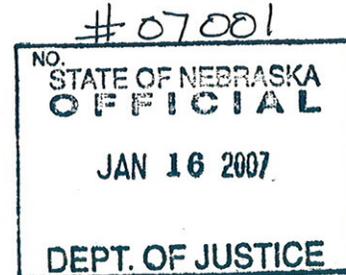




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JON BRUNING
ATTORNEY GENERAL



SUBJECT: Constitutionality of audiovisual court appearances conducted without a written waiver.

REQUESTED BY: Senator Lavon Heidemann
Nebraska State Legislature

WRITTEN BY: Jon Bruning, Attorney General
J. Kirk Brown, Solicitor General

You inquire whether the Sixth Amendment of our federal constitution would be violated if the mandatory written and oral waiver provisions of Neb. Rev. Stat. §§29-4203 (1) and (2) (2006 Cum.Supp.) were to be repealed. Section 49-4203 is a part of a series of statutes which authorize audiovisual court appearances under certain circumstances. See, §29-4201 et.seq. For the reasons set forth below, we conclude that repeal of the mandatory waiver provisions of §29-4203 (1) and (2) would not violate the Sixth Amendment or its state counterpart, Article I, Section 11 of the Nebraska Constitution.¹

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him...." This clause, known as the Confrontation Clause, guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *United States v. Yates*, 438 F.3d 1307, 1312 (2006).

¹ The analysis for the Nebraska Constitution is the same as the analysis under the federal constitution. *State v. Hembertt*, 269 Neb. 840, 847, 696 N.W.2d 473, 480 (2005).

However, audiovisual court appearances are not authorized to occur for trials or any other form of evidentiary hearing in a criminal case. See, §29-4202. By its very definition a criminal defendant would not have the need or opportunity to "confront" witnesses in the course of an appropriate audiovisual court appearance. Therefore, we observe no Sixth Amendment Confrontation Clause issues raised by the audiovisual court appearance process generally. See, *Maryland v. Craig*, 497 U.S. 836 (1990). "We fail to see how Anderson's or Hochstein's absence at a time when their attorneys were arguing matters of law to the court could frustrate the fairness of the proceedings." *State v. Anderson and Hochstein*, 207 Neb. 51, 68-69, 296 N.W.2d 440, 451-452 (1980). In the instance of an audiovisual court appearance, the criminal defendant is not "absent", just not physically present at the same location as the court.

We certainly observe no Sixth Amendment basis for the current requirement of §29-4203(1) and (2) that a written and oral waiver must be obtained from a criminal defendant before conducting an audiovisual court appearance. Even if a Sixth Amendment right were implicated by the audiovisual court appearance process, waivers of any such right are not required to be reduced to writing or specifically inquired into by the trial court before proceeding. *United States v. Gagnon*, 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) (holding that defendant must assert right of confrontation and right to be present at trial and cannot claim those rights for first time on appeal); *State v. Bjorklund* 258 Neb. 432, 469-470, 604 N.W.2d 169, 205 (2000); *State v. Bradley* 236 Neb. 371, 380-381, 461 N.W.2d 524, 533 - 534 (1990).

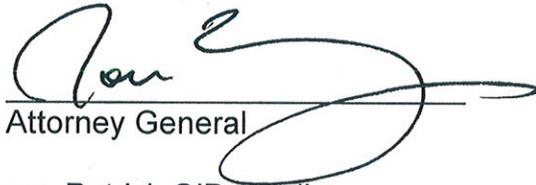
Sincerely,

JON BRUNING
Attorney General



J. Kirk Brown
Solicitor General

Approved:



Attorney General

cc: Patrick O'Donnell
Clerk of the Legislature