

# TWO-WAY VIDEO TRIAL TESTIMONY AND THE CONFRONTATION CLAUSE: FASHIONING A BETTER *CRAIG* TEST IN LIGHT OF *CRAWFORD*

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## I. INTRODUCTION

The use of videoconference technology to capture the testimony of remote trial witnesses raises complex legal issues for which the United States Supreme Court has provided little guidance. Such technology has been used in state and federal civil cases, where its use is widely accepted.<sup>1</sup> Use of this technology in federal criminal trials, however, raises a host of constitutional concerns. At the top of those concerns is whether the Sixth Amendment’s Confrontation Clause generally requires live trial testimony over video testimony. Whether and under what circumstances two-way video transmission of remote witness testimony violates the Sixth Amendment’s guarantee of confrontation are issues in need of clearer guidelines.

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1. See, e.g., FED. R. CIV. P. 43(a) (authorizing use of videoconferencing technology in federal civil cases); see also Fredric I. Lederer, *The Potential Use of Courtroom Technology in Major Terrorism Cases*, 12 WM. & MARY BILL RTS. J. 887, 913-14 (2004).

In 2002, the Supreme Court failed to approve a proposed amendment to Rule 26 of the Federal Rules of Criminal Procedure that would have authorized two-way video presentation of remote witness testimony in “exceptional circumstances,” leaving district courts to make case-by-case determinations when prosecutors wish to invoke the procedure.<sup>2</sup> In the absence of legislative guidance, lower courts have used a variety of tests to guide this inquiry. Tests have included that set forth in *Maryland v. Craig*,<sup>3</sup> which governs the use of one-way closed-circuit television to capture child witness testimony in child abuse cases; the exceptional circumstances test, which is modeled after the Rule of Criminal Procedure governing the admissibility of video deposition testimony;<sup>4</sup> and a recent proposal by the dissenting judges in an en banc Eleventh Circuit Court of Appeals case that would link the inquiry to hearsay rules and condition the test on witness availability.<sup>5</sup>

This Article examines the strengths and weaknesses of each of the above tests and concludes that the most appropriate test is one that is similar to the *Craig* test, but which accommodates the Supreme Court’s pronouncements in more recent and related hearsay cases.<sup>6</sup> This proposed test is grounded in two basic premises. First, because the exceptional circumstances test too easily dispenses with the Sixth Amendment’s core guarantee of face-to-face confrontation,<sup>7</sup> the controlling test should require prosecutors to demonstrate a governmental interest significant enough to overcome this core guarantee. Second, because the Supreme Court in *Crawford v. Washington*<sup>8</sup> replaced the *Ohio v. Roberts*<sup>9</sup> overly-subjective reliability balancing test with a simple cross-examination requirement,<sup>10</sup> and because

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2. See Order of the Supreme Court, 207 F.R.D. 89, 96 (2002) (Breyer, J., dissenting) (rejecting proposed amendments to Rule 26(b) of the Federal Rules of Criminal Procedure); see also *infra* note 143 and accompanying text.

3. 497 U.S. 836 (1990).

4. FED. R. CRIM. P. 15.

5. See *United States v. Yates*, 438 F.3d 1307, 1314 n.4 (11th Cir. 2006) (en banc).

6. See *California v. Green*, 399 U.S. 149, 155 (1970) (“While . . . hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence . . .”).

7. See *id.* at 156-57 (“[T]he particular vice that gave impetus to the confrontation claim was the practice of trying defendants on ‘evidence’ which consisted solely of ex parte affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact.” As a result, it is the “literal right to ‘confront’ the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause . . .”).

8. 541 U.S. 36, 60 (2004).

9. 448 U.S. 56, 66 (1980).

10. See *Crawford*, 541 U.S. at 55-56 (“We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, con-

*Crawford* was decided several years after *Craig*, the revised test should similarly replace *Craig*'s reliability balancing test with a cross-examination requirement.

This proposed test has several advantages. Most significantly, because it replaces *Craig*'s balancing test with a set of specific requirements, this proposed test would be easier for courts to administer and would remove the subjectivity inherent in the *Craig* test. In addition, by making an opportunity to cross-examine the remote witness a requirement, this test satisfies the *Crawford* Court's concern that reliability cannot be established without an opportunity for cross-examination.<sup>11</sup> Finally, by requiring prosecutors to demonstrate an important public policy justification (rather than merely witness unavailability), this test ensures that a criminal defendant's confrontation rights are not too easily dispensed with.<sup>12</sup>

Before analyzing each available test, Part II summarizes the arguments favoring the admission of remote, two-way videoconference testimony. Part III.A describes the interplay between the fundamental rights of cross-examination and physical confrontation embedded in the Clause and briefly discusses the Supreme Court's leading Confrontation Clause cases, *Coy v. Iowa*<sup>13</sup> and *Maryland v. Craig*.<sup>14</sup> Part III.B examines the disagreement between the Second and Eleventh Circuit Courts of Appeals as to whether the *Craig* test should extend beyond one-way video procedures to govern two-way procedures as well. The discussion in Part III.B serves as a springboard to Part IV, which more critically analyzes each court's approach.

Employing a textualist analysis, Part IV.A considers whether the *Craig* test should be confined to the one-way video procedure at issue in *Craig* or whether it might also extend to two-way videoconference testimony. This Section carefully examines the precise language of *Craig*, particularly those passages where the Court enunciates its holding. This Section concludes that, while certain language in *Craig* seems to confine the test to one-way video, other language indicates that the test would apply more broadly. This Section ultimately concludes that *Craig* applies to cases outside the realm of the child abuse context, but that its reach is limited.

Part IV.B considers arguments for and against the exceptional circumstances test, a test employed by the Second Circuit in *United States v. Gigante*,<sup>15</sup> but more recently rejected by the Supreme Court

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dition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability.”).

11. *See id.*

12. *See infra* note 163 and accompanying text.

13. 487 U.S. 1012 (1988).

14. 497 U.S. 836 (1990).

15. 166 F.3d 75 (2d Cir. 1999).

when it declined to adopt proposed Rule 26(b). Part IV.B concludes that the exceptional circumstances test is flawed in that it too easily dispenses with the constitutional rights of criminal defendants.

Part IV.C examines additional tests the Court might consider upon review of a case admitting remote testimony by two-way video. This Section considers, and ultimately rejects, the proposal submitted by the dissenting judges in *United States v. Yates*<sup>16</sup> that courts should apply either *Craig* or *Crawford* in determining the admissibility of such testimony, depending on whether the witness is available to testify at trial.

Finally, after examining the strengths of each available test, Part V sets forth a proposed test derived from *Craig*, but containing requirements seemingly prescribed by *Crawford*. This Part ends with a list of arguments in support of the proposed test. Part VI concludes.

## II. ARGUMENTS FAVORING THE ADMISSION OF CONTEMPORANEOUS TRIAL TESTIMONY BY TWO-WAY VIDEO

Terrorism cases are largely dependent on evidence from abroad.<sup>17</sup> When the recent increase in terrorism prosecutions is coupled with the increasingly global nature of the economy and its concomitant increase in international crimes, federal courts are likely to see a significant increase in the need for foreign witnesses across a range of federal criminal trials.<sup>18</sup>

Because of their inability to subpoena foreign witnesses to testify in the United States (absent an applicable treaty),<sup>19</sup> federal prosecutors are often constrained to the mechanisms available in the foreign country to obtain the needed evidence, and those mechanisms frequently fall short of Sixth Amendment protection.<sup>20</sup> Thus, for example, if the witness's home country is grounded in the civil law tradition, as in France or Switzerland, the evidence that is available under the local procedure would often fail to satisfy the Confrontation Clause.<sup>21</sup> In such circumstances, the current Federal Rules of Criminal Procedure seemingly require remote testimony to be obtained by

16. 438 F.3d 1307, 1314 n.4 (11th Cir. 2006) (en banc).

17. See Lederer, *supra* note 1, at 924-25.

18. See Lynn Helland, *Remote Testimony—A Prosecutor's Perspective*, 35 U. MICH. J.L. REFORM 719, 723-24 (2002).

19. United States citizens are subject to federal courts' subpoena powers no matter their location. 28 U.S.C. § 1783(a) (2000). On the other hand, citizens of foreign countries typically may not be compelled to testify in the United States unless they can be served with a subpoena while in the United States. See *United States v. Johnpoll*, 739 F.2d 702, 709 (2d Cir. 1984).

20. See Helland, *supra* note 18, at 723-25.

21. See *id.* at 724-25.

Rule 15 deposition.<sup>22</sup> Rule 15 testimony, however, is an imperfect substitute for live testimony and is wrought with confrontation concerns.

Unlike live testimony, Rule 15 testimony can be presented stenographically, which prevents the jury from assessing the witness's demeanor;<sup>23</sup> it does not always require the witness to be confronted with the defendant during the taking of the testimony;<sup>24</sup> and it may be taken weeks or even months before trial, denying the parties the opportunity to question the witness in the context of other witnesses and trial proceedings.<sup>25</sup> Thus, in many cases, employing two-way videoconference technology to admit testimony that would otherwise be presented by video deposition would eliminate Rule 15's inherent limitations.<sup>26</sup>

The limitations inherent in Rule 15 favor permitting trial courts to invoke either the Rule 15 deposition or contemporaneous videoconference, depending on which procedure best protects the confrontation rights of a given defendant. Indeed, in some cases a trial court may determine that the added confrontation benefit of the defendant's presence at a Rule 15 deposition makes the deposition preferable, while in other cases the opportunity for a credibility assessment provided by live transmission may better ensure the testimony's reliability.<sup>27</sup> This determination would depend on factors such as the

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22. See Order of the Supreme Court, 207 F.R.D. 89, 96 (2002) (Breyer, J., dissenting) (arguing that, in rejecting proposed Rule 26(b), "the Court denies all litigants—prosecutors and consenting defendants alike—the benefits of advances in modern technology"). *But see* United States v. Hasting, 461 U.S. 499, 505 (1983) ("[F]ederal courts may, within limits, formulate procedural rules not specifically required by . . . Congress."); United States v. Yates, 438 F.3d 1307, 1324 n.8 (11th Cir. 2006) (en banc) (Tjoflat, J., dissenting) (arguing that the Supreme Court's rejection of the proposed Rule 26(b) and Justice Scalia's opinion on the matter "represents nothing more than the legal musings of a Supreme Court Justice on an issue that has yet to be briefed and argued in a case or controversy before the Court" and thus has little authoritative effect); United States v. Nippon Paper Indus. Co., 17 F. Supp. 2d 38, 43 (D. Mass. 1998) (relying on "a constitutional hybrid" procedure that "borrow[ed] from the precedent associated with Rule 15 videotaped depositions [and] marr[ie]d it to the advantages of video teleconferencing"); United States v. Gigante, 971 F. Supp. 755, 758-59 (E.D.N.Y. 1997) (relying on court's "inherent power" to structure a criminal trial in a just manner under Federal Rules of Criminal Procedure 2 and 57(b)).

23. See FED. R. CRIM. P. 15(f) (providing that "[a] party may use all or part of a deposition as provided by the Federal Rules of Evidence"); see also Helland, *supra* note 18, at 721 (describing the limitations inherent in this procedure).

24. Pursuant to Federal Rule of Criminal Procedure 15(c)(2), the defendant may waive his right to be present at the deposition. In addition, where defendants are unable to travel to the deposition site, they have often participated in the deposition by open telephone line. Helland, *supra* note 18, at 722.

25. See *id.* at 721-22.

26. *Id.*; see also Richard D. Friedman, *Remote Testimony*, 35 U. MICH. J.L. REFORM 695, 698-99 (2002) (noting various benefits of permitting remote videoconference testimony).

27. See *Yates*, 438 F.3d at 1323 (Tjoflat, J., dissenting). According to Judge Tjoflat, a court's choice between deposition testimony and testimony by two-way videoconference would be determined by which procedure provided greater protection to the defendant's confrontation rights, a determination which is unequivocally case-specific.

quality of the video technology, whether the deposition would be played before the jury or simply read into evidence, whether the witness's testimony is accusatory or descriptive, and the importance of testimony being obtained in the context of trial rather than prior to trial.<sup>28</sup> Thus, for example, if a defendant waives his right to be present at a Rule 15 video deposition or if the defendant is in custody and cannot travel to the deposition,<sup>29</sup> the court might require a contemporaneous trial videoconference to preserve at least a *virtual* face-to-face confrontation between witness and defendant. If, however, the defendant is willing and able to travel to the deposition site, then the court could require the Rule 15 deposition to preserve an actual physical face-to-face confrontation between witness and defendant. In either case, a choice between two imperfect options [is better than no choice at all].<sup>30</sup>

Currently, in light of the Supreme Court's rejection of proposed Rule 26(b), lower courts will likely conclude that the Rules of Criminal Procedure prohibit the use of the two-way video procedure altogether, as Rule 26 now provides that witness testimony "must be taken *in open court*."<sup>31</sup> Absent a Rule 26(b)-like rule, most courts would hesitate to rely on highly general and uncertain sources of legal authority, such as their inherent power to structure a criminal trial in a just manner under Rules 2 and 57(b).<sup>32</sup> Thus, in many cases, the only practical alternative to two-way videoconference is to lose the evidence entirely, making the argument for permitting the routine presentation of remote testimony via two-way videoconference even stronger.<sup>33</sup> This would be the scenario, for example, when a key remote witness is identified after the deadline for taking deposition testimony has passed.

Legal scholars have argued that the admission of remote two-way video testimony is further justified on pragmatic grounds. A partner in a New Jersey law firm recently noted,

28. *See id.*

29. In such situations, the defendant often participates in the deposition by open telephone line. *See* Helland, *supra* note 18, at 722.

30. Judge Tjoflat makes a similar argument in his dissent in *Yates*. *See Yates*, 438 F.3d at 1325 (Tjoflat, J., dissenting); *see also* *United States v. Gigante*, 971 F. Supp. 755, 759 (E.D.N.Y. 1997) ("Defendant concedes that his own purported poor health precludes his traveling to the deposition and he prefers televised presentation of live testimony to a deposition.").

31. FED. R. CRIM. P. 26(b) (emphasis added). There are two broad exceptions to Rule 26 where other federal laws excuse the witness's personal appearance in court. First, Rule 15 of the Federal Rules of Criminal Procedure permits a witness's deposition testimony to be substituted for live testimony when "exceptional circumstances" make it in the interests of justice to do so. Second, admissible hearsay, taken as a whole, excuses Rule 26's personal appearance requirement. Helland, *supra* note 18, at 720.

32. *See supra* note 22.

33. *See* Friedman, *supra* note 26, at 703; *see, e.g., Yates*, 438 F.3d at 1310 (majority opinion) (witnesses, who were located in Australia, were not subject to government's subpoena power and were unwilling to travel to United States to testify).

Videoconferencing is winning fans among both lawyers and judges. Plaintiff attorneys see it as a tool to help win cases and better serve clients. Judges see it as useful and appropriate in some circumstances, supporting the public policy goals of fairness, access, and judicial efficiency.

Both camps recognize the power of videoconferencing to leverage scarce resources. For busy attorneys, the ability to make efficient use of time, the scarcest of all resources, will be the ultimate enticement of videoconferencing.<sup>34</sup>

Despite such sentiments, even a great idea for improving court efficiency falls flat if it does not pass constitutional muster, and many judges believe that two-way video testimony is wrought with confrontation concerns.<sup>35</sup> With that said, not all judges believe that remote video testimony is constitutionally problematic, particularly those who view cross-examination, rather than face-to-face confrontation, as the Clause's primary aim. Eleventh Circuit Judge Stanley Marcus, for example, contends that remote video testimony fully complies with the Confrontation Clause by providing the accused with the opportunity to cross-examine the witness; providing testimony under oath; and allowing the judge, jury, and defendant to view the witness while testifying.<sup>36</sup> Indeed, the same advantages have been cited by commentators in comparing live, two-way video testimony to constitutionally permissible hearsay.<sup>37</sup>

In summary, when a witness is unwilling to travel to the United States to testify, the current Rules of Criminal Procedure would generally require their testimony to be presented by video deposition, but such testimony is wrought with confrontation concerns. In many instances, two-way video technology can be a useful substitute for this procedure. When combined with its many efficiency advantages, the argument favoring the use of such technology in circumstances that do not violate the Sixth Amendment is strong.

### III. THE CURRENT LEGAL LANDSCAPE

#### A. *United States Supreme Court: Physical Confrontation Versus Cross-Examination*

The Sixth Amendment's Confrontation Clause assures the right of an accused "to be confronted with the witnesses against him."<sup>38</sup> This overarching right of confrontation encompasses two underlying protections: (1) the right to a face-to-face confrontation of adverse wit-

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34. Samuel L. Davis, *A Practical Guide to Videoconferencing*, TRIAL, Mar. 2000, at 48, 53.

35. See Order of the Supreme Court, 207 F.R.D. 89, 94 (2002).

36. See *Yates*, 438 F.3d at 1328 (Marcus, J., dissenting).

37. Lederer, *supra* note 1, at 921-23.

38. U.S. CONST. amend. VI.

nesses<sup>39</sup> and (2) the right to cross-examine adverse witnesses.<sup>40</sup> Each of these underlying protections is designed to enhance truth-seeking.<sup>41</sup>

The United States Supreme Court has declared that face-to-face confrontation forms “the core of the values furthered by the Confrontation Clause.”<sup>42</sup> This core value serves dual purposes. First, facing one’s accusers deters false accusations, as it is far more difficult to lie when looking directly upon the accused.<sup>43</sup> Second, face-to-face confrontation enables jurors to “examine the demeanor of the witness as the witness accuses the defendant, as well as the demeanor of the defendant as he hears the accusations . . . .”<sup>44</sup> This, in turn, enables jurors to more properly assess credibility.<sup>45</sup>

The second right advanced by the Clause—the right of cross-examination—is perhaps just as crucial, as cross-examination has been deemed the “greatest legal engine ever invented for the discovery of truth.”<sup>46</sup>

In recent years, the Supreme Court has been schizophrenic in choosing which of these two objectives is the *primary* purpose underlying the Confrontation Clause. For example, in a 1988 Supreme Court opinion written by Justice Scalia, *Coy v. Iowa*,<sup>47</sup> after examining the history of the Clause, the Court described “the irreducible literal meaning of the Clause” as “[the] right to *meet face to face* all those who appear and give evidence at trial.”<sup>48</sup> In reaching this conclusion, Justice Scalia reasoned from the “plain text” of the Clause. Scalia declared, “The thesis [that the only essential interest pre-

39. See *California v. Green*, 399 U.S. 149, 156-57 (1970).

40. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (“The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination.”); see also *United States v. Bordeaux*, 400 F.3d 548, 556 (8th Cir. 2005) (“In addition to expressing a strong ‘preference’ for face-to-face encounters, the confrontation clause affords defendants the right to cross examine the witnesses against them.”). More than 100 years ago, in *Mattox v. United States*, 156 U.S. 237, 242-43 (1895), the United States Supreme Court summarized the goals of the Confrontation Clause as follows:

The primary object of [the Confrontation Clause] was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may . . . judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

41. See *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987) (noting that both cross-examination and face-to-face confrontation “ensur[e] the integrity of the fact-finding process”).

42. *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) (citing *Green*, 399 U.S. at 157).

43. *Id.* at 1019-20.

44. See Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 HOUS. L. REV. 1003, 1011 (2003).

45. See *id.*

46. *Maryland v. Craig*, 497 U.S. 836, 846 (1990) (quoting *Green*, 399 U.S. at 158).

47. 487 U.S. 1012 (1988).

48. *Id.* at 1021 (quoting *Green*, 399 U.S. at 175 (Harlan, J., concurring)).

served by the right was cross-examination] is on its face implausible, if only because the phrase ‘be confronted with the witnesses against him’ is an exceedingly strange way to express a guarantee of nothing more than cross-examination.”<sup>49</sup>

According to Scalia, “there is something deep in human nature that regards face-to-face confrontation between accused and accuser as ‘essential to a fair trial in a criminal prosecution,’ ”<sup>50</sup> in that a witness “may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts.”<sup>51</sup> It is always more difficult to tell a lie about a person to his face than behind his back.<sup>52</sup> “In the former [case,] even if the lie is told, it will often be told less convincingly.”<sup>53</sup>

Just two years later, in *Maryland v. Craig*,<sup>54</sup> the Court held that the Confrontation Clause does not prohibit a state from using one-way closed-circuit television to capture testimony of a child witness in a child abuse case even where the child cannot view the defendant while testifying.<sup>55</sup> The Court declared that “[a]lthough face-to-face confrontation forms ‘the core of the values furthered by the Confrontation Clause,’ . . . it is not the *sine qua non* of the confrontation right.”<sup>56</sup>

In *Craig*, a school teacher was charged with sexual abuse of a six-year-old child.<sup>57</sup> Before trial, the State sought to invoke a state statutory procedure permitting the child to testify by one-way closed-circuit television.<sup>58</sup> The trial court granted the State’s motion.<sup>59</sup> During the subsequent testimony, the witness was permitted to testify in a separate room with only the attorneys present.<sup>60</sup> The judge, jury, and defendant remained in the courtroom.<sup>61</sup> Under the State’s procedure, a video monitor was used to display the testimony to those in the courtroom.<sup>62</sup> During this time, the witness could not see the defendant; however, the defendant was able to communicate with her attorney.<sup>63</sup> Upon the strength of the disputed testimony, Craig was convicted.<sup>64</sup>

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49. *Id.* at 1019 n.2.

50. *Id.* at 1017 (citing *Pointer v. Texas*, 380 U.S. 400, 404 (1965)).

51. *Id.* at 1019 (citation omitted).

52. *Id.*

53. *Id.*

54. 497 U.S. 836 (1990).

55. *Id.* at 855.

56. *Id.* at 847 (citations omitted).

57. *Id.* at 840.

58. *See id.* at 840-41 (describing the Maryland statutory procedure used in *Craig*).

59. *See id.* at 842-43.

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.* at 840.

64. *Id.* at 843.

On appeal to the United States Supreme Court, Craig argued that her Sixth Amendment confrontation rights were violated by use of the video procedure.<sup>65</sup> In retreating from a literal face-to-face requirement, the *Craig* Court reasoned, “We have never held . . . that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial.”<sup>66</sup> The Court noted, for example, that most cases approving the use of hearsay evidence implicated the “literal right” to confront but were not subject to the face-to-face requirement.<sup>67</sup> According to the Court, the central concern of the Confrontation Clause is not face-to-face confrontation, but “to ensure the reliability of the evidence against a criminal defendant.”<sup>68</sup>

Applying these principles, *Craig* set forth a two-part test for determining whether an exception to the Confrontation Clause’s face-to-face requirement is warranted: “[A] defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where [1] denial of such confrontation is necessary to further an important public policy and [2] only where the reliability of the testimony is otherwise assured.”<sup>69</sup> With respect to the first prong, *Craig* added the additional requirement of a case-specific finding of necessity.<sup>70</sup> *Craig* did not define what constitutes an “important public policy,” but it did provide guidance as to what makes testimony reliable. The Court declared that reliability of the evidence is assured by providing the defendant with not only (1) a “personal examination;” but also (2) the right of cross-examination; (3) the giving of statements under oath; and (4) an opportunity to assess demeanor and, hence, credibility.<sup>71</sup>

Both *Craig* and *Coy* indicate that the Supreme Court is willing to permit the presentation of trial testimony by videoconference under circumstances that justify retreat from a literal application of the Sixth Amendment’s face-to-face requirement. While retreating from

65. *Id.* at 942.

66. *Id.* at 844.

67. *See id.* at 847-48 (describing various hearsay exceptions); *see also Coy v. Iowa*, 487 U.S. 1012, 1024 (O’Connor, J., concurring).

68. *See Craig*, 497 U.S. at 845.

69. *Id.* at 850.

70. *See id.* at 855-56 (noting trial court’s finding that allowing the child witness to testify via one-way video was “necessary to protect [the] child witness from trauma”). This finding of “necessity” has three components: first, the “trial court must hear evidence and determine whether use of the one-way closed-circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify;” second, the “trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant;” and third, “the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*.” *United States v. Turning Bear*, 357 F.3d 730, 736 (8th Cir. 2004) (quoting *Craig*, 497 U.S. at 856).

71. *See Craig*, 497 U.S. at 845-46.

an absolute face-to-face requirement, the Court nevertheless cautioned that this requirement should only be sacrificed in “narrow circumstances.”<sup>72</sup> Just how narrow such circumstances may be likely depends on whether the current Supreme Court Justices would view cross-examination, rather than physical confrontation, as the primary aim of the Clause.

### B. Federal Circuit Split

#### 1. The Second Circuit’s “Exceptional Circumstances” Test

In *Craig*, the Supreme Court upheld the presentation of child witness testimony taken from the judge’s chambers and transmitted to the courtroom by use of one-way closed-circuit television. Nine years later, in *United States v. Gigante*,<sup>73</sup> the Second Circuit Court of Appeals considered the related issue of whether a defendant’s Sixth Amendment confrontation rights were violated when the trial court allowed a government witness to testify via two-way closed-circuit television from a remote location.<sup>74</sup> At trial, the Government asserted that the defendant, Vincent Gigante, was the boss of the New York mafia’s Genovese family.<sup>75</sup> The Government charged Gigante with various conspiracy-related charges.<sup>76</sup> Gigante was subsequently convicted on the strength of testimony offered by six former Mafia members, which included Genovese family member Peter Savino.<sup>77</sup> According to the Second Circuit, Savino “was a crucial witness against Gigante.”<sup>78</sup> As a government cooperator, Savino was a participant in the Federal Witness Protection Program.<sup>79</sup> At the time of Gigante’s trial, Savino was in the final stages of an inoperable, fatal cancer and was under medical supervision at an undisclosed location.<sup>80</sup>

At trial, the Government moved to allow Savino to testify via closed-circuit television.<sup>81</sup> The court held a hearing to determine whether Savino was able to travel to the courthouse to present his testimony live.<sup>82</sup> At the hearing, a Government physician testified that it would be “medically unsafe” for Savino to travel.<sup>83</sup> Finding that Savino was indeed unable to travel due to his health, the court

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72. According to Justice O’Connor, “in certain narrow circumstances, ‘competing interests . . . may warrant dispensing with confrontation at trial.’” *Craig*, 497 U.S. at 848.

73. 166 F.3d 75 (2d Cir. 1999).

74. *Id.* at 78.

75. *Id.*

76. *Id.*

77. *See id.* at 78-79.

78. *Id.* at 79.

79. *Id.*

80. *Id.*

81. *Id.* at 80.

82. *Id.* at 79.

83. *Id.*

permitted Savino to testify via two-way closed-circuit television, basing its decision on the court's inherent power to structure a criminal trial in a just manner under Rules 2 and 57(b) of the Federal Rules of Criminal Procedure.<sup>84</sup> During his subsequent testimony, Savino was visible on video screens to the jury, the defense, and the judge.<sup>85</sup> Likewise, "Savino could see and hear defense counsel and other courtroom participants on a video screen from his remote location."<sup>86</sup>

Upon review, the Second Circuit held that the Sixth Amendment right of confrontation did not require a face-to-face confrontation with Savino in the same room.<sup>87</sup> With little explanation, the court reasoned that the closed-circuit television procedure adequately preserved each of *Craig's* four elements of confrontation, stating, "Savino was sworn; he was subject to full cross-examination; he testified in full view of the jury, court, and defense counsel; and Savino gave this testimony under the eye of Gigante himself."<sup>88</sup>

While the *Gigante* court applied *Craig's* four "reliability" elements (comprising one-half of the *Craig* analysis), the court explicitly refused to apply the full *Craig* test, stating,

In *Craig*, the Supreme Court indicated that confrontation rights "may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Gigante* seeks to hold the government to this standard, and challenges the government to articulate the important public policy that was furthered by Savino's testimony. However, the Supreme Court crafted this standard to constrain the use of one-way closed-circuit television, whereby the witness could not possibly view the defendant. Because [the trial court] employed a two-way system that preserved the face-to-face confrontation celebrated by *Coy*, it is not necessary to enforce the *Craig* standard in this case.<sup>89</sup>

The *Gigante* court further reasoned that the Government could have lawfully presented Savino's testimony by Rule 15 video deposition<sup>90</sup> and that the closed-circuit presentation of Savino's testimony afforded greater protection of Gigante's confrontation rights than would have been provided by a Rule 15 deposition. Indeed, under

84. *Id.* at 80.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 80-81 (internal citations omitted).

90. Rule 15(a)(1) of the Federal Rules of Criminal Procedure provides, "A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice." FED. R. CRIM. P. 15(a)(1).

Rule 15, the court could have simply admitted the transcript of Savino's deposition, which would have precluded the jury from visually assessing the witness's demeanor.<sup>91</sup> Further reducing the confrontation value of Savino's Rule 15 deposition was the fact that Gigante had not attended the deposition.<sup>92</sup>

Rather than applying the public policy prong of the *Craig* test, the *Gigante* court fashioned a test based on the requirements of Rule 15, ruling that "[u]pon a finding of *exceptional circumstances*, . . . a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice."<sup>93</sup> According to the court, Savino's illness and participation in the Federal Witness Protection Program, coupled with Gigante's own inability to participate in a distant deposition, satisfied this "exceptional circumstances" requirement.<sup>94</sup>

A few years later, in an unpublished opinion,<sup>95</sup> the Sixth Circuit Court of Appeals applied the *Gigante* test to a Confrontation Clause challenge. In that case, the trial court had admitted videoconference testimony of an elderly witness who was too ill to travel.<sup>96</sup> In affirming, the Sixth Circuit simply quoted the passage of *Gigante* applying *Craig's* four reliability factors and declared, "The same reasoning applies [here]."<sup>97</sup> Aside from this unpublished opinion, no other federal appeals court has adopted the *Gigante* test.

## 2. *The Eleventh Circuit's Application of Craig*

With *Coy*, *Craig*, and *Gigante* as its guide, in 2006, the Eleventh Circuit Court of Appeals, sitting *en banc*, considered whether certain Alabama defendants' Sixth Amendment confrontation rights were violated by the presentation of testimony by witnesses located in Australia via two-way videoconference.<sup>98</sup>

In *United States v. Yates*, various federal criminal defendants were tried in the Middle District of Alabama for mail fraud and related offenses arising out of their involvement with an Internet pharmacy.<sup>99</sup> Prior to trial, the Government moved to introduce testimony from two witnesses in Australia by means of a live, two-way

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91. See *Gigante*, 166 F.3d at 81.

92. See FED. R. CRIM. P. 15(c) (giving defendant ability to waive the right to be present at a Rule 15 deposition); see also *Gigante*, 166 F.3d at 79 (refusing to address the Government's argument that Gigante had actually waived his right to confront Savino because, according to the court, Savino's testimony by two-way videoconference did not violate Gigante's confrontation rights).

93. *Gigante*, 166 F.3d at 81 (emphasis added).

94. *Id.* at 81.

95. *United States v. Benson*, 79 F. App'x 813 (6th Cir. 2003).

96. *Id.* at 820.

97. See *id.* at 820-21.

98. See *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006) (*en banc*).

99. *Id.* at 1309-10.

videoconference.<sup>100</sup> In support of its motion, the Government declared that both witnesses were “essential witnesses to the government’s case-in-chief.”<sup>101</sup> The Government further declared that both witnesses were unwilling to travel to the United States to testify and that both were beyond the government’s subpoena powers.<sup>102</sup> Defendants opposed the motion, arguing that admission of such testimony would violate their Sixth Amendment confrontation rights.<sup>103</sup> The district court granted the motion, finding that the Government had asserted an “important public policy of providing the fact-finder with crucial evidence” and “in expeditiously and justly resolving the case.”<sup>104</sup>

At trial, the witnesses were sworn in by a deputy clerk of the federal district court and acknowledged that they understood their testimony was under oath and subject to penalty for perjury.<sup>105</sup> The Government questioned the witnesses by means of two-way videoconference, and each defendant’s attorney cross-examined the witnesses.<sup>106</sup> The defendants, the jury, and the judge could see the testifying witnesses on a television monitor, and the witnesses could see the courtroom.<sup>107</sup> However, certain technical difficulties impacted the abilities of the witnesses, defendants, and counsel to see each other and to communicate during the videoconference.<sup>108</sup> The jury found the defendants guilty on all counts, and defendants appealed.<sup>109</sup> On appeal, a three-judge panel held that the defendants’ Sixth Amendment confrontation rights were violated by the videoconference procedure.<sup>110</sup> The full court later agreed to rehear the case *en banc*.<sup>111</sup>

In the *en banc* proceedings, the Government argued that the *Craig* rule applied only to one-way video, as *Gigante* had ruled.<sup>112</sup> The Government also argued that two-way video testimony provides greater protection of a criminal defendant’s confrontation rights than does a Rule 15 video deposition and that such testimony should therefore be admissible whenever Rule 15 deposition testimony is admissible.<sup>113</sup>

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100. *Id.* at 1310.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *See id.* at 1310 n.2 (noting witness’s difficulty in seeing everyone in the courtroom, even when camera was directed toward the particular individuals).

109. *Id.* at 1310.

110. *See United States v. Yates*, 391 F.3d 1182 (11th Cir. 2004).

111. *See United States v. Yates*, 404 F.3d 1291 (11th Cir. 2005).

112. *Yates*, 438 F.3d at 1312.

113. *Id.*

The court rejected both arguments. In dismissing the first argument, the court explicitly rejected *Gigante's* decision to apply the Rule 15 exceptional circumstances test rather than the *Craig* test. The court declared,

The *Gigante* trial court should have applied *Craig*. In fact, . . . if the [*Gigante*] court had applied the *Craig* test, its necessity standard likely would have been satisfied; to keep the witness safe and to preserve the health of both the witness and the defendant, it was necessary to devise a method of testimony other than live, in-court testimony . . . .<sup>114</sup>

The court also noted that at least four other Federal Circuits had ruled that the *Craig* test (and specifically its necessity requirement) applies to testimony presented by means of two-way video: the Eighth,<sup>115</sup> Sixth,<sup>116</sup> Ninth,<sup>117</sup> and Tenth.<sup>118</sup> In such cases, courts have allowed child witness testimony via two-way closed-circuit television under the Child Victims' and Child Witnesses' Rights Statute,<sup>119</sup> but only where the trial court's specific findings satisfied both parts of the *Craig* test.<sup>120</sup>

The court rejected the Government's second argument that two-way video testimony is superior to testimony taken by video depositions.

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114. *Id.* at 1313. With respect to *Craig's* necessity requirement, the *Yates* court noted, "Indeed, the Second Circuit held that *Gigante's* confrontation rights had been adequately protected by the district court through its procedure of holding an evidentiary hearing and making specific factual findings regarding the exceptional circumstances that made it inappropriate for the witness to appear in the same place as the defendant." *Id.* at 1313 (citing *United States v. Gigante*, 166 F.3d 75, 79-80, 81(2d Cir. 1999)).

115. In a 2005 opinion, the Eighth Circuit rejected the Government's argument that the exceptional circumstances test should apply to a Confrontation Clause challenge to witness testimony procured by two-way videoconference. The court held that *Craig* applies to both one-way and two-way video systems, reasoning that both procedures employ virtual confrontations, rather than live, face-to-face confrontation. The court declared, "The virtual 'confrontations' offered by [all] closed-circuit television systems fall short of the face-to-face standard because they do not provide the same truth-inducing effect [upon the testifying witness]." *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005).

116. *See United States v. Moses*, 137 F.3d 894, 897-98 (6th Cir. 1998).

117. *See United States v. Quintero*, 21 F.3d 885, 892 (9th Cir. 1994); *United States v. Garcia*, 7 F.3d 885, 887 (9th Cir. 1993).

118. *See United States v. Carrier*, 9 F.3d 867, 870-71 (10th Cir. 1993); *United States v. Farley*, 992 F.2d 1122, 1125 (10th Cir. 1993).

119. *See* 18 U.S.C. § 3509 (2000). In response to *Craig*, Congress passed the Child Victims' and Child Witnesses' Rights Act, 18 U.S.C.A. § 3509, which sets forth the conditions under which a child may testify in federal court by closed-circuit television. In cases applying § 3509, the federal circuit courts have consistently upheld *Craig's* necessity requirement, holding that § 3509(b)(1)(B)(i) requires a case-specific finding that a child witness be unable to testify or communicate reasonably because of the physical presence of the defendant. *Moses*, 137 F.3d at 897-98.

120. *See, e.g., United States v. Turning Bear*, 357 F.3d 730, 735-36 (8th Cir. 2004) (finding Confrontation Clause violated where district court failed to make an adequate case-specific finding that child witness had fear of testifying in defendant's presence, rather than a general fear of the courtroom).

tion under Rule 15. The court reasoned that Rule 15 gives a defendant the opportunity to be present at the deposition while the two-way video procedure does not, thereby providing the defendant with greater protection of his confrontation rights.<sup>121</sup> The court further noted that the two-way video procedure is not authorized by the Federal Rules of Criminal Procedure and that in 2002 the Supreme Court rejected a proposed revision to Rule 26 that would have authorized the procedure.<sup>122</sup>

Applying *Craig's* two-part test, the *Yates* court found that while “[t]he Government’s interest in presenting the fact-finder with crucial evidence is . . . an important public policy,” the prosecutor’s need for the videoconference testimony to make and expeditiously resolve a case are not *sufficient enough* policies to outweigh the defendants’ rights to confront their accusers face-to-face, as all criminal prosecutions include at least some evidence crucial to the Government’s case.<sup>123</sup> The court further deemed *Craig's* necessity requirement lacking because the trial court had failed to hold an evidentiary hearing to consider evidence of necessity.<sup>124</sup> The court noted that where a Rule 15 deposition is available, as in *Yates*<sup>125</sup> (which would have permitted the defendant to be present during the testimony), the lack of necessity is “strikingly apparent.”<sup>126</sup>

Having decided that the public policy prong of the *Craig* test was not met, the court did not address the reliability prong. The court did state, however, that the second prong should be analyzed by considering each of *Craig's* four elements of confrontation: (1) a “personal

121. *United States v. Yates*, 438 F.3d 1307, 1314 (11th Cir. 2006) (en banc).

122. *See id.* (citing Order of the Supreme Court, 207 F.R.D. 89, 93 (2002)). In rejecting the revision, Justice Scalia stated that “the Judicial Conference’s proposed [Rule] 26(b) is of dubious validity under the Confrontation Clause.” *Order of the Supreme Court*, 207 F.R.D. at 93.

123. *Yates*, 438 F.3d at 1316.

124. *See id.* (“The district court made no case-specific findings of fact that would support a conclusion that this case is different from any other criminal prosecution in which the Government would find it convenient to present testimony by two-way video conference.”).

125. *See id.* at 1317-18 (“The district court did not find that there was anything to prevent the Defendants from traveling to Australia to be present for a Rule 15 deposition. In fact, it found that the only reason a Rule 15 deposition may not have been an appropriate alternative to the video conference was that the Government had waited too long to request such a deposition.”); *id.* at 1317 n.9 (“The current version of Rule 15 continues to guarantee the defendant . . . an opportunity to be present at the deposition. . . . In a case like this, where the deposition would be taken at the request of the government, the current rule *requires* the government to pay the expenses of such a defendant’s attendance.”).

126. *See id.* at 1316 (“*Craig* requires that furtherance of the important public policy make it *necessary* to deny the defendant his right to a physical face-to-face confrontation.”); *see also In re Letters of Request from Supreme Court of Hong Kong*, 821 F. Supp. 204, 209 (S.D.N.Y. 1993) (stating that Rule 15 guarantees defendants a right to be present at deposition so as to prevent the use of deposition testimony at trial from violating the Sixth Amendment confrontation right).

examination,” (2) a meaningful oath, (3) the opportunity for cross-examination, and (4) the opportunity to observe witness demeanor.<sup>127</sup>

#### IV. CRITIQUE OF THE VARIOUS TESTS GOVERNING ADMISSION OF REMOTE TWO-WAY VIDEO TESTIMONY

The Supreme Court’s decision in *Craig* indicates its willingness to permit the taking of trial testimony by videoconference under circumstances that justify retreat from a literal application of the Sixth Amendment’s face-to-face requirement. However, courts and commentators disagree as to which specific test should determine the constitutionality of any particular use of videoconference technology. Supreme Court Justice Stephen Breyer, Professor Richard Friedman, and the Second Circuit Court of Appeals argue that the exceptional circumstances test is the most appropriate test. Various other Circuit Courts of Appeals, led by the Eleventh Circuit, contend that the *Craig* test is more appropriate. This Part examines each test that has been proposed to govern this inquiry and concludes that the most appropriate test is a modified *Craig* test setting forth the firm requirements of cross-examination and a case-specific finding that denial of face-to-face confrontation is necessary to further an important public policy.

##### A. *Should the Craig Test Govern?*

In assessing what test should govern the admissibility of remote two-way video testimony, one should first examine the specific language of potentially controlling Supreme Court precedent, such as *Craig*. If *Craig* applies broadly to all situations where face-to-face confrontation is denied, then the *Gigante* court misapplied controlling Supreme Court precedent in adopting the exceptional circumstances test. However, if *Craig* does not clearly apply, then one must consider whether the exceptional circumstances test is preferable over the *Craig* test.

In *Gigante*, with little supporting argument, the Second Circuit refused to apply *Craig* because *Craig* dealt with one-way video, whereas *Gigante* involved a two-way video procedure. Subsequent litigants advocating the *Gigante* approach have elaborated on this distinction, arguing that two-way video is distinct from one-way video in that it preserves the “face-to-face” confrontation promised by the Sixth Amendment.<sup>128</sup> This distinction is flawed.<sup>129</sup> First, both

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127. *Yates*, 438 F.3d at 1318.

128. *See United States v. Bordeaux*, 400 F.3d 548, 553 (8th Cir. 2005).

129. *See id.* at 554 (rejecting argument that *Craig* is limited to one-way video and stating, “*Craig* would govern this case even if there were not a precedent squarely on point be-

one-way and two-way video systems employ virtual confrontation, rather than in-person confrontation, and hence do not provide the same truth-inducing effect upon the testifying witness.<sup>130</sup> In addition, virtual confrontation impairs cross-examination due to the inevitable delay in transmission and sense of distance it creates.<sup>131</sup>

In his dissenting opinion in *Yates*, Judge Marcus makes a far more persuasive argument that the *Craig* rule should not apply to remote two-way videoconference testimony. Judge Marcus argues that *Craig* is distinguishable from *Yates* on three grounds: (1) while *Craig* involved witnesses who could have been ordered to testify in court in the usual fashion, in *Yates* the witnesses were truly unavailable; (2) *Craig* was tailored to a very specific factual scenario involving an abused child who, if forced to take the witness stand to confront her abuser, would suffer additional emotional trauma and would likely provide less reliable testimony, thus defeating the truth-seeking goals of confrontation; and (3) two-way video, unlike a one-way procedure, allows the witness to see the jury and the defendant, thus protecting a criminal defendant's confrontation rights to a greater degree than one-way video through a *virtual* confrontation.<sup>132</sup>

The validity of Marcus's first distinction is addressed in the next subsection. While Marcus's third distinction is indeed valid, it does not answer the initial question of whether the *Craig* test, or some other test, should govern. Rather, it more properly addresses the application of the *Craig* test (or some similar test) by addressing to what extent face-to-face confrontation is actually compromised by the two-way video procedure. Thus, it is a factor for courts to consider in determining whether to admit a particular witness's testimony via two-way video. Marcus's second distinction, however, warrants closer inspection.

In support of his second distinction, Marcus argues that the *Craig* Court's "final summary of its holding spoke in the narrowest of terms."<sup>133</sup> Marcus quotes the following *Craig* passage:

In sum, we conclude that where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the

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cause a 'confrontation' via a two-way closed-circuit television is not constitutionally equivalent to a face-to-face confrontation").

130. See *id.*; see also *Yates*, 438 F.3d at 1314.

131. See Friedman, *supra* note 26, at 702.

132. See *Yates*, 438 F.3d at 1327 (Marcus, J., dissenting).

133. See *id.* at 1331.

evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.<sup>134</sup>

After quoting this passage, Marcus declares, “*Craig’s* relevance ebbs as the circumstances of a case—the technique at issue, the identity of the witness, and the nature of the testimony—move farther away from the situation at *Craig’s* heart—one-way video testimony by an abused child against her alleged abuser.”<sup>135</sup>

While Marcus’s observation is certainly valid, his argument becomes moot if the Supreme Court in *Craig* in fact stated that its holding applied to situations beyond the scope of the precise *Craig* facts. Thus, the starting point for analyzing Marcus’s narrow reading of *Craig* is a close inspection of the language of the *Craig* opinion itself, particularly those passages where the Court enunciates or explains its holding.

The first two steps in the *Craig* Court’s analysis were to determine whether the literal face-to-face requirement of the Confrontation Clause is subject to exceptions<sup>136</sup> and which test should govern the application of those exceptions.<sup>137</sup> Relying on the strength of established precedents (such as a host of hearsay exceptions that would be abrogated under a literal reading of the Clause), the Court first determined that exceptions to the face-to-face requirement were indeed warranted.<sup>138</sup> The Court then turned toward delineating a particular test for lower courts to apply in determining whether an exception is warranted in any given case. In its first statement of its new test, the Court declared, “[O]ur precedents confirm that a defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.”<sup>139</sup>

As written, the above description of the *Craig* test directly contradicts Judge Marcus’s argument that the test only applies to the narrow factual circumstances of *Craig*. Had the Court intended to narrow its holding to child abuse victims, it could have easily done so. For example, it could have phrased its test as allowing an exception where “necessary to further the important public policy of protecting child abuse victims from trauma caused by testifying in the defendant’s presence,” rather than using the broader language it selected—where “necessary to further an important public policy.”<sup>140</sup>

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134. *Id.* (citing *Maryland v. Craig*, 497 U.S. 836, 857 (1990)).

135. *Id.*

136. *See Craig*, 497 U.S. at 844-50.

137. *Id.* at 851-60.

138. *Id.* at 848 (citing *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

139. *Id.* at 850 (citations omitted).

140. *Id.*

Further, in the above passage, the Court did not specify that its holding only applies to certain kinds of criminal defendants (that is, those accused of child abuse). Rather, the Court's statement makes the test applicable to *any* defendant's right to confront *any* accusatory witness. Finally, in the sentence immediately following the above passage, the Court turned toward applying its freshly-minted test to the specific facts of *Craig*, indicating that the Court had moved from delineating its new test to applying it.<sup>141</sup>

While the *Craig* Court's first statement of its holding contradicts Marcus's argument, its second statement supports it:

[W]e hold that, if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.<sup>142</sup>

This narrow statement of its holding (along with the Court's preface, "we hold that") more directly supports Marcus's argument that the *Craig* holding is tailored to a specific factual scenario involving an abused child who would likely suffer emotional trauma if forced to take the witness stand to confront her abuser. Rather than being a statement of the controlling test, however, the above-quoted passage falls within the section of the *Craig* opinion actually applying the new test. Having already set forth its test in the previous section of its opinion,<sup>143</sup> this passage was thus likely not intended to define the outer reaches of the test itself.

The argument favoring a broad application of the *Craig* test is also supported by the myriad number of cases outside the child abuse context where courts have applied the *Craig* test, including cases involving disguised witnesses,<sup>144</sup> those involving witnesses who are medically unable to travel to court to testify,<sup>145</sup> and cases where ex-

141. *See id.* at 851.

142. *Id.* at 855.

143. *Compare id.* at 844-50 (describing precedents leading to the *Craig* test), *with id.* at 851-60 (applying the test to the facts of *Craig*).

144. *E.g.*, *Morales v. Artuz*, 281 F.3d 55 (2d Cir. 2002) (applying the *Craig* test and upholding admission of testimony of adult witness who testified wearing sunglasses); *People v. Sammons*, 478 N.W.2d 901 (Mich. Ct. App. 1991) (applying *Craig* test to determine whether permitting adult prosecution witness to testify wearing full face-mask violated Confrontation Clause); *Romero v. State*, 173 S.W.3d 502 (Tex. Crim. App. 2005) (applying the *Craig* test to determine whether defendant's Sixth Amendment confrontation rights were violated when adult witness testified at trial wearing sunglasses, a hat, and a turned-up collar).

145. *E.g.*, *State v. Sewell*, 595 N.W.2d 207, 212-13 (Minn. Ct. App. 1999) (ruling that the *Craig* test determines whether a witness who is too ill to travel may testify at trial via videoconference).

pert witnesses seek to testify remotely by videoconference.<sup>146</sup> In light of these developments, the Supreme Court may be reluctant to limit application of the *Craig* test to its precise facts, as this would potentially overturn a line of cases applying the test to factual scenarios outside the scope of child abuse cases.<sup>147</sup> Thus, despite the Second Circuit's willingness to disregard *Craig* and despite the arguments of the dissenting judges in *Yates*, the *Craig* test should not be lightly dismissed as the most appropriate standard for judging the constitutionality of the two-way video procedure.

*B. Is the "Exceptional Circumstances" Test a Workable Standard?*

In *Gigante*, the Second Circuit ruled that a trial court may allow a witness to testify via two-way closed-circuit television upon a finding of "exceptional circumstances" where permitting the testimony would further the interest of justice.<sup>148</sup> *Gigante's* exceptional circumstances test mirrors the exceptional circumstances standard set forth in Federal Rule of Criminal Procedure 15, but omits Rule 15's requirement that the defendant be given the opportunity to be physically present during the testimony.

In the wake of *Gigante*, in April 2002, the United States Supreme Court considered a proposed amendment to Rule 26 of the Federal Rules of Criminal Procedure that would have permitted live two-way video testimony when a witness is unavailable to testify in court.<sup>149</sup> Similar to the *Gigante* test and derived from the Rule 15 standard,<sup>150</sup> the proposal would have allowed the use of remote video testimony in exceptional circumstances.<sup>151</sup> The proposal declared,

In the interest of justice, the court may authorize contemporaneous, two-way video presentation in open court of testimony from a witness who is at a different location if: [1] the requesting party establishes exceptional circumstances for such transmission; [2] appropriate safeguards for the transmission are used; and [3] the

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146. *E.g.*, *Gentry v. Deuth*, 381 F. Supp. 2d 614, 616-17 (W.D. Ky. 2004) (ruling that the *Craig* test determines the admissibility of remote expert witness testimony taken via two-way closed-circuit television).

147. *But see* *United States v. Yates*, 438 F.3d 1307, 1331 (11th Cir. 2006) (en banc) (Marcus, J., dissenting) ("I suspect that the Supreme Court never intended lower courts to apply *Craig* outside the peculiar and poignant facts of that case: the case of a terrorized child for whom a forced encounter with her abuser in open court would compound the trauma she had suffered from the very events she was to relate.").

148. *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999).

149. *See* Order of the Supreme Court, 207 F.R.D. 89, 90 (2002).

150. *See id.* at 96 (Breyer, J., dissenting).

151. Proposed Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure (Apr. 29, 2002).

witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)-(5).<sup>152</sup>

Citing possible Confrontation Clause concerns, the Supreme Court rejected the proposal.<sup>153</sup> The Court's decision left the current Rule 26 intact, which provides that "[i]n every [federal criminal] trial the testimony of witnesses must be taken *in open court*."<sup>154</sup>

### 1. Arguments Supporting the Exceptional Circumstances Test

Despite the Supreme Court's hesitation in endorsing the exceptional circumstances standard, there are strong arguments favoring its adoption. First, at least two federal circuit courts have adopted the standard,<sup>155</sup> and in applying this standard rather than the *Craig* test, each court still applied arguably the most significant portion of the *Craig* test: the reliability prong.

A test that focuses on reliability is firmly rooted in the rhetoric of *Craig*, which declares that "[t]he central concern of the Confrontation Clause is to ensure the reliability of [prosecution] evidence."<sup>156</sup> By deeming the Clause's "central concern" as being to "ensure reliability," the *Craig* Court leaves open the possibility that a mere showing of reliability would satisfy the Clause's demands; by requiring just that, *Gigante's* exceptional circumstances test is perhaps justified in applying *Craig's* four reliability factors and employing a rough substitute for its public policy requirement.<sup>157</sup>

Further, a test that mirrors the requirements of Rule 15 would provide trial courts with an easy-to-administer alternative to the Rule 15 video deposition. This additional procedure would provide courts with a choice between two imperfect alternatives for capturing the testimony of an unavailable witness.<sup>158</sup> Trial courts could then se-

152. *Id.* The current Federal Rule of Evidence 804(a)(4) and (5) defines "unavailability" as including situations in which the declarant is either "unable to be present or to testify at the hearing because of death or . . . physical or mental illness or infirmity;" or

absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2) [involving hearsay exception for statement under belief of impending death], (3) [involving hearsay exception for statements against interest], or (4) [involving hearsay exception for statement of personal or family history], the declarant's attendance or testimony) by process or other reasonable means.

153. *Order of the Supreme Court*, 207 F.R.D. at 89.

154. FED. R. CRIM. P. 26(b) (emphasis added); *see supra* note 31.

155. *See United States v. Benson*, 79 F. App'x 813 (6th Cir. 2003) (adopting *Gigante's* exceptional circumstances test and affirming the Second Circuit's reasoning).

156. *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

157. A test that focuses on the reliability prong of *Craig* is further justified by additional Supreme Court precedent such as *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987), where the Court stated that "the right to confrontation is a functional one for the purpose of promoting reliability in a criminal trial."

158. *See supra* note 30 and accompanying text.

lect the particular method that protects the defendant's confrontation rights to the greatest degree.<sup>159</sup> And by utilizing the same standard as Rule 15, courts could develop a more uniform body of case law to govern the two procedures.<sup>160</sup>

Similarly, because a pretrial deposition seeks to replicate trial testimony, one could argue that the most appropriate standard for determining whether to admit in-court video testimony would be the *exact* standard already authorized by Rule 15. According to Professor Akhil Reed Amar, "because a formal deposition purports to be a precise rendition of [an adverse witness's] words, under oath, a jury may treat it as the exact legal equivalent of in-court testimony—and it should be treated as such for Confrontation Clause purposes."<sup>161</sup> Professor Amar's argument is supported by the fact that the Framers designed the Confrontation Clause to address both in-court and out-of-court testimony.<sup>162</sup>

## 2. Arguments Against the Exceptional Circumstances Test

Various arguments counsel against adoption of the exceptional circumstances test. First, *Craig's* public policy requirement is far more stringent than *Gigante's* exceptional circumstances requirement, and as a "core" constitutional right, the right to physically face one's accusers should not be easily dispensed with.<sup>163</sup>

Case law reveals that "considerations of public policy" are more exacting than "exceptional circumstances." Pursuant to Rule 15 case law, exceptional circumstances are generally present where a witness's testimony is material to the case and where the witness is un-

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159. See Order of the Supreme Court, Committee Note, 207 F.R.D. 89, 103 (2002) ("The amendment provides an alternative to the use of depositions, which are permitted under Rule 15. The choice between these two alternatives . . . will be influenced by the individual circumstances of each case, the available technology, and the extent to which each alternative serves the values protected by the Confrontation Clause.")

160. See Helland, *supra* note 18, at 721 (noting that "the apparent goal of the Judicial Conference" in considering proposed Rule 26(b) was to authorize remote video testimony "in about, if not exactly, the same circumstances in which Rule 15 already authorizes the substitution of a deposition for a live witness").

161. See Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1049 (1998). In his article, Professor Amar does not squarely address the issue of which test should be used to regulate videoconferencing of remote witnesses, but rather whether the term "witness," as used in the Confrontation Clause, should encompass both in-court witnesses and pretrial declarants who "witness" via government-prepared affidavits and depositions.

162. See *id.* at 1048-49. This argument, however, is only as strong as the actual level of similarity between deposition and trial testimony. If a formal deposition is not, in fact, a "precise rendition" of a witness's likely in-court testimony, it should not be treated as the "exact legal equivalent" of such testimony, and hence the same standard of constitutionality should not necessarily apply to both types of testimony.

163. Recall that the *Craig* Court cautioned that the face-to-face requirement should only be sacrificed in "narrow circumstances." See *Maryland v. Craig*, 497 U.S. 836, 849 (1990).

available for trial.<sup>164</sup> Thus, under the exceptional circumstances test, a mere showing of witness “unavailability” becomes a stand-in for a showing of “exceptional circumstances.”<sup>165</sup> Further, the unavailability requirement is often satisfied where a witness simply desires not to travel to the United States. For example, in *United States v. Farfan-Carreon*, the court found the exceptional circumstances standard met by a witness who resided in Mexico and refused to travel to the United States to testify out of fear of possible United States prosecution.<sup>166</sup> Similarly, in *United States v. Drogoul*, the Eleventh Circuit deemed the circumstances “exceptional” where Italian witnesses simply declared a general unwillingness to testify in the United States.<sup>167</sup> Finally, in *United States v. Terrazas-Montano*, the court allowed the introduction of deposition testimony of four alien witnesses who would not eat unless they were returned to Mexico.<sup>168</sup>

As compared to the exceptional circumstances standard, *Craig*’s public policy requirement better assures that a criminal defendant’s confrontation rights are not easily compromised. For example, the *Yates* court found *Craig*’s public policy requirement lacking in circumstances that would have likely satisfied the *Gigante* court—that is, where the witness was both unavailable and was deemed “crucial” to the Government’s case.<sup>169</sup> Unlike the exceptional circumstances standard, the public policy requirement demands more than a mere demonstration that the witness wishes not to testify in court.<sup>170</sup> In *United States v. Bordeaux*, for example, the Eighth Circuit held that *Craig*’s public policy requirement was not satisfied where the witness feared testifying before the defendant; this same general fear, however, would have satisfied both the *Farfan-Carreon* and *Drogoul* courts.<sup>171</sup>

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164. See *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999) (citing *United States v. Johnpoll*, 739 F.2d 702, 709 (2d Cir. 1984)).

165. See *United States v. Drogoul*, 1 F.3d 1546, 1552 (11th Cir. 1993) (“[O]rdinarily, exceptional circumstances exist within the meaning of Rule 15(a) when the prospective deponent is unavailable for trial and the absence of his or her testimony would result in an injustice. The principal consideration guiding whether the absence of a particular witness’s testimony would produce injustice is the materiality of that testimony to the case.” (citation omitted)); see also Friedman, *supra* note 26, at 708-09.

166. 935 F.2d 678, 680 (5th Cir. 1991).

167. 1 F.3d at 1553; see also *United States v. Sindona*, 636 F.2d 792 (2d Cir. 1980) (permitting deposition of four Italian witnesses where two witnesses refused to travel to the United States and the other two witnesses had not obtained necessary travel documents).

168. 747 F.2d 467 (8th Cir. 1984).

169. See *United States v. Yates*, 438 F.3d 1307, 1316 (11th Cir. 2006) (en banc).

170. *Id.*

171. See *United States v. Bordeaux*, 400 F.3d 548, 555 (8th Cir. 2005) (“The district court found that [the witness’s] fear of the defendant was only one reason why she could not testify in open court; it did not find that [the witness’s] fear of the defendant was the dominant reason. The district court therefore denied Mr. Bordeaux his [S]ixth [A]mendment right to confront [the witness].”).

Another indication that the *Craig* standard better protects the rights of criminal defendants is that *Craig* requires courts to balance the defendant's Sixth Amendment rights against the State's interests, whereas the exceptional circumstances test does not.<sup>172</sup> In finding that the Government's interest in presenting crucial evidence is an "important public policy" but that such interest does not outweigh a defendant's confrontation rights, *Yates* illustrates that a *Craig*-like balancing test ensures defendant rights are not too easily dispensed with.<sup>173</sup> By contrast, under the exceptional circumstances approach, a court need not balance the defendant's rights against the State's interests. Rather, the court would only need to consider whether circumstances warrant admission of the testimony. By focusing on the Government's proffered exceptional circumstances, or in plain terms—*whether the evidence is helpful to the government and might be difficult to obtain otherwise*—the exceptional circumstances test leaves the defendant's interests out of the inquiry.<sup>174</sup> But because the Bill of Rights was intended to protect criminal defendants rather than to ensure evidence inclusion,<sup>175</sup> a test that clearly accounts for the defendant's interests is essential.

A second argument against the exceptional circumstances test is embedded in the rhetoric of *Craig* itself, which indicates that a public policy-type requirement is an indispensable element of any test purporting to admit the existence of exceptions to the right of confrontation. In allowing for exceptions to the Clause's face-to-face requirement, a primary justification offered by the *Craig* Court was that "general [constitutional requirements] . . . must occasionally give way

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172. See *Maryland v. Craig*, 497 U.S. 836, 846, 851 (1990). Applying its test to Maryland's one-way closed-circuit television procedure, the *Craig* Court came down in favor of the state. While noting the defendant's interest in "reducing the risk that a witness will wrongfully implicate an innocent person"—an interest particularly applicable to impressionable child witnesses—the Court deemed it more important to protect the State's "substantial interest" in protecting victims of child abuse from the trauma of testifying against their alleged perpetrators. See *id.* In reaching this determination, the Court reasoned that where face-to-face confrontation causes significant emotional distress in a child witness, such confrontation would actually disserve the Confrontation Clause's truth-seeking goal—and that the Maryland procedure still preserved the other three interests protected by the Clause: oath, observation of demeanor, and cross-examination. *Id.* at 857.

173. See *Yates*, 438 F.3d at 1316. ("The Government's interest in presenting the factfinder with crucial evidence is, of course, an important public policy. We hold, however, that . . . the prosecutor's need for the video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the Defendants' rights to confront their accusers face-to-face.")

174. Indeed, Rule 15 case law indicates that if a material witness is simply unavailable, a court is likely to find the circumstances "exceptional." See Friedman, *supra* note 26, at 708.

175. See George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145 (2001) (arguing that the framers of the Bill of Rights intended them to be formidable barriers to the successful prosecution of federal criminal defendants, whether guilty or innocent).

to considerations of *public policy* and the necessities of the case.”<sup>176</sup> Significantly, in conveying its point that constitutional rights are not absolute, the Court declared that constitutional requirements must occasionally give way to considerations of *public policy*, rather than to *exceptional circumstances*.<sup>177</sup> Additional Supreme Court cases support the notion that this language was carefully and intentionally selected. For example, in *Coy*, the Court declared, “We leave for another day . . . the question whether any exceptions [to the face-to-face requirement] exist. Whatever they may be, they would surely be allowed only when necessary to further *an important public policy*.”<sup>178</sup>

A third argument against the *Gigante* standard is that the *Gigante* opinion itself is not well-reasoned. The *Gigante* court refused to apply *Craig* primarily because *Craig* dealt with a one-way video procedure whereas *Gigante* involved a two-way procedure.<sup>179</sup> The *Gigante* court, however, did not explain why this distinction mandates separate tests of constitutionality.<sup>180</sup> Further, the *Gigante* court even admitted that there may be “intangible elements” of confrontation that are “reduced or even eliminated” by all forms of video testimony.<sup>181</sup>

Justice Scalia noted a similar concern in rejecting the Proposed Rule 26(b), arguing,

I cannot comprehend how one-way transmission (which *Craig* says does not ordinarily satisfy confrontation requirements) becomes transformed into full-fledged confrontation when reciprocal transmission is added. . . . [A] purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations in the defendant’s presence—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant’s image. Virtual confrontation might be sufficient to

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176. *Craig*, 497 U.S. at 848 (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)) (emphasis added).

177. *Id.*

178. *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) (emphasis added).

179. *See United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999).

180. The closest the Second Circuit came to justifying its choice of tests was to argue that the two-way video procedure “may provide at least as great protection of confrontation rights as Rule 15” and hence requires “[no] stricter standard for its use than the standard articulated by Rule 15.” *See Gigante*, 166 F.3d at 81. As the *Yates* court noted, however, this argument is flawed in that Rule 15 provides the defendant with the right to physically confront the witness at the time of the testimony whereas the remote two-way video procedure does not. *United States v. Yates*, 438 F.3d 1307, 1314 (11th Cir. 2006) (en banc).

181. *Gigante*, 166 F.3d at 81; *see also United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005). (“‘Confrontation’ through a two-way closed-circuit television is not different enough from ‘confrontation’ via a one-way closed-circuit television to justify different treatment under *Craig*.”).

protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.<sup>182</sup>

*Gigante's* distinction between one-way and two-way video is suspect for the additional reason that the Supreme Court itself has not drawn such a distinction. For example, in justifying its holding, the *Craig* Court noted the number of states that at the time permitted the use of videotaped testimony of sexually abused children.<sup>183</sup> The Court noted that twenty-four states authorized the use of one-way television and that eight others authorized the use of two-way video.<sup>184</sup> While the Court could have easily drawn a distinction between one-way and two-way video procedures in the subsequent text, it did not.<sup>185</sup>

A fourth and final argument against adopting the *Gigante* standard is that the defendant's right to be physically present is an indispensable aspect of Rule 15. Indeed, courts have noted that Rule 15 gives defendants the right to be present at depositions *specifically* to prevent the subsequent use of the testimony at trial from violating the Sixth Amendment's right to confrontation.<sup>186</sup> Thus, employing Rule 15's standard in a situation that does not provide defendants with the right to be present during the testimony would make the procedure constitutionally suspect.

This final argument also significantly undermines the reasoning of *Gigante*. Recall that in justifying its adoption of the exceptional circumstances standard, the *Gigante* court argued that the two-way video procedure "may provide at least as great protection of confrontation rights" as the Rule 15 deposition and thus does not require "a stricter standard for its use than the standard articulated by Rule 15."<sup>187</sup> This argument, however, ignores the fact that Rule 15 allows the defendant to physically face his accuser, whereas the remote two-way video procedure does not—a right which the Supreme Court has deemed the "core" of the guarantees afforded by the Confrontation Clause.<sup>188</sup>

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182. See Order of the Supreme Court, 207 F.R.D. 89, 93-94 (2002); see also *Bordeaux*, 400 F.3d at 553 (8th Cir. 2005) (rejecting argument that *Craig* only applies to one-way procedures).

183. See *Maryland v. Craig*, 497 U.S. 836, 854-55 (1990).

184. *Id.*

185. See *id.* at 853-54.

186. See *In re Letters of Request from Supreme Court of Hong Kong*, 821 F. Supp. 204, 209 (S.D.N.Y. 1993) ("To prevent the use of deposition testimony under Rule 15 . . . from being a violation of the defendant's Sixth Amendment rights of confrontation and right to counsel, the Rule provides that the defendant and his attorney must be given an opportunity to be present, even if that means that all necessary costs are borne by the government and even if the defendant is not in the custody of the authority prosecuting him.").

187. See *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999).

188. See *supra* note 7 and accompanying text.

In summary, a comparison of the *Craig* and *Gigante* tests reveals that the public policy prong of the *Craig* test is indispensable. Because the *Craig* Court cautioned that face-to-face confrontation should not be easily dispensed with, a mere showing of witness unavailability should not suffice;<sup>189</sup> such a showing, however, would routinely satisfy the exceptional circumstances test. Further, the public policy requirement is rooted in the Supreme Court's justification for admitting exceptions to the face-to-face requirement in the first place.<sup>190</sup> By eliminating this requirement, the exceptional circumstances test impermissibly tilts the Sixth Amendment's balance away from who it was intended to protect—the criminal defendant—in favor of that which it was originally designed to guard against, overly zealous prosecution.<sup>191</sup>

### C. Is the "Available" / "Unavailable" Distinction a Workable Solution?

In *United States v. Yates*, both dissenting opinions contend that the proper standard for governing the use of remote two-way video testimony in a case such as *Yates* is not the *Craig* standard, but rather the test set forth in *Crawford v. Washington*,<sup>192</sup> the most recent Supreme Court case governing the admissibility of out-of-court testimonial statements.

In his *Yates* dissent, Judge Marcus argues that trial courts should apply one of two tests when determining the admissibility of two-way videoconference testimony, depending on whether the witness is or is not available to testify at trial.<sup>193</sup> Marcus's argument can be summarized as follows,

- 1) If the witness is available to testify, but circumstances would make the witness's testimony more reliable if given outside the presence of the defendant (as in *Craig*, where the witness would be further traumatized by the defendant's presence), then the *Craig* test should govern;

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189. See *Craig*, 497 U.S. at 850 ("That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with.")

190. In further support of this position, in applying its test, the *Craig* Court explicitly noted the "critical" role the public policy prong plays in its application, stating, "The critical inquiry in this case . . . is whether use of the [Maryland one-way video] procedure is necessary to further an important state interest." See *Craig*, 497 U.S. at 852.

191. See Toni M. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863, 887-88 (1988); see also Helland, *supra* note 18, at 732-33 (noting Justice Scalia's argument that the *Craig* standard is more stringent with respect to the defendant's presence than is the Rule 15 standard for out-of-court deposition testimony).

192. 541 U.S. 36 (2004).

193. See *United States v. Yates*, 438 F.3d 1307, 1329-30 (11th Cir. 2006) (en banc) (Marcus, J., dissenting).

2) If, however, the witness is truly unavailable to testify (where, for example, the witness is beyond the Government's subpoena power and refuses to travel to the United States to testify, as in *Yates*), then the test enunciated in *Crawford* should govern.<sup>194</sup>

According to Marcus, under the *Crawford* test, if a witness is truly unavailable to present his testimony at trial, the Confrontation Clause would be satisfied if the defendant is given an adequate opportunity to cross-examine the witness.<sup>195</sup> The implication in Marcus's argument is that, in such a situation, testimony by two-way videoconference will almost always satisfy a Confrontation Clause challenge.

In his separate dissent, Judge Tjoflat makes a similar argument, contending that remote testimony should be categorized as "out-of-court" testimonial evidence, thus falling within the *Crawford* regime.<sup>196</sup> According to Tjoflat, because *Crawford* does not require the defendant to be physically present, the admission of remote testimony by two-way video is immune from Confrontation Clause challenge (again, assuming the accused is given an opportunity to cross-examine the witness).<sup>197</sup>

### 1. Arguments Supporting the Available/Unavailable Distinction

In his 2002 article *Remote Testimony*, Professor Richard Friedman argues that the situation of the child witness who would be traumatized by having to testify against the accused face-to-face is fundamentally different than that of the witness who is fully able to testify but cannot be brought to the courtroom.<sup>198</sup> Friedman contends that in the case of the child witness, electronically transmitted testimony represents the greatest possible degree of confrontation that can be used without traumatizing the child and losing the testimony altogether.<sup>199</sup> According to Friedman, unlike the child witness, actual physical confrontation is possible for the witness who is able to testify in the defendant's presence but logistically cannot be brought to court.<sup>200</sup>

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194. *Id.* at 1330.

195. *See id.* at 1328-29 (Marcus, J., dissenting) (arguing that *Craig* is distinguishable from *Yates* in that, in *Craig*, the child witnesses were available to testify, whereas the defendants in *Yates* were not).

196. *See id.* at 1325-27 (Tjoflat, J., dissenting).

197. *Id.* With respect to the specific issue presented in *Yates*, Judge Tjoflat concludes, "In this case, the witnesses' statements were unquestionably testimonial, and therefore the *Crawford* requirements would need to be satisfied. The defendant here was given a full opportunity to cross-examine the unavailable witnesses. Constitutional issue settled. Accordingly, . . . the procedure utilized here . . . passes constitutional muster." *Id.* at 1326-27.

198. *See Friedman, supra* note 26, at 706.

199. *See id.*

200. *See id.*

In his *Yates* dissent, Judge Marcus invokes Friedman's distinction to support his proposed test.<sup>201</sup> He argues that the situation in *Yates* is distinguishable from that in *Craig*. In *Craig*, the one-way procedure was intentionally designed to prevent the child from viewing the defendant while she testified.<sup>202</sup> In *Yates*, the purpose was to allow a confrontation between the defendants and their accusers, not to prevent one.<sup>203</sup> Thus, in the *Craig* context, a test is needed that determines to what extent face-to-face confrontation can be sacrificed without violating the defendant's confrontation rights; however, in the *Yates* context, a test is needed to determine to what degree face-to-face confrontation should be manufactured so as to avoid confrontation concerns. According to Judge Marcus,

The sole purpose of the *Craig* test is to determine when a court can relax the rigid requirement of face-to-face confrontation. But when a witness is truly unavailable, the requirement of face-to-face confrontation does not apply in the first place, so the *Craig* test ought not to apply either.<sup>204</sup>

At bottom, Judge Marcus's argument is driven by the goal to admit reliable evidence whenever possible (rather than to protect the rights of criminal defendants). He writes,

When it is possible to produce a witness for trial, the requirement of physical presence works adequately . . . as a means of insulating the adversarial process from contamination by inquisitorial practices. If it were applied in situations where the witness cannot be produced at trial, however, this rigid procedural device would perform far more poorly. Because the in-person confrontation rule assumes that the witness is available, rigid application of the rule would result in exclusion of *all* statements of unavailable witnesses, which would lead courts to discard too much reliable evidence.<sup>205</sup>

In short, Marcus's proposal would guarantee that reliable evidence not be rejected simply because it is logistically difficult to ensure a witness's presence in court. Retaining reliable evidence in this manner would therefore further the ends of justice.

## 2. Arguments Against the Available/Unavailable Distinction

Judge Marcus's proposed distinction is flawed for several reasons. First, and most significantly, it misinterprets applicable Supreme Court precedent.<sup>206</sup> As Justice Scalia noted in rejecting the Proposed

201. See *United States v. Yates*, 438 F.3d 1307, 1332 (11th Cir. 2006) (en banc) (Marcus, J., dissenting).

202. See *id.*

203. See *id.*

204. See *id.* at 1331.

205. See *id.*

206. *Id.* at 1314 n.4.

Rule 26(b), Marcus's distinction ignores the fact that the constitutional test the Supreme Court applies to live, in-court testimony (*Craig*) is different from the test it applies to out-of-court statements (*Crawford*).<sup>207</sup> Testimony taken from a remote location is nonetheless presented live during the trial, and hence is more similar to the testimony presented in *Craig* (that is, in-court testimony of a child abuse victim taken from the judge's chambers during trial), than that presented in *Crawford* (that is, a tape-recorded statement given at the scene of a crime by a witness to the crime long before criminal charges have been filed).<sup>208</sup>

Second, even accepting Marcus's argument that the unavailable remote witness calls for a different test than that applied to child abuse victims, because the Confrontation Clause was designed to ensure a face-to-face confrontation, a test requiring the defendant and his counsel to travel to the witness's location before resorting to remote testimony as a fallback would be more desirable than Marcus's proposal.<sup>209</sup> In the case of the *Yates*-type witness and unlike the child abuse victim, the court would forego an *actual opportunity* for confrontation if it did not require that the accused and witness be brought together for questioning where possible. Such an actual opportunity for physical confrontation should not be easily excused.<sup>210</sup>

Third, Marcus's proposal would have the undesirable effect of premising the controlling constitutional test on the particular witness's location and nationality (which determines whether the remote witness could be forced to testify in America by subpoena). Pursuant to 28 U.S.C. § 1783, a federal court may subpoena any national or resident of the United States who happens to be located in a foreign country.<sup>211</sup> Thus, only foreign nationals who are located in a

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207. See Order of the Supreme Court, 207 F.R.D. 89, 94 (2002) (citing *White v. Illinois*, 502 U.S. 346, 358 (1992)) ("There is . . . no basis for importing the 'necessity requirement' announced in [*Craig*] into the much different context of out-of-court declarations admitted under established exceptions to the hearsay rule.").

208. See *Yates*, 438 F.3d at 1314 n.4 (noting that "*Crawford* applies only to testimonial statements made prior to trial, and the live two-way video testimony at issue in this case was presented at trial."); see also Friedman, *supra* note 26, at 709 ("The consequence of a declarant being deemed unavailable under Rule 804(a) is that it makes potentially applicable a set of hearsay exceptions, including the one for testimony previously given, set out in Rule 804(b). That is a considerably different matter from the question of whether testimony from a remote location should be allowed. The incorporation of Federal Rules of Evidence 804(a)(4) and (5) would therefore breed confusion."); see also Amar, *supra* note 161, at 1045 (arguing that hearsay law notions of the term "witness" should not affect Confrontation Clause analysis, as the former is primarily an evidence law issue while the latter is a constitutional law issue).

209. Under this proposal, the fallback option of receiving testimony via two-way video would apply in special circumstances preventing travel, such as where the defendant is too ill to travel or the foreign country cannot ensure the defendant's safety.

210. See Friedman, *supra* note 26, at 706.

211. 28 U.S.C. § 1783 (2000).

country where no treaty allows for the witness's subpoena are beyond the federal courts' subpoena power. Under Marcus's proposal, if the remote witness is a national or resident of the United States or if the witness is subject to subpoena by treaty,<sup>212</sup> the witness would not be truly unavailable and the *Craig* test would apply. If, however, the witness is a foreign citizen located outside of the United States, the far less restrictive *Crawford* test would govern. Such a distinction seems both arbitrary and unresponsive to the constitutional concerns inherent in the use of two-way videoconference technology.

Finally, the line between "available" and "unavailable" is too unclear to serve as the benchmark of constitutionality. For example, if the witness in *Yates* had been willing to travel to America to testify but simply preferred to stay home, then neither of Marcus's tests would apply and a third test would be needed for this witness category. Another problematic example is that of the adult witness who claims a mental infirmity that, although not making it impractical for her to travel to the courtroom, makes it very uncomfortable for her to do so but still allows her to testify comfortably from a remote location.<sup>213</sup> Again, under Marcus's proposal, it is unclear whether the *Crawford* test or the *Craig* test would govern. For these reasons, Marcus's proposed test is not a viable substitute for the *Craig* test.

#### V. THE MODIFIED *CRAIG* TEST: APPLYING THE LESSONS OF *CRAWFORD* IN FASHIONING A NEW *CRAIG* TEST

In March of 2004, the Supreme Court issued its landmark decision involving out-of-court testimonial statements, *Crawford v. Washington*,<sup>214</sup> in which the Court overruled *Ohio v. Roberts*.<sup>215</sup> In *Roberts*, the Court held that when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause requires a showing that (1) he is "unavailable" to testify at trial and (2) his previous statement being offered into evidence bears adequate "indicia of reliability."<sup>216</sup> According to *Roberts*, reliability can be inferred without more in a case where the evidence falls within "a firmly rooted hearsay exception," as such evidence is inherently trustworthy and hence does not offend the Confrontation Clause.<sup>217</sup> However, in cases not involving a firmly rooted hearsay exception,

212. See, e.g., Treaty on Mutual Assistance in Criminal Matters, U.S.-Italy, art. 15, Nov. 9, 1985, 24 I.L.M. 1539, 1541 (providing that potential witnesses may be ordered by the Italian government to testify in the United States).

213. See Friedman, *supra* note 26, at 710.

214. 541 U.S. 36 (2004).

215. 448 U.S. 56 (1980).

216. *Id.* at 66.

217. *Id.*

the evidence must be excluded “absent a showing of particularized guarantees of trustworthiness.”<sup>218</sup>

Justice Scalia authored the opinion in *Crawford*, in which six of the remaining eight Justices joined (with the other two Justices concurring in the result).<sup>219</sup> In that case, petitioner Michael Crawford had stabbed a man who allegedly tried to rape his wife, Sylvia.<sup>220</sup> At Crawford’s trial for assault and attempted murder, the State played a tape-recorded statement made by Sylvia to the police in which she described the stabbing.<sup>221</sup> Sylvia’s recorded statement indicated that the stabbing was not in self defense.<sup>222</sup> Arguing that Sylvia had admitted in her statement that she had facilitated the crime, the State invoked the hearsay exception for statements against penal interest.<sup>223</sup> On the strength of this evidence, Crawford was convicted.<sup>224</sup> Crawford appealed, arguing that the statement’s admission violated the Sixth Amendment’s Confrontation Clause, as he had no opportunity to cross-examine Sylvia regarding her out-of-court statement.<sup>225</sup> Finding that Sylvia’s statement was “reliable” under the old *Ohio v. Roberts* test, the Washington Supreme Court upheld Crawford’s conviction.<sup>226</sup> The Washington Supreme Court unanimously concluded that although Sylvia’s statement did not fall under a firmly rooted hearsay exception, it bore guarantees of trustworthiness in that it was nearly identical to the defendant’s own version of the events.<sup>227</sup>

In reversing, the United States Supreme Court overruled *Roberts* by replacing the second prong of the *Roberts* test—which requires a

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218. *Id.* In *Roberts*, the witness was truly “unavailable” to testify. *Id.* at 59-60. The defendant in *Roberts* was charged with receiving stolen property, including credit cards. *Id.* at 58. At the defendant’s preliminary hearing, defense counsel called the daughter of the credit card holder to the stand, who testified that she had allowed the defendant to use her apartment while she was away. *Id.* However, the daughter refused to admit that she had given the defendant the credit cards at issue without first informing him that she did not have permission to use them. *Id.* The defendant testified at his subsequent trial that the daughter had given him her parent’s credit cards with permission to use them. *Id.* at 59. The daughter, having run away from home after the preliminary hearing, was unavailable to testify at trial. *Id.* at 59-60. The prosecution moved to admit her preliminary hearing testimony. *Id.* at 59. The trial court admitted the transcript into evidence, and the defendant was subsequently convicted. *Id.* at 60.

219. *Crawford v. Washington*, 541 U.S. 36, 37 (2004).

220. *Id.* at 38.

221. *Id.*

222. *Id.* at 38-40.

223. *Id.* at 40.

224. *Id.* at 41.

225. *See id.* at 40 (“Sylvia did not testify [pursuant to the Washington] state marital privilege, which generally bars a spouse from testifying [at trial] without the other spouse’s consent.” *See* WASH. REV. CODE § 5.60.060(1) (1994).)

226. *Crawford v. Washington*, 541 U.S. 36, 38 (2004).

227. *See id.* at 41 (noting the Washington Supreme Court’s reasoning that “when a co-defendant’s confession is virtually identical [to, *i.e.*, interlocks with,] that of a defendant, it may be deemed reliable.”).

showing of “reliability”—with a simpler test, one requiring merely an opportunity to cross-examine the witness. In perhaps the most significant passage of *Crawford*, Justice Scalia declared,

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to . . . amorphous notions of “reliability.” . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. . . . The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one.<sup>228</sup>

This passage is significant in the instant analysis because it suggests that an overwhelming majority of the current Supreme Court Justices<sup>229</sup> would find the *Craig* test constitutionally suspect, in that it ratifies testimonial statements under a *Roberts*-like subjective determination of reliability without necessarily requiring an opportunity for cross-examination. Under such a framework, as the *Crawford* Court noted, “[w]hether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them.”<sup>230</sup> Such an inquiry is overly subjective and ignores the primary purpose of the Clause as providing procedural, rather than substantive, protection.

In the realm of testimonial evidence presented by child abuse victims, *Craig* held that a defendant’s right to confront accusatory witnesses may be satisfied only where the reliability of the testimony is assured.<sup>231</sup> *Craig* declared that reliability is to be determined by considering whether the witness testifies under oath, whether the defendant is able to physically confront the witness, whether the defendant is given an opportunity to cross-examine the witness, and whether the jury is able to assess witness demeanor.<sup>232</sup> Subsequent

228. *Id.* at 61-62 (internal citations omitted).

229. Justices Stevens, Kennedy, Souter, Thomas, Ginsburg, and Breyer signed the *Crawford* majority opinion written by Justice Scalia. Chief Justice Rehnquist filed an opinion concurring in the judgment which Justice O’Connor joined.

230. See *Crawford*, 541 U.S. at 63 (describing the inherent subjectivity of a *Craig*-like “reliability” test).

231. See *Maryland v. Craig*, 497 U.S. 836, 850-51 (1990).

232. *Id.* at 845-46.

courts have afforded varying relative weights to these four factors. In *Romero v. State*,<sup>233</sup> for example—a case in which a Texas court ruled that the Confrontation Clause was violated when an adult witness was allowed to testify in sunglasses, a hat, and turned up collar—the court ruled that where two of the four *Craig* elements of confrontation are compromised, reliability is not assured.<sup>234</sup> In reaching this result, the court balanced the four reliability factors. The opportunity for cross-examination was just one of four factors the court considered, and the court's opinion does not indicate that the cross-examination factor was afforded a heavier weight than the others.<sup>235</sup> This balancing-test approach for assessing reliability would likely offend the *Crawford* Court, which declared that “replacing categorical constitutional guarantees with open-ended balancing tests . . . do[es] violence to [the constitutional] design.”<sup>236</sup>

Rather than treating the opportunity for cross-examination as just one of four factors to consider in assessing whether testimonial statements are reliable, the *Crawford* Court would make opportunity for cross-examination a firm requirement. *Crawford* declares, “[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”<sup>237</sup>

While *Craig* and *Crawford* address different (albeit related) factual scenarios, for the sake of predicting what the Court might do in a *Yates*-type situation, one should assume that the principles of analysis underlying each scenario would not differ. *Roberts* was decided in 1980 but was overruled by *Crawford* in 2004. *Craig* was decided in 1990, after *Roberts* but before *Crawford*. Because *Crawford* abandoned the *Roberts* balancing test for assessing reliability in favor of a bright-line rule requiring an opportunity for cross-examination, and because seven of the current Supreme Court Justices signed the majority opinion in *Crawford*, one can imagine the

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233. 173 S.W.3d 502 (Tex. Crim. App. 2005).

234. See *id.* at 505-06 (finding two of the four *Craig* reliability factors compromised: physical presence and demeanor).

235. For example, the *Romero* court declared, “While there may be circumstances sufficient to justify a procedure that overrides not just one but *two* elements of a defendant's right to confrontation, those circumstances should rise above the ‘important’ interests referred to in *Craig* to interests that are truly compelling.” *Id.* at 506.

236. *Crawford v. Washington*, 541 U.S. 36, 67-68 (2004); see also *United States v. Yates*, 438 F.3d 1307, 1323 n.5 (11th Cir. 2006) (en banc) (Tjoflat, J., dissenting) (“I hasten to note that I do not believe a court should engage in a conceptual balancing of whether a particular confrontation element is invariably more important than another. I do believe, however, that a district court must take into account the extent to which a defendant's right to confrontation has been abridged; extensive deprivations are at least *prima facie* evidence of unreliability.”).

237. *Crawford*, 541 U.S. at 53-54.

Supreme Court reaching the same result in the context of a challenge to *Craig's* general applicability.<sup>238</sup> The *Crawford* Court, after all, reasoned that “[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to . . . amorphous notions of ‘reliability,’ ”<sup>239</sup> and both types of cases involve the admissibility of “testimonial statements” against a criminal defendant.<sup>240</sup>

Rather than simply eliminating the four-part *Craig* reliability test altogether, the Supreme Court might opt for a middle-ground solution. In modifying the *Craig* rule to comport with the rhetoric of *Crawford*, the Court could simply make cross-examination a *requirement* rather than one of a few *factors* to balance in assessing reliability. Such a test, which I will term the “Modified *Craig* Test,” might look like this:

A defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only if each of the conditions set forth in subsections A and B are met:

A) General Requirements:

1) The trial court makes a case-specific finding that denial of physical, face-to-face confrontation is necessary to further an important public policy. This showing requires something more than a demonstration that the witness is unavailable to testify.

2) Defendant has either been given an opportunity to cross-examine the witness before trial or the court ensures that the witness will be subject to a meaningful cross-examination at trial through its authorized procedure.

238. Even before *Crawford* was decided, commentators argued that such a challenge would prove successful. In 2002, for example, Professor Richard Friedman noted three problems with extending *Craig*: (1) *Craig* was a 5-4 decision, (2) *Craig* should arguably be limited to circumstances in which the specific witness would be traumatized by testifying in the courtroom, and (3) there is a fundamental difference between a child witness who would be traumatized by having to testify face-to-face with the accused and a witness who is fully able to testify but cannot be brought to the courtroom. See Friedman, *supra* note 26, at 705-06.

239. *Crawford*, 541 U.S. at 61.

240. See, e.g., Hammon v. State, 809 N.E.2d 945, 951 (Ind. Ct. App. 2004), *rev'd*, 829 N.E.2d 945 (Ind. 2005), *rev'd and remanded sub nom.*, Davis v. Washington, 126 S. Ct. 2266 (2006) (interpreting the Supreme Court’s characterization of testimonial statements to encompass statements with an “official and formal quality”). In addition to in-court testimony, “testimonial” statements include affidavits, custodial examinations, prior testimony, and other pretrial statements that are anticipated to be used prosecutorially. See Chris Hutton, *Sir Walter Raleigh Revived: The Supreme Court Revamps Two Decades of Confrontation Clause Precedent in Crawford v. Washington*, 50 S.D. L. REV. 41, 48 (2005); see also *id.* at 61 n.157 (citing multiple cases that found statements to be “testimonial” in nature).

3) The witness testifies under a constitutionally meaningful oath.

4) The fact-finder has an opportunity to observe the witness's demeanor in order to properly assess credibility. This requirement will be deemed satisfied if the court, upon observation of the proposed procedure's technical aspects, is satisfied that the procedure adequately portrays demeanor evidence.

5) The defendant is given advance notice, at least 30 days prior to the start of trial, of foreseeable circumstances that may lead the proponent to request the taking of trial testimony by video transmission.

If the trial court finds that any of the requirements provided in section A are substantially impaired, the witness must testify in court and in the defendant's presence.

B) Technical Requirements: If the trial court finds that each of the section A requirements are satisfied, the court may allow the witness to testify via two-way video-conference, subject to the following technical standards:

1) The transmission must be by two-way rather than one-way video, unless special circumstances warrant the taking of testimony by one-way video, such as in cases where the witness is a child abuse victim;<sup>241</sup>

2) The transmission must enable the courtroom participants to see and hear the witness clearly and enable the witness to see the judge, jury, counsel, and accused clearly;<sup>242</sup>

3) Throughout the transmission, the jury must be able to view both the witness's face and the portions of his body that are normally visible for witnesses testifying live in court; and

4) The transmission must reveal any coaching of the witness (so the court can rule on whether such coaching is proper and so that the jury will be fully aware of any coaching).<sup>243</sup>

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241. See Friedman, *supra* note 26, at 712, 715-17 (describing Professor Friedman's proposed test).

242. See *id.* at 713, 715-16.

243. See Friedman, *supra* note 26, at 713-14; see also *State v. Warford*, 389 N.W.2d 575 (Neb. 1986) (finding Confrontation Clause was violated by procedure where defendant was unable to communicate with his attorney during questioning and where the camera that

This proposed test has several advantages. First, it *requires* an opportunity to cross-examine the witness, thereby satisfying the *Crawford* Court's concerns and appeasing those who believe that cross-examination is the Confrontation Clause's primary concern. Second, by replacing *Craig's* reliability balancing test with a set of firm requirements, this proposed test would be easier for courts to administer and would remove the subjectivity inherent in the reliability balancing test. Third, this proposed test ensures that the procedure used by trial courts complies with technical requirements designed to enable the jury to fully assess demeanor evidence. Fourth, this test requires advance notice of the Government's intention to obtain trial testimony by videoconference, which provides defendants an opportunity to request the witness's presence at trial and to supplement the resulting trial testimony with deposition testimony.<sup>244</sup> Fifth, by requiring prosecutors to demonstrate an important public policy (rather than merely witness unavailability), this test ensures that a criminal defendant's confrontation rights are not too easily dispensed with. Sixth, this proposal maintains the case-specific finding of necessity required by *Craig*, which ensures that trial courts consider the actual necessity of the two-way video procedure in each particular case vis-à-vis the rights of the defendant, thereby further insulating criminal defendants from potential abuse. And finally, this proposed test avoids casting doubt upon those cases that have applied *Craig* outside the child abuse context.

## VI. CONCLUSION

Whether two-way video transmission of remote witness testimony violates the Sixth Amendment's guarantee of confrontation in any given case is an issue in need of a clearer set of guidelines. A variety of tests have been proposed to govern this inquiry, including the *Craig* test, the exceptional circumstances test, and a test that would condition the inquiry on witness availability. Because the exceptional circumstances test too easily dispenses with the "core" guarantee of a face-to-face confrontation, and because the Supreme Court in *Crawford* replaced its old subjective reliability balancing test with a cross-examination requirement, the most appropriate test is a modified *Craig* test calling for a governmental interest significant enough to overcome the right to a face-to-face confrontation and replacing *Craig's* reliability balancing test with a set of firm requirements. This test could simply be termed the "Modified *Craig* Test."

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recorded the examination of the witness failed to show a complete view of the witness and the examiner).

244. See *United States v. Gigante*, 971 F. Supp. 755, 758 (E.D.N.Y. 1997).

Ultimately, the desirability of any proposed test may depend on whether the Supreme Court views cross-examination, rather than physical confrontation, as the primary aim of the Confrontation Clause. In several recent cases, the Court has placed the right of cross-examination above the right to a physical confrontation. In a significant number of other cases, however, the Court has reversed field.

The debate as to which right is primary forms the core of the disagreement in *Yates*. In the final paragraph of his dissent, Judge Marcus writes,

I believe that my colleagues have lost sight of what the Sixth Amendment Confrontation Clause was designed to do: prevent the government from obtaining summary convictions based on ex parte examinations that the defendant had no opportunity to oppose through the critical engine of cross-examination. The majority's holding has reduced the Clause's protections to an abstract and sterile rule that states that unless the defendant and the witness can be brought together in the same room, the witness's testimony must be excluded, no matter what steps the court takes to ensure fair and effective cross-examination.<sup>245</sup>

The Second Circuit has also recognized that Confrontation Clause analysis ultimately depends on which of these two values the Court deems most significant. In *Morales v. Artuz*,<sup>246</sup> in which the court upheld the admission of prosecution testimony where the witness wore sunglasses on the stand, the court declared,

To the extent that the Supreme Court's "established law" of confrontation seeks to assure cross-examination and an opportunity for the *witness* to see the *defendant*, Sanchez's sunglasses created no impairment. On the other hand, to the extent that the right assures an opportunity for the defendant and especially the jurors to see the witness's eyes in order to consider her demeanor as an aid to assessing her credibility, some impairment occurred.<sup>247</sup>

Those arguing that physical confrontation is the primary right have argued that it is far more difficult to lie when looking directly upon the accused and that a physical confrontation is needed for the

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245. See *United States v. Yates*, 438 F.3d 1307, 1336 (11th Cir. 2006) (en banc) (Marcus, J., dissenting).

246. 281 F.3d 55 (2d Cir. 2002).

247. *Id.* at 60; see also Massaro, *supra* note 191, at 873 ("[T]he common law history of admitting dying declarations shows that statements by some absent witnesses probably should be permitted. Thus, the questions become when and why these exceptions will be allowed. Neither history nor the 'plain meaning' of the clause responds adequately to these questions. In these grey areas, *interpreters necessarily will be guided by their theory about the core value of the confrontation guarantee*, and by their estimation of the importance of that value vis-à-vis other policy concerns.") (emphasis added).

fact-finder to make a meaningful credibility assessment.<sup>248</sup> These advocates have also argued that physical confrontation includes intangible elements having nothing to do with the reliability of the evidence presented. The *Coy* Court, for example, noted that there is something deep in human nature that regards face-to-face confrontation as “essential to a fair trial.”<sup>249</sup> By ensuring the appearance of a fair proceeding, face-to-face confrontation makes the outcome more acceptable to the defendant and to society.<sup>250</sup> Textualists further argue that the Framers would not have selected the phrase “be confronted with the witnesses against him” to express nothing more than the right of cross-examination.<sup>251</sup>

On the flip side, however, the word “confronted” cannot simply mean face-to-face confrontation because the Clause would then prohibit the admission of any accusatory hearsay statement made by an absent declarant (such as those who have passed away before trial commenced).<sup>252</sup> In addition, the textualist argument favoring physical confrontation as the Clause’s primary right runs up against an equally persuasive textualist argument – that in drafting the Sixth Amendment, the Framers could have simply included the words “face to face” rather than “confront.” Article XII of the Massachusetts State Constitution, for example, contains an explicit guarantee of physical confrontation, declaring that “every subject shall have a right . . . to meet the witnesses against him face to face.”<sup>253</sup> Indeed, there are strong arguments on either side of this debate, and a particular judge’s interpretive preference is often outcome-determinative, as the disagreement in *Yates* demonstrates.

The decision of whether to admit remote two-way video testimony may also depend on the significance a particular judge attaches to the distinction between virtual testimony and live, in-person testimony. Virtual confrontation undoubtedly creates a diminished sense of confrontation due to the sheer distance and sense of insulation caused by testifying remotely.<sup>254</sup> Virtual confrontation may also im-

248. See, e.g., Chase, *supra* note 44, at 1011; see also FED. R. CIV. P. 43, Advisory Committee Notes to 1996 Amendments (“The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.”).

249. *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988).

250. See Massaro, *supra* note 191, at 894.

251. *Coy*, 487 U.S. at 1019 n.2.

252. See *Maryland v. Craig*, 497 U.S. 836, 849 (1990).

253. MASS. CONST. pt. 1, art. XII.

254. In *Stoner v. Sowders*, 997 F.2d 209, 213 (6th Cir. 1993), the Sixth Circuit Court of Appeals commented on the distinction between virtual and in-person confrontation:

[With virtual confrontation] the jury and the judge never actually see the witness. The witness is not confronted in the courtroom situation. The immediacy

pair cross-examination.<sup>255</sup> However, the precise effects of virtual confrontation are still unknown.<sup>256</sup>

In the final analysis, the uncertainty as to the actual effect that virtual confrontation has on confrontation and the inclusion of the Confrontation Clause in the Bill of Rights counsel in favor of a test that does not unduly restrict the right of the accused to physically confront his accusers. Because the Supreme Court's recent Confrontation Clause jurisprudence criticizes subjective reliability determinations, and because the exceptional circumstances test too easily dispenses with the core guarantee of face-to-face confrontation, the best available standard is the Modified *Craig* Test.

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of a living person is lost. In the most important affairs of life, people approach each other in person, and television is no substitute for direct personal contact. Video tape is still a picture, not a life, and it does not come within the rule of the confrontation clause which insists on real life where possible, not simply a close approximation.

255. See Friedman, *supra* note 26, at 702.

256. See *id.* at 717 ("How the impact of th[e] [confrontation] right is affected by interposing video screens and monitors and great distance between witness and accused is an interesting issue. I do not believe we yet have a good understanding of that issue, and so we should not cut back on the right of the accused to confront the witnesses against him 'face to face.'").