearing, where the state informed N.A. of its intent to call four witnesses. Three of the witnesses testified in person. Two were family members of N.A. who provided their recent observations of N.A. and the opinion that she was unable to care for herself. A fire chief also offered in-person testimony about a false fire report that N.A. had called in about eight months prior. The fourth witness was Ashley Post, a licensed clinical social worker with the Western Montana Mental Health Center. Ms. Post was to testify by Vision Net, which is a two-way electronic audio-video communication system, citing a need to be near her office in case of an emergency. N.A. objected to the remote testimony on the grounds of Montana's Confrontation Clause, which provides an individual the right to confront witnesses.

The district court overruled the defense's objection, relying on its interpretation of Montana's Confronta-

tion Clause and the State's presentation of Montana Code Annotated (MCA) §53-21-140 (1) and 53-21-140(3) (2009). Ms. Post proceeded to provide testimony on the circumstances leading up to N.A.'s involuntary commitment and described N.A.'s depressed mood, spotty adherence to medication treatment, thoughts of suicide, and delusional thoughts, including that her brothers had tried to make her overdose and that one of her brothers had held her captive for a year. Ms. Post concluded that she believed that N.A. had a mental disorder, was a danger to herself, and would likely deteriorate without further treatment. Ms. Post, moreover, provided the opinion that, because N.A. inconsistently took her psychiatric medications, she would need to be placed in a level of care that would allow for involuntary medications to be given for her stabilization.

Based on the testimonies presented, the district court found that N.A. was given a diagnosis of a mental disorder, was substantially unable to provide for her own needs, and was an imminent threat of injury to herself and others, and therefore required commitment. Accordingly, the district court ordered N.A. to be involuntarily placed at Montana State Hospital in Warm Springs for a period of up to ninety days. N.A. appealed.

### Ruling and Reasoning

The Supreme Court of Montana concluded that the district court had committed a reversible error and the judgment was reversed.

Justice Laurie McKinnon delivered the opinion of the court with Justices Shea, Baker, and Gustafson concurring. The civil commitment order was reviewed to determine whether the findings of fact were clearly erroneous, and its conclusions of law were correct. A finding of fact would clearly be erroneous if it were not supported by substantial credible evidence, the court misapprehended the effect of the evidence, or the court otherwise erred. The state did not contest that the district court erred in allowing Ms. Post's video testimony, but instead argued that this error was harmless and did not warrant reversal.

In reviewing the governing statute (MCA §53-21-140 et seq.), the Supreme Court of Montana highlighted the unambiguous declaration that two-way electronic audio-video communications "may not be used" in an initial civil commitment hearing if the patient objects. The court concluded that allowing Ms. Post's remote testimony did not constitute "harmless

error,” given that she was the state’s primary witness, the only mental health professional who testified, and the person whose testimony the district court primarily relied upon to commit N.A. Additionally, the court was unpersuaded by the state’s argument that N.A. should have requested a continuance to allow time for Ms. Post to testify in person, countering that N.A. was under no obligation to request a continuance, especially given that the hearing was being held on the last possible day of the statutorily-mandated timeline for civil commitment proceedings. Strict adherence to the involuntary commitment statute was applied because of the liberties at stake, and the Supreme Court of Montana found that the statute was clear and unambiguous regarding the legislative intent.

#### Dissent

Justices Sandefur, McGrath, and Rice voiced the dissenting opinion. They suggested that the majority followed the statute too simplistically; the statute was implemented before modern technological advancements; and transportation over long-distances while being handcuffed would be inhumane and costly.

#### Discussion

The increased use of videoconferencing has brought about its own unique challenges. The Montana Code regarding the use of two-way-electronic audio-video communication allowed this method of testimony, but only if all parties were in agreement. This case illustrates that when a statute’s legislative intent is clear, unambiguous, and unmistakable, then that statute is not open to alternate interpretation.

Over the past few decades, both the fields of medicine and the law have debated how extensively videoconferencing technology should be used. Both fields have recognized potential benefits of videoconferencing, including reductions in costs of transportation, convenience, and avoidance of delays. The use of videoconferencing in psychiatry has not been without its critics. Psychiatrists have been skeptical regarding the inability to perform physical examinations and detect nonverbal cues using videoconferencing, and clinicians and patients alike have been skeptical about the effect of telemedicine on rapport and the loss of direct patient-doctor contact (Cowan KE, McKean AJ, Gentry MT, *et al.* Barriers to use of telepsychiatry: Clinicians as gatekeepers. *Mayo Clin Proc.* 2019; 94 (12):2510-2523). The use of teleconferencing in medicine also brings up questions of equality for patients

who do not have access to the required technology, as well as concerns about security.

Courts have also considered the question of the use of videoconferencing over the past decades, particularly in relation to the Confrontation Clause of the Sixth Amendment that guarantees defendants the right to confront witnesses against them in criminal proceedings. The Confrontation Clause has traditionally been interpreted as guaranteeing that these confrontations must occur in-person. For example, in *Coy v. Iowa*, 487 U.S. 1012 (1988), Justice Scalia delivered the Supreme Court decision that the use of a one-way screen designed to protect a child witness from having to see the defendant in a sex crime case was a violation of the constitutional right to “face-to-face” confrontation. The use of videoconferencing in the courtroom has generally been considered inferior to in-person testimony; criticisms include that remote testimony may impede the ability to assess witness credibility, and also may affect the way the witness is perceived (Izzo NC: How litigators are confronting COVID in the courtroom [Internet]; August 31, 2020. Available from: <https://www.americanbar.org/groups/litigation/committees/trial-practice/articles/2020/covid-19-video-testimony-courtrooms/>. Accessed April 1, 2022).

The onset of the COVID-19 pandemic placed increasing pressure on both the medical and legal fields to utilize videoconferencing technology. Physicians began to use videoconferencing so that they could provide care to their patients without increasing the risk of spreading disease. These platforms became an everyday necessity and now are part of daily routine for many in health care. Courtrooms have been under similar pressure to use videoconferencing to limit COVID transmission and protect the public and people in the courtroom, but as this case illustrates, courts also must balance the right of defendants to confront witnesses, and states may have laws that clearly delimit the use of teleconferencing. States with such explicit instruction in their statutes may find it difficult to quickly adjust practice to meet the needs of society in changing times, such as during a pandemic.

## Weight of Expert Testimony

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