

**TESTIMONY OF DEPUTY ATTORNEY GENERAL
WILLIAM A. APPLETON JR.
BILL NO. 35-0031
THIRTY-FIFTH LEGISLATURE OF THE VIRGIN ISLANDS
COMMITTEE ON HOMELAND SECURITY, JUSTICE AND
PUBLIC SAFETY
SEPTEMBER 10, 2024**

Good morning, Chairman Kenneth L. Gittens, Committee on Homeland Security, Justice and Public Safety members, other Senators, Legislative staff, and the listening and viewing audiences. I am William Appleton, Deputy Attorney General for the St. Croix District. It is an honor and privilege to appear before you this morning.

The Department of Justice appreciates the opportunity to comment on Bill No. 35-0031. With me here today is Assistant Attorney General Chad Mitchell from the Department of Justice's Family Law Division. Attorney Mitchell has extensive practice experience in this topic area and is available to assist in answering specific questions from the Committee regarding Bill No. 35-0031 and proposed amendments.

The Department of Justice has done a preliminary review of Bill No. 35-0031 and offers the following comments.

Bill No. 35-0031 seeks to amend Title 5 of the Virgin Islands Code, Subtitle 3, Part 1, by adding a new Chapter 301A, and creating the Child Victims' and Child Witnesses' Rights Act. Bill No. 35-0031 also seeks to repeal Title 5 V.I.C. § 3510.

Although there is no stated purpose specifically included or identified in the proposed legislation, the obvious intention is to make legal proceedings less traumatic for children who are victims and/or witnesses. Bill No 35-0031 is very similar in both form and content to 18 U.S.C.S. § 3509, which was enacted in 1990 in “response to the alarming increase in reports of suspected child abuse cases made each year.”¹ Like 18 U.S.C.S. § 3509, Bill No. 35-0031 provides an outline specifically for working with child victims and witnesses.

Bill No. 35-0031 has a definition section, §3512. Instead of providing its own definition of several already statutorily defined terms, this section should reference the current laws in the criminal and family law code. (e.g., Sexual abuse as defined in 14 V.I.C. §§ 1699-1709 and 5 V.I.C. § 2502) To provide new definitions here that do not match the definitions in the criminal code or family code can only lead to confusion. Where novel terms are being introduced into the body of law, it is quite appropriate and necessary to define such terms. In addition to the terms defined, I propose an additional definition:

¹ <http://www.justice.gov/archives/usam/archives/usam-9-7500-obscenity-sexual-exploitation-sexual-abuse-and-related-offenses#9-75.610>

Child Victim or Witness Testimony by Alternative Methods – Methods by which a child testifies which does not include all of the following:

- (A) having the child present in person in an open forum;
- (B) having the child testify in the presence and full view of the finder of fact and presiding officer; and,
- (C) allowing all of the parties to be present, to participate and to view and be viewed by the child.

Bill No. 35-0031 defines a child as “a person who is under the age of 18, who is or is alleged to be a victim of a crime involving physical abuse, sexual abuse or exploitation, or a witness to a crime committed against another person.” Bill No. 35-0031 describes which children qualify and the types of protection available to them. For example, alternatives to live in-court testimony are provided and include taking the child’s live testimony by two-way closed-circuit television or by videotaped deposition. The proposed legislation also considers the competency and privacy of child victims and witnesses, the use of testimonial aides, and the importance of speedy trials.

Because Bill No. 35-0031 allows for alternatives to live in-court testimony, the most relevant and foreseeable challenge involves the Sixth Amendment to the US Constitution, which provides a defendant the right to confront any witness against them in a criminal trial. The Sixth Amendment’s confrontation clause helps

establish credibility and reliability in the evidence presented by allowing a defendant to challenge witness testimony through cross-examination. Sixth Amendment legal challenges based on the confrontation clause often involve a detailed analysis of whether the protections afforded to a defendant set forth in the confrontation clause can be satisfied without the traditional face-to-face in-person physical confrontation of the witness subject to cross-examination.

Although a defendant's right to confront witnesses is important, it is not absolute. Courts have consistently held that alternatives to live in-court testimony may be used if deemed necessary to further a compelling state interest. This includes cases in which the court makes a specific finding that a child victim, or witness, would be unable to testify because of fear or that the witness would be traumatized by testifying, in person.

In *Maryland v. Craig*, the United States Supreme Court decided the issue of whether the Confrontation Clause “prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant’s physical presence, by one-way closed-circuit television.”² The Court found the use of one-way closed-circuit television, when necessary, does not negate the intentions and protections afforded the defendant by the confrontation clause. “Though we affirm

² *Maryland v. Craig*, 497 U.S. 836

the importance of face- to-face confrontation with witnesses appearing at trial,” the Court ruled, “we cannot say that such confrontation is an indispensable element of the Sixth Amendment’s guarantee of the right to confront one’s accuser.”³ The Court was careful to add that a defendant’s right to confront witnesses in person should be denied only if the “denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.”⁴

In *United States v. Etimani*, the United States Court of Appeals for the Ninth Circuit found that placement of a closed-circuit monitor was proper after the defendant appealed his conviction, arguing that placement of the monitor violated 18 U.S.C.S. § 3509(b)(1)(D).⁵ Additionally, the United States District Court for the District of Oregon has ruled that the confidentiality and speedy trial provisions of 18 U.S.C.S. § 3509 are constitutional.⁶ In deciding *United States v Broussard*, the Oregon court disagreed with the defendants’ claim that 18 U.S.C.S. § 3509 violated their Sixth Amendment rights to a fair trial.

Alternatively, the United States Court of Appeals for the Fifth Circuit found that the trial judge violated the defendant’s Sixth Amendment right to in-person confrontation by allowing the child victim to testify by two-way closed-circuit

³ *Id.* at 849-50

⁴ *Id.* at 850

⁵ *United States v. Etimani*, 328 F.3d 493

⁶ *United States v. Broussard*, 767 F. Supp. 1536

television.⁷ The defendant argued the trial judge did not make the specific on-the-record findings required by 18 U.S.C.S. § 3509(b)(1)(C). The Court of Appeals agreed. Instead of the trial court finding that the child could not reasonably communicate because of fear, the court observed a reluctance to testify in addition to the physical effects of fear. Both 18 U.S.C.S. § 3509(b)(1)(C) and § 3513(a)(3) of the proposed legislation require courts “support a ruling on the child’s inability to testify with findings on the record.” Other cases, including *United States v. Thunder*, have been overturned because the order for an alternative to in-court testimony was not narrowly tailored toward the advancement of any compelling interest.⁸

While the Department of Justice does not object to increasing protections afforded to child victims and witnesses, there are some concerns about the proposed legislation's application. Primarily, sections 3517, 3518, and 3519 of the proposed legislation require the assistance of, and funding for, third parties including guardians ad litem and multidisciplinary child abuse teams. For example, § 3519 of Bill No. 35-0031 states, “in order to protect the best interests of the child, the court shall appoint, and provide reasonable compensation and payment for expenses for guardian ad litem for a child who was a victim of a crime involving abuse or exploitation.”

⁷ *United States v. Cotto-Fiores*, 970 F.3d 17

⁸ *United States v. Thunder*, 2006 U.S. App. LEXIS 15861 (8th Cir., June 22, 2006)

Do these positions currently exist within the territory's courts? How will these new or expanded positions be funded? If funding is not an issue, are there human resources available within the territory to effectively fill these positions? To be successful, each requirement of the proposed Child Victims' and Child Witnesses' Rights Act must be attainable and funded.

Second, if passed, Bill No. 35-0031 places a duty on the courts to follow and apply the provisions contained within the legislation. Courts must be careful when invoking the Child Victims' and Child Witnesses' Rights Act, making sure to include a detailed finding that the child is unable to testify in open court in the presence of the defendant and supporting such a ruling in the record. Orders must be narrowly tailored toward the advancement of a compelling interest; otherwise, courts risk having decisions overturned for not properly applying the law.

Finally, 18 U.S.C.S. § 3509(a)(9)(A) defines sexual contact as "the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person." Bill No. 35-0031 does not include a similar definition for sexual contact; instead, it limits sexual conduct to actual or stimulated sexual intercourse, penetration and bestiality. Is this intentional? Does the legislation not intend to cover child victims of sexual contact?

While there are other differences between the defined terms in 18 U.S.C.S. § 3509 and Bill No. 35-0031, they are slight and do not significantly alter the context of the proposed legislation. However, now is the appropriate time to consider whether the included definitions are inclusive enough to accomplish the scope of Bill No. 35-0031 without being overly broad.

Committee members, that concludes my prepared remarks. Attorney Mitchell and I respectfully welcome any questions.