IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

MUKI JOSEPH REDHART CALLAHAN,
Defendant-Appellant.

Supreme Court Case No.: CRA16-015
Superior Court Case No.: CF0132-12

AMENDED OPINION

(Amended pursuant to Order dated October 19, 2018)

Cite as: 2018 Guam 17

Appeal from the Superior Court of Guam
Argued and submitted on May 18, 2017
Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ROBERT J. TORRES, Associate Justice.

MARAMAN, C.J.:

[1] Defendant-Appellant Muki Callahan appeals his conviction of multiple counts of criminal sexual conduct. He alleges the trial court erred, under Guam Rule of Evidence 804.1, when it granted the People's motion to take child-witness testimony via closed-circuit television on review of only therapist letters and without an evidentiary hearing. He also alleges that the procedure employed when closed-circuit television was unavailable, which had him seated in the back of the courtroom with no view of the witnesses or jury, violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. Finally, he alleges error, under the Due Process Clauses of the Fifth and Fourteenth Amendments, in the exclusion of evidence of molestation he experienced and denial of the assistance of a defense expert. For the following reasons, we vacate Callahan's judgment of conviction.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Muki Callahan lived with his older sister by adoption and frequently babysat her children. In February 2012, Callahan's sister contacted law enforcement, after her daughter K.R.F. said that Callahan had been sexually abusing her. Callahan was removed from the home, and the allegations were investigated.

[3] A grand jury indicted Callahan, then sixteen years old, for multiple charges of criminal sexual conduct related to acts perpetrated against his sister's children—K.R.F., age eight, and M.J.T., age five. Defense counsel informed the trial court that Callahan's mental state might be an issue in the matter. The trial court ordered an evaluation pursuant to 9 GCA § 7.25.

[4] Kirk Bellis, D.O., conducted a one-hour, ten-minute evaluation and submitted a letter to the court containing his findings. The letter relates that Callahan said he was "not sure" he knew what he was doing at the time the incidents occurred and that he did not feel he was in control. Record on Appeal ("RA"), tab 24 at 1 (Letter from Kirk Bellis, D.O. to Hon. James L. Canto II, Apr. 20, 2012). The letter also discloses years of sexual abuse Callahan suffered in the foster care system and the years following. *Id.* at 2. Dr. Bellis wrote that he "ha[d] no strong diagnostic entities [he] would consider except for depression, Post Traumatic Stress Disorder and a possibility of Attention Deficit Hyperactive [Disorder] . . . ." *Id.* at 4. Dr. Bellis asserted: "On the basis of the history and from the reports and examination, it may be concluded that the defendant would not have been substantially affected by any mental state, mental illness, or mental defect at the time of the alleged offense." *Id.* Dr. Bellis also found that Callahan had no strong impediment to participation in his defense. *Id.*

[5] The People obtained a superseding indictment that eliminated allegations of criminal conduct occurring prior to Callahan's sixteenth birthday and mooted a jurisdictional dispute over those claims. During trial, the People filed an amended superseding indictment to conform the charges to the evidence.

[6] Before trial, Callahan filed a motion for appointment of a defense expert. Callahan requested the appointment of Mary Katherine Fegurgur, Psy.D., MSW, BSW, to "conduct[] a forensic psychological examination to determine whether [Callahan]'s history of violent sexual assault has resulted in any behavior disorder." RA (Ex Parte Mot. & Order for Appointment of Defense Expert at 3, Dec. 27, 2012). Callahan requested evaluation for sexually reactive behavior disorder—similar to post-traumatic stress disorder. Callahan represented that the

condition may provide a complete defense because a sufferer may be unable to control his actions.

[7] The trial court denied Callahan's motion, finding no support that sexually reactive behavior disorder was a full defense or that Callahan demonstrated the appointment's necessity. In its order, the court held in abeyance the People's motion to present child-witness testimony via video.

[8] The People filed a motion *in limine* that included, among other things, a request pursuant to Guam Rule of Evidence 804.1 to take child-witness testimony via closed-circuit television. Callahan opposed this request. The People subsequently filed two letters from K.R.F. and M.J.T.'s therapists, which recommended the procedure. During the motion hearing, Callahan's counsel stated: "I'd love to cross examine [the therapists], but I can't." Transcript ("Tr.") at 15 (Mot. in Limine Hr'g, Sept. 20, 2013). The court asked whether the defense doubted the veracity or authenticity of the letters; the defense stated it did not. The trial court granted the People's motion, and Callahan petitioned this court for interlocutory review. We declined interlocutory review.

[9] On the fourth day of trial, the People and trial court realized that proper arrangements had not been made for the children to testify via closed-circuit television. New arrangements would cause a few days' delay. The trial court proposed, *sua sponte*, a different arrangement, which the People supported: Callahan was to sit in the back of the courtroom, with the witnesses' view of him obstructed. One of the two defense attorneys would sit next to him, along with a marshal "to prevent him from getting up." Tr. at 15 (Jury Trial – Day 4, Oct. 2, 2013). The second attorney could "come forward and speak to the examining attorney on [Callahan's] behalf." *Id.* The defense objected to this procedure, but ultimately received only a limiting instruction for the jury

not to put any weight in anyone's absence from the courtroom at any time during the proceedings. Callahan was unable to see the witnesses or the jury during this time. While he may also have had trouble hearing the witnesses on occasion, a system was devised whereby the attorney sitting with Callahan would signal out of view of the jury and witness for the judge to instruct the witness to speak up. The defense volunteered to have Callahan also sit in the back of the room, subject to the same procedures, during a non-child witness to make it harder for the jury to draw inferences from his absence during only certain portions of the trial.

[10] The defense raised a concern that members of the jury were glancing back at the area of the courtroom where Callahan was sitting even though they were not supposed to know he was there. The trial judge stated that he and the court staff, whom he consulted, had not noticed this occurring. The judge noted that as the jury was walking out, one person turned to look "but not towards the exact corner and not for an inordinate amount of time." Tr. at 192 (Jury Trial – Day 5, Oct. 3, 2013). The court also used other means to keep Callahan's presence secret, such as removing the chairs in which Callahan and his counsel were seated prior to the jury passing through that area. The People also indicated they had not noticed the jury's attention drawn to the corner.

[11] The jury found Callahan guilty of several instances of first- and second-degree criminal sexual conduct. The trial court sentenced Callahan to thirty years' imprisonment.

[12] Callahan's counsel did not timely appeal his conviction, and the trial court denied a motion to extend the time in which to file the appeal because counsel failed to "put forth any substantive reason why [Callahan's] admitted neglect is somehow excusable or why there is otherwise good cause . . . ." RA, tab 191 at 2 (Order Denying Mot. Ext. Time Filing Notice Appeal, June 27, 2014). Callahan appealed this denial; we reversed and remanded for

reconsideration. *People v. Callahan*, 2015 Guam 24 ¶ 39. On remand, the trial court denied Callahan's motion again.

[13] Callahan filed a petition for a writ of habeas corpus in the Superior Court. The court granted the petition, vacating and re-entering judgment in the underlying case and instructing the clerk of court to issue a new notice of entry on the docket. Callahan then filed a timely appeal.

[14] After briefing concluded, this court requested, *sua sponte*, supplemental briefing concerning the appropriate standard of review. We also granted in part the People's motion to supplement the record with the therapist letters—omitted from the record by mistake. The People had requested these letters be filed under seal, but we ordered redacted versions filed on the public docket.

II. JURISDICTION

[15] This court has jurisdiction over an appeal from a final judgment of conviction. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-231 (2018)); 7 GCA §§ 3107, 3108(a) (2005); 8 GCA § 130.15(a) (2005).

III. STANDARD OF REVIEW

[16] We review questions of law, including constitutional questions, *de novo*. *People v. Kitano*, 2011 Guam 11 ¶ 17 (Confrontation Clause); *People v. Diego*, 2013 Guam 15 ¶ 13 (due process); *Ada v. Guam Tel. Auth.*, 1999 Guam 10 ¶ 10 (statutory interpretation). "We review the denial of a 'request for public funds to hire an expert' for an abuse of discretion." *People v. Santos*, 2003 Guam 1 ¶ 15 (quoting *United States v. Labansat*, 94 F.3d 527, 530 (9th Cir. 1996)).

IV. ANALYSIS

[17] First, Callahan alleges his rights to due process and confrontation were violated when the trial court granted the People's motion to take child-witness testimony by means of closed-circuit

television without an evidentiary hearing. He argues the therapist letters the trial court reviewed when granting the motion were facially insufficient. He also argues that the procedure used to shield the child witnesses violated the Confrontation Clause. Second, he alleges his constitutional right to a fair trial was violated by the exclusion of evidence that he was previously molested and by the denial of a court-appointed defense expert.

A. Callahan's Sixth Amendment Confrontation Clause Rights Were Violated

[18] The Confrontation Clause of the Sixth Amendment, made applicable to Guam through the Organic Act, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . ." U.S. Const. amend. VI; *see also* 48 U.S.C.A. § 1421b(g), (u) (Westlaw through Pub. L. 115-231 (2018)). The Due Process Clause of the Fourteenth Amendment, made applicable to Guam through the Organic Act, reads: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ." U.S. Const. amend. XIV, § 1; *see also* 48 U.S.C.A. § 1421b(e), (u); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1370 (9th Cir. 1992) ("The Mink Amendment . . . expressly extends to Guam the Due Process Clause of the Fourteenth Amendment . . . ."). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands. . . . [N]ot all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

1. The trial court erred in not providing Callahan an evidentiary hearing on the government's motion to shield the child witnesses.

[19] Callahan claims that his due process rights were violated when the trial court denied him an evidentiary hearing on the People's motion to take child-witness testimony via closed-circuit television. He argues that he should have been allowed to cross-examine K.R.F. and M.JT.'s therapists who offered letters in support of the motion.

[20] Guam Rule of Evidence 804.1(a) allows a trial court in cases involving "physical, sexual or mental abuse of a child" to "order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of closed-circuit television." Guam R. Evid. 804.1(a). The trial court must determine that a particular child (1) will suffer serious emotional distress (2) as a result of the defendant's presence (3) resulting in the child's inability to reasonably communicate. *See* Guam R. Evid. 804.1(a)(2); *see also Craig v. Maryland*, 497 U.S. 836, 856 (1990). All three components of the finding are necessary.

[21] The text of Rule 804.1 does not require a hearing. *See* Guam R. Evid. 804.1(c)(1) ("In [making this determination], the judge *may* observe and question the child either inside or outside the courtroom and hear testimony of a parent or custodian of the child or any other person, including a person who has dealt with the child in a therapeutic setting." (emphasis added)). Additionally, the United States Supreme Court—when allowing testimony via closed-circuit television in *Craig*—did not explicitly state that an evidentiary hearing is necessary before a court decides to deviate from standard confrontation procedures.[1] *See generally* 497 U.S. 836. However, the trial court in *Craig* did in fact hold a full hearing. *See id.* at 842 ("In support of its motion invoking the one-way closed circuit television procedure, the State presented expert testimony . . . ."). Indeed, *Craig* instructs that "[t]he trial court must hear evidence." 497 U.S. at 855; *cf. Eight Hundred, Inc. v. Fla. Dep't of Revenue*, 837 So. 2d 574, 576 (Fla. Dist. Ct. App. 2003) ("Representations by an attorney for one of the parties regarding the facts, and documents attached as exhibits to a motion, do not constitute evidence."). Further, in *State v. Vogelsberg*, 2006 WI App 228, 297 Wis. 2d 519, 724 N.W.2d 649, a case cited by the

[1] The version of the Maryland law the Supreme Court passed upon in *Craig* did not contain the permissive language. That appears to have been added to the Maryland law at a later date before appearing in our own statute. *Compare* Guam R. Evid. 804.1, *with* Md. Code Ann., Crim. Proc. § 11-303 (Westlaw through 2018 Regular Session), *and Craig*, 497 U.S. at 840 n.1 (replicating the text of the Maryland statute passed upon in full).

People, "[t]he court took testimony on the motion from the child's stepmother and his counselor." *Id.* ¶ 2.

[22] The People's inability—and our own—to provide a case where no evidentiary hearing was required *when requested* before employing closed-circuit procedures suggests hearings regularly occur. Even if such a case existed, we would not necessarily adopt the reasoning. "That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with." *Craig*, 497 U.S. at 850. To hold that this requirement of confrontation could be set aside on the basis of unsworn letters, over objection by the defense, would easily dispense of that right. We hold that, when requested, an evidentiary hearing is required on Rule 804.1 motions.

[23] In addition to the failure to hold a hearing, the therapists' letters do not facially meet the elements of Rule 804.1. The therapists' letters for both children detail the post-traumatic stress disorder and anxiety disorder each suffers. People v. Callahan, CRA16-015 (Notice Submission Redacted Docs., Exs. 1-2 (May 1, 2017)). The letters also detail the children's fears, especially of Callahan. *Id.*

[24] For K.R.F., the therapist concludes, "Based on the physical threats that were paired with the abuse/rape that [K.R.F.] experienced, and [K.R.F.]'s continued anxiety and fear for her safety, it is strongly recommended that she be afforded an opportunity to testify in a confidential setting, separate from Mr. Callahan." *Id.* at Ex. 1. The letter addressing M.J.T. discloses that he has frequent flashbacks that make "his daily life emotionally difficult to manage." *Id.* at Ex. 2. For M.J.T., the therapist recommends:

> With regard to testifying, [M.J.T.] has expressed intense fear of contact, regardless of the type, with the alleged perpetrator. The mere discussion of going to Guam triggered PTSD symptoms and an overall regression in his daily functioning. [M.J.T.] also believes Mr. Callahan can still hurt, [sic] even though

> he is incarcerated. Because of his level of fear, it is strongly recommended that he be afforded an opportunity to testify in a confidential setting, separate from Mr. Callahan.

Id. While the letters contain evidence of the first two elements required by Rule 804.1(a)(2)—(1) serious emotional distress (2) because of the defendant's presence—nothing indicates that the children will be unable to reasonably communicate as a result. In *Craig*, expert testimony found that the children "wouldn't be able to communicate effectively" or would "become extremely timid and unwilling to talk." 497 U.S. at 842 (quoting *Craig v. State*, 560 A.2d 1120, 1128-29 (Md. 1989)). Evidence of the child's inability to reasonably communicate is required. It is absent here.

[25] A record regarding Rule 804.1's three elements is best made at an evidentiary hearing where the defendant has the opportunity to confront and cross-examine the witnesses against him or her. Here, the trial court relied on insufficient letters and denied Callahan the opportunity to examine the therapists under oath.

[26] The People argue that any error in not holding an evidentiary hearing was harmless.[2] In their supplemental brief, the People contend that the failure to conduct a required evidentiary hearing is harmless "if the evidence presented at trial sufficiently establishes" the factual basis of the underlying issue. Appellee's Suppl. Br. at 8 (May 11, 2017) (citing *United States v. Dhinsa*, 243 F.3d 635, 656 (2d Cir. 2001)). Even if this is the general rule, no evidence in the therapists' letters or at trial showed that the children would be unable to reasonably communicate. The People point to the children's "fragility" and "their ongoing psychological problems." *Id.* (citing

[2] In the People's Supplemental Brief, they materially misstate the harmless error analysis. The People suggest that this court must find beyond a reasonable doubt that the lack of testimony contributed to the verdict obtained in order to reverse. Appellee's Suppl. Br. at 7 (May 11, 2017). This is wrong. The harmless error analysis *requires* reversal unless this court is convinced beyond a reasonable doubt that the error did *not* contribute to the verdict obtained. *See People v. Roten*, 2012 Guam 3 ¶ 41.

Tr. at 107, 115-16 (Jury Trial – Day 5, Oct. 3, 2013); Tr. at 46-48 (Jury Trial – Day 6, Oct. 4, 2013)). While relevant to the emotional distress element, the children's fragility and psychological issues alone do not establish an inability to communicate. The People also needed to show that the trauma was such that testifying in Callahan's presence would result in the children's inability to reasonably communicate. *See* Guam R. Evid. 804.1(a); *Craig*, 497 U.S. at 856. Because a necessary element was not established by evidence, the trial court erred in granting the motion to take child-witness testimony via closed-circuit television.

2. The trial court erred in screening the defendant during the testimony of the child witnesses.

[27] Despite the trial court's grant of a motion to take child testimony via closed-circuit television, a miscommunication between the trial court and the People resulted in the proper arrangements not being made. Tr. at 15-24 (Jury Trial – Day 4, Oct. 2, 2013). Instead of delaying the trial to make the arrangements, the trial court *sua sponte* decided to employ a novel procedure. *Id.* at 15. Callahan was required to leave the defense table and listen to testimony in the corner of the courtroom. *Id.* Callahan could not see the jury and child witnesses. *Id.* Similarly, the jury and witnesses were shielded from Callahan. *Id.* The trial court instructed the jury not to make inferences based on Callahan's absence. *Id.* at 23, 203-04.

[28] Callahan argues that this novel procedure is at odds with Rule 804.1, the Due Process Clauses, and the Confrontation Clause. Callahan alleges the following specific errors: (1) he was unable to see the jury or the child witnesses; (2) the jury saw he was conspicuously absent from the defense table during this period; (3) he had trouble hearing the testimony and communicating with counsel; and (4) the jury knew he was in the back of the room. Appellant's Br. 26-34 (Mar. 2, 2017). Without reaching an analysis of all the factual matters in Callahan's claims, we find that the novel procedure is clearly prohibited by *Coy v. Iowa*, 487 U.S. 1012 (1988).

[29] In *Coy*, the Court held that placing a screen between the defendant and the child witness violated "the right to face-to-face confrontation." 487 U.S. at 1020. While it is true that the U.S Supreme Court approved of child testimony via closed-circuit television in *Maryland v. Craig*, 497 U.S. 836, nothing in *Craig* changes *Coy*. Because Callahan was screened from the witness and could not observe the testimony, *Coy* controls here. The Confrontation Clause violations here are nearly indistinguishable from *Coy*. In fact, they are worse because Callahan was also screened from the jury and removed from the defense table.

[30] We are not confronted with the use of digital video conferencing programs or other methods that might strike the same balance as *Craig*'s closed-circuit television. We are confronted with a procedure eerily similar to, if not worse than, that prohibited by *Coy*. Our decision does not undermine Rule 804.1 testimony; it condemns the novel procedure used here.

[31] It is worth stressing that the People and the court created this problem, but Callahan was made to suffer the consequences. Guam courts have adopted procedures the United States Supreme Court passed upon, *compare* Guam R. Evid. 804.1, *with Craig*, 497 U.S. at 840 n.1—procedures that have withstood judicial testing. The trial court denied Callahan his confrontation and due process rights when, to avoid a delay, it deviated from Rule 804.1 and used a prohibited screening procedure. Far from confusing the procedure, our decision today strengthens Rule 804.1 because it reinforces it as a valid, albeit narrow, exception to a defendant's rights under the Confrontation Clause.

[32] Confrontation Clause violations, along with other constitutional errors, are generally subject to harmless-error review. *Coy*, 487 U.S. at 1021. "Guam has codified the harmless error doctrine in Rule 130.50(a) of the Guam Rules of Criminal Procedure and in Rule 103(a) of the Guam Rules of Evidence." *People v. Jesus*, 2009 Guam 2 ¶ 53. For error of a constitutional

magnitude, we adhere to the requirements of *Chapman v. California*, 386 U.S. 18 (1967)—an error must be harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24; *see also People v. Felder*, 2012 Guam 8 ¶ 32 n.15. Certain errors, however, are so significant that they constitute structural error. *See, e.g.*, *Unites States v. Cronic*, 466 U.S. 648, 659 (1984). Structural errors are limited but include denial of counsel at critical stages, *see id.*, biased judges, denial of a public trial, and seriously defective reasonable doubt instructions, *see, e.g.*, *Neder v. United States*, 527 U.S. 1, 7-8 (1999). Structural errors defy harmless error review and are subject to automatic reversal. *Neder*, U.S. at 7-8

[33] We find the error to be structural. If this case were no worse than *Coy*, harmless error analysis would apply. However, Callahan was removed from the defense table and was unable to fully perceive and participate in one of the most critical stages of the proceeding against him—the presentation of the victims' testimony implicating him in the crime. Testimony, via closed-circuit television under *Craig*, allows a defendant to see and perceive the trial. Callahan was denied that ability. The removal of Callahan deprived him of meaningful access to his primary trial counsel at a critical stage. The United States Supreme Court has found that it is structural error "when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *See Cronic*, 466 U.S. at 659 n.25. Further, the exclusion of the defendant violates his right to be present. *Cf. Diaz v. United States*, 223 U.S. 442, 455 (1912) (cited with approval in *Taylor v. United States*, 414 U.S. 17, 19 (1973)). Callahan's exclusion from perceiving the trial and corresponding separation from trial counsel was a "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *See Davis v. Alaska*, 415 U.S. 308, 318 (1974) (quoting *Brookhart v. Janis*, 384 U.S. 1, 3 (1966)). In addition to impeding meaningful consultation with his lawyer, Callahan's

absence from the defense table left the jury to speculate about the reasons for his absence. Our conclusion is reinforced because these errors were the direct result of the trial court employing a procedure for victim testimony specifically condemned in *Coy*. While juries are presumed to follow instructions, *see, e.g.*, *Penry v. Johnson*, 532 U.S. 782, 799 (2001), juries are still comprised of human beings and there are certain common-sense limits to the general rule, *see, e.g.*, *Bruton v. United States*, 391 U.S. 123, 135 (1968) ("[T]he practical and human limitations of the jury system cannot be ignored."); *United States v. Martinez*, 514 F.2d 334, 343 (9th Cir. 1975) ("We do not think that the court's prompt cautionary instruction could 'unring the bell.'"). A curing instruction was insufficient here. Therefore, we hold that, where a defendant has not waived or relinquished his or her right to be present, *see, e.g.*, *Illinois v. Allen*, 397 U.S. 337, 342-44 (1970), an objected-to and involuntary exclusion of a defendant from a critical stage of his or her trial constitutes structural error.

[34] Because Callahan was involuntarily excluded from the trial and separated from his attorney in a way that interfered with his ability to participate in his defense, while the primary witnesses against him were testifying, the error is structural. Automatic reversal is required.

B. The Trial Court Abused Its Discretion by Refusing to Appoint a Defense Expert.

[35] "[The United States Supreme] Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal citations omitted) (quoting

California v. Trombetta, 467 U.S. 479, 485 (1984)). "[W]hen a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." *Ake*, 470 U.S. at 74.

[36] In *People v. Santos*, we stated that a denial of a request for public funds to hire an expert is reviewed for abuse of discretion. 2003 Guam 1 ¶ 15. We articulated the following test:

> The defendant "must show that the lack of an expert deprived him of effective assistance of counsel . . . . [by] demonstrat[ing] *both* that reasonably competent counsel would have required the assistance of the requested expert for a paying client, *and* that he was prejudiced by the lack of expert assistance." "Prejudice must be shown by clear and convincing evidence."

Id. (alterations in original) (quoting *Labansat*, 94 F.3d at 530). Appointment is required and prejudice is established when a defendant shows: (1) that he or she is financially unable to pay the fees of the witness; and (2) that the presence of the witness is necessary to an adequate defense. 8 GCA § 75.15 (2005); *see also Santos*, 2003 Guam 1 ¶¶ 16-17. The defendant must show his inability to pay and specifically articulate the necessity of the expert. *See Santos*, 2003 Guam 1 ¶¶ 20-24.

[37] Because the trial court did not question and the parties do not dispute Callahan's financial need, *see* RA, tab 84 at 2-4 (Dec. & Order, May 17, 2013), this case implicates only the second element as to whether Callahan's requested expert was necessary to an adequate defense. In a pre-trial motion, Callahan requested that the court appoint Dr. Fegurgur to "conduct[] a forensic psychological examination to determine whether [Callahan]'s history of violent sexual assault has resulted in any behavior disorder." RA (Ex Parte Mot. & Order for Appointment of Defense Expert at 3, Dec. 27, 2012). Specifically, Callahan was to be evaluated for sexually reactive behavior disorder—similar to post-traumatic stress disorder. *Id.* Callahan represented to the

court that such a finding may constitute a complete defense because a person with the disorder may be unable to control his actions. *Id.* The court denied the motion for appointment of a defense expert, because it found that (1) Dr. Bellis, a court-appointed expert, opined that "[Callahan] suffers from no mental illness, disease or defect"; (2) Callahan's ability to question Dr. Bellis, who has shown no sign of being uncooperative, on the stand or to cross-examine him if necessary using the information gleaned from consulting with Dr. Fegurgur was unimpeded; and (3) no authority indicated that sexually reactive behavior disorder is a complete defense to criminal liability. RA, tab 84 at 2-4 (Dec. & Order).

[38] First, Callahan has established that he was prejudiced because the presence of the witness was necessary to an adequate defense. The Superior Court's finding that "Dr. Bellis . . . found that he suffers from no mental illness, disease or defect," *id.* at 3, is clearly erroneous. Dr. Bellis's letter to the court states: "At this point, I have no strong diagnostic entities I would consider *except for* depression, Post Traumatic Stress Disorder and a possibility of Attention Deficit Hyperactive [Disorder] . . . ." RA, tab 24 at 4 (Letter from Kirk Bellis, D.O. to Hon. James L. Canto II) (emphasis added). In other words, Dr. Bellis did find that Callahan may suffer from post-traumatic stress disorder. Additionally, Dr. Bellis performed a brief forensic analysis that appeared to be aimed at competency to stand trial, while Callahan sought an expert regarding culpability. *See Ake*, 470 U.S. at 68 (finding the appointment of a defense expert required for sanity even after a competency evaluation had been completed). Unlike cases where an expert is requested to review for "any possible defenses," *see, e.g.*, *State v. Pierce*, 488 S.E.2d 576, 583 (N.C. 1997), Callahan made a detailed request to try and mount a defense to the charges. Callahan requested a specific doctor to examine him for a specific condition that shares specific features with post-traumatic stress disorder—a condition for which the court-appointed

expert found clinical indicators. While it is true, as the trial court observed, that "[t]he mere hope or suspicion of the availability of certain evidence that might erode the State's case or buttress a defense will not suffice to satisfy the requirement that defendant demonstrate a threshold showing of specific necessity for expert assistance," RA, tab 84 at 3 (Dec. & Order) (quoting *Santos*, 2003 Guam 1 ¶ 24), the defense's request was specific enough to overcome this standard.

[39] In an attempt to show that a court-appointed defense expert was not necessary to Callahan's defense, the People draw our attention to Dr. Bellis's statement that any consideration of mental disease or defect was irrelevant because Callahan denied involvement and guilt. Appellee's Br. at 40 (citing RA, tab 24 at 4 (Letter from Kirk Bellis, D.O. to Hon. James L. Canto II)). However, the text of Dr. Bellis's letter reveals contradictions in Callahan's statements. While Callahan denied involvement, he also declared that he may not have "kn[own] what he was doing at the time," or that he was not "in control at the time." RA, tab 24 at 1 (Letter from Kirk Bellis, D.O. to Hon. James L. Canto II). The latter statements contradict Dr. Bellis's estimation that consideration of mental disease or defect was irrelevant, as evidence of such mental defect would have been relevant in establishing that Callahan lacked the requisite *mens rea* for the charged offense.

[40] Additionally, the Superior Court found that Callahan failed to provide authority indicating that sexually reactive behavior disorder is a complete defense to criminal liability. RA, tab 84 at 2-4 (Dec. & Order). Title 9 GCA § 7.16 provides:

> A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental illness, disease or defect, he lacked substantial capacity to know or understand what he was doing, or to know or understand that his conduct was wrongful, or to control his actions.

9 GCA § 7.16 (2005). Although Callahan does not cite any case law specific to sexually reactive behavior disorder, he does cite 9 GCA § 7.16, and he explains: "Defense counsel's understanding of this behavior is that, similar to post-traumatic stress disorder, a person who suffers from sexually reactive behavior may be unable to control his actions." RA (Ex Parte Mot. & Order for Appointment of Defense Expert at 3, Dec. 27, 2012). Defense counsel informed the court that the disorder may be a complete defense to liability. *Id.* Although Callahan failed to articulate in great detail the nuances of sexually reactive behavior disorder, his invocation of 9 GCA § 7.16 and post-traumatic stress disorder—along with his explanation of the mechanism by which the defense would work, namely, through negation of *mens rea*—reasonably placed the disorder within the probable bounds of Guam's diminished capacity defense. *See generally People v. Jung*, 2001 Guam 15 (discussing Guam's broad application of the diminished capacity doctrine).

[41] It is also clear from the record that the lack of a defense expert resulted in a continuously shifting defense strategy. Callahan, at an early stage, raised the possibility of a mental disease or defect defense. RA, tab 50 at 2 (Def.'s First Witness List & Notice of Defense, Dec. 18, 2012). However, due to the absence of an expert to support diminished capacity, the defense signaled in opening statements they would be pursuing factual innocence. *See, e.g.*, Tr. at 27-28 (Jury Trial – Day 1, Sept. 27, 2013) ("This case is about false allegations from two accusers, ages four and eight at the time of the alleged incident."). This defense was limited by the evidence as was demonstrated by closing arguments, which were devoted almost solely to doubt regarding the date of occurrence—not Callahan's complete lack of involvement.[3] *See, e.g.*, Tr. at 154 (Jury Trial – Day 7, Oct. 7, 2013) ("This case is all about time. And the evidence that you have is [the

[3] The defense stopped short of any concession on the issue of factual innocence.

mother] saying that she believes, that she believes that this occurred in July."). The defense wanted to pursue a diminished capacity defense, RA (Ex Parte Mot. & Order for Appointment of Defense Expert at 3, Dec. 27, 2012), but was forced instead to pursue factual innocence after the appointment of Dr. Fegurgur was denied. Without the assistance of Dr. Fegurgur, Callahan was unable to mount an adequate defense and was forced to alter his defense theory.

[42] Second, Callahan has demonstrated how competent counsel would have required the assistance of the requested expert. As noted above, Dr. Bellis examined Callahan and found that Callahan may suffer from post-traumatic stress disorder. However, Dr. Bellis's examination appeared to be aimed at competency, while Callahan sought an expert regarding culpability. For example, on the issue of mental capacity, Dr. Bellis stated: "The defendant's mental state would not preclude the defendant from having had substantial capacity to understand what the defendant was doing or to control the defendant's actions." RA, tab 24 at 4 (Letter from Kirk Bellis, D.O. to Hon. James L. Canto II). Notably absent from Dr. Bellis's letter is a distinct opinion as to whether he actually believed that Callahan "lacked substantial capacity to know or understand what he was doing, or to know or understand that his conduct was wrongful, or to control his actions." *See* 9 GCA § 7.16. Given that Dr. Bellis's examination was incomplete in terms of consideration of culpability and of sexually reactive behavior disorder, Dr. Bellis's cooperativeness on the stand is irrelevant. Dr. Bellis would have been unable to answer questions regarding his opinion on Callahan's culpability and on whether Callahan suffered from sexually reactive behavior disorder. Although litigants and their attorneys are often expected to find other ways to "educate [themselves] regarding a particular scientific discipline," *Santos*, 2003 Guam 1 ¶ 21 (quoting *State v. Newton*, 347 S.E.2d 81, 83-84 (N.C. Ct. App. 1986)), these methods have limits. "[T]he ability to subpoena a state examiner and to question that person on

the stand does not amount to the expert assistance required by *Ake*." *Starr v. Lockhart*, 23 F.3d 1280, 1288-89 (8th Cir. 1994), *superseded by statute on other grounds*, Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214, *as recognized in Williams v. Norris*, 576 F.3d 850, 865 (8th Cir. 2009). Knowledge of Callahan's mental state and potential trauma-based conditions—left undeveloped by the state's expert, Dr. Bellis—was necessary for a competent defense attorney to adequately prepare and properly present Callahan's case. *See United States v. Pete*, 819 F.3d 1121, 1134 (9th Cir. 2016) ("Because [the defendant] 'requested expert services in furtherance of a claim that would, if meritorious, change the outcome of the case,' he was prejudiced by not having access to the expert he requested." (citation omitted)). Therefore, competent counsel would have required the assistance of the requested expert, Dr. Fegurgur, on these issues.

[43] Because Callahan demonstrated his inability to pay and the necessity of Dr. Fegurgur's testimony to his defense, he was prejudiced by the trial court's denial of his request for public funds to hire an expert. Moreover, Callahan has demonstrated that competent counsel would have required the assistance of the requested expert. Accordingly, the trial court abused its discretion and Callahan's conviction must be reversed on this claim as well.

C. We Decline to Address Callahan's Other Claims of Error.

[44] Callahan raises additional claims of error, including the trial court's refusal to admit evidence that Callahan himself was previously molested. Appellant's Reply Br. 6-7 (Apr. 17, 2017). However, since we are reversing and remanding on other bases, we need not address these claims as they can be reviewed fresh on remand. *See Hemlani v. Hemlani*, 2015 Guam 16 ¶¶ 33-34.

V. CONCLUSION

[45] Because the Superior Court violated Callahan's rights under the Confrontation Clause and abused its discretion in denying his request for public funds to hire an expert, we **REVERSE** and **VACATE** Callahan's judgment of conviction, and we **REMAND** the case to the Superior Court for further proceedings not inconsistent with this opinion.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice