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# AVOIDING VIRTUAL JUSTICE: VIDEO- TELECONFERENCE TESTIMONY IN FEDERAL CRIMINAL TRIALS

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There is no witness in the courtroom. Yet, testimony is being given, cross-examination is occurring, and a judge is ruling on objections. All eyes are fixed on a television, as if it were a person on the witness stand. In place of a human being there is only audio and video. It is as though the jury is watching a movie instead of a trial, and the witness never needs to enter the courtroom.

Video-teleconferencing (VTC) technology allows a witness to testify from anywhere in the world.<sup>1</sup> Although witnesses can be seen and heard virtually as if they were in the courtroom, it is unclear whether the use of this technology in criminal trials is constitutional.<sup>2</sup> The guarantee that all criminal defendants have the right to confront the witnesses against them

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1. VTC is the use of two-way simultaneous transmission of audio-visual information picked up by cameras and microphones on one end and communicated by monitor and speakers on the other end. Courts use a variety of terms to describe the technology including: videoconferencing, interactive television, and two-way closed circuit television. This Comment will use the term video-teleconference (VTC) for the sake of simplicity and clarity.

VTC has been used for testimony, including trials with international witnesses, that would have been otherwise impossible before the development of the technology. *See, e.g., United States v. Nippon Paper Indus.*, 17 F. Supp. 2d 38, 38-39 (D. Mass. 1998) (allowing VTC testimony from a witness located in Japan at a criminal antitrust trial in the United States). It has also been used in other procedural matters such as sentencing and competency hearings that only transcend interstate or inter-building borders, but such uses have frequently been disallowed on appeal. *See United States v. Lawrence*, 248 F.3d 300, 305 (4th Cir. 2001) (vacating resentencing because physical presence of defendant requirement was not satisfied by VTC); *United States v. Frierson*, 208 F.3d 282, 283 (1st Cir. 2000) (reversing district court's allowance of VTC in involuntary commitment hearing); *United States v. Navarro*, 169 F.3d 228, 238-39 (5th Cir. 1999) (vacating sentencing because physical presence of defendant requirement was not satisfied by VTC). This Comment, however, will only focus on VTC testimony in federal criminal trials, not on other parts of the judicial process. This Comment will also not discuss child victim witnesses, as the law regarding VTC testimony by such witnesses is well established. *See infra* note 69.

2. *See infra* note 107.

is a fundamental element of American criminal procedure.<sup>3</sup> That guarantee, as enshrined in the Confrontation Clause of the Sixth Amendment to the United States Constitution, does not provide that defendants have the right to only “virtually” confront witnesses against them.<sup>4</sup> Yet, VTC still allows for the defendant to see and be seen by the witness and vice versa, and ensures the ability of the defendant to cross-examine the witness.<sup>5</sup> The Supreme Court has long stressed these factors as the vital elements of confrontation.<sup>6</sup> Nevertheless, courts have acknowledged that VTC testimony may not perfectly satisfy the Confrontation Clause.<sup>7</sup>

State and federal courts, in both criminal and civil trials, have diverged in their acceptance of this new technology.<sup>8</sup> In some situations, a judge can easily dismiss or uphold a defendant’s complaint. For instance, the

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3. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 42-51 (2004) (discussing extensively the history and importance of confrontation in criminal trials). In the debates prior to the final adoption to the Bill of Rights, one anti-federalist expressed the fundamental nature of confrontation when complaining of the insufficient protections provided to criminal defendants by the federal government:

For the security of life, in criminal prosecutions, the bills of rights of most of the States have declared, that no man shall be held to answer for a crime until he is made fully acquainted with the charge brought against him; he shall not be compelled to accuse, or furnish evidence against himself—the witnesses against him shall be brought face to face, and he shall be fully heard by himself or counsel. That it is essential to the security of life and liberty . . . Are not provisions of this kind as necessary in the general government, as in that of a particular State? The powers vested in the new Congress extend in many cases to life; they are authorized to provide for the punishment of a variety of capital crimes, and no restraint is laid upon them in its exercise, save only, that “the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be in the State where the said crimes shall have been committed.” . . . What security is there, that a man shall be furnished with a full and plain description of the charges against him? That he shall be allowed to produce all proof he can in his favor? *That he shall see the witnesses against him face to face*, or that he shall be fully heard in his own defence by himself or counsel?

LETTERS OF BRUTUS, NO. II (1788), reprinted in I BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 508 (1971) (emphasis added).

4. See U.S. CONST. amend. VI. (providing that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”).

5. See, e.g., *United States v. Gigante*, 166 F.3d 75, 81-82 (2d Cir. 1999) (holding that the defendant’s ability to see and be seen by the witness and to cross-examine the witness via VTC satisfied the Confrontation Clause when the witness was unavailable to testify in court).

6. *Coy v. Iowa*, 487 U.S. 1012, 1017-20 (1988); *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965) (“[A] major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him.”).

7. Cf. *Gigante*, 166 F.3d at 81 (“Closed-circuit television should not be considered a commonplace substitute for in-court testimony by a witness. There may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony.”).

8. See *infra* Part I.

law regarding the use of VTC testimony in federal civil trials and in certain international courts, such as the International Criminal Court, is fairly well-established, with evidentiary rules outlining the permissible use of VTC testimony.<sup>9</sup> Accordingly, the court need only ascertain if the facts of the case in question satisfy the demands of the rule.<sup>10</sup>

In other situations, however, such as in federal criminal trials in the United States, there is no clear evidentiary rule.<sup>11</sup> Federal criminal trials lack the aid of any rule, let alone a clear rule, regarding the use of VTC testimony.<sup>12</sup> Without a rule specifically allowing or disallowing VTC testimony, there is dissonance among federal criminal decisions.<sup>13</sup> Courts that support the use of VTC testimony frequently focus on the similarity between VTC testimony and depositions.<sup>14</sup> Other decisions focus on reliability, abuse of the medium, a lessening of important trial formality, and the significant psychological difference between a television screen and a live human being.<sup>15</sup> As time becomes more valuable, and as globalization increases the number of cases with international defendants and witnesses, VTC could save both time and money, and allow the introduction of otherwise unavailable testimony in federal criminal trials.<sup>16</sup> These potential advantages, however, need to be balanced against both a criminal defendant's constitutional right to confrontation and the fact that faster and more convenient travel now allows witnesses who may have once been considered unavailable because of distance to appear in court.

This Comment examines the confused state of the law regarding the use of VTC testimony in federal criminal trials. First, this Comment will

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9. See *infra* notes 31-32, 36.

10. See *Air Turbine Tech., Inc. v. Atlas Copco AB*, 217 F.R.D. 545, 546-47 (S.D. Fla. 2003) (finding the facts of the case did not satisfy Federal Rule of Civil Procedure 43 and thus refusing to order the use of VTC testimony).

11. For example, the use of VTC testimony was the major appellate issue in *United States v. Yates*, 438 F.3d 1307, 1311 (11th Cir. 2006) (en banc).

12. In its 2002 update of the Federal Rules of Criminal Procedure, the United States Supreme Court rejected an amendment to Rule 26 that would have discussed VTC testimony in the Rules for the first time. Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89, 93 (2002) (statement of Scalia, J.).

13. Compare *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999) (applying the same standard as that for depositions and holding that the lower court's use of VTC testimony did not violate the Confrontation Clause), with *Yates*, 438 F.3d at 1313, 1316 (applying the same standard as that for one-way closed circuit television and holding that the lower court's use of VTC testimony did violate the Confrontation Clause).

14. See, e.g., *Gigante*, 166 F.3d at 81 ("A more profitable comparison can be made to the Rule 15 [of the Federal Rules of Criminal Procedure] deposition . . .").

15. See *infra* notes 89-90 and accompanying text.

16. E.g., Ronald T.Y. Moon, *1995 State of the Judiciary Address*, HAW. B.J., Jan. 1996, at 25, 28 (discussing VTC in the state of Hawaii, where in the state's first circuit, "case processing time [was] reduced by at least 50 percent, and, because of decreased staff demands on the Department of Public Safety (DPS), the DPS has saved 2,400 hours of staff time, which translates to \$45,000 annually").

briefly examine the beginnings of VTC testimony. Next, this Comment will discuss the implementation of VTC testimony in a variety of legal systems outside of federal criminal law. This Comment will then outline the dissonant decisions in federal criminal cases considering VTC testimony. Next, this Comment will consider how the technology abridges a defendant's right to confrontation, and analyze efforts to reconcile VTC testimony with the Confrontation Clause. Then, this Comment will evaluate how the Supreme Court's 2002 rejection of a proposed amendment to the Federal Rules of Criminal Procedure that would have allowed for VTC testimony,<sup>17</sup> and the Court's interpretation of the Confrontation Clause in *Crawford v. Washington*<sup>18</sup> should affect the use of VTC testimony in federal criminal trials. Finally, after evaluating contrasting rules regarding the use of VTC testimony in federal criminal trials, this Comment will propose a rule that allows VTC testimony only upon a case-specific finding that it is necessary to further an important public policy, or upon the defendant's consent.

## I. VTC TESTIMONY IN COURT

### A. *Maryland v. Craig Restrains Early Enthusiasm for VTC in Criminal Trials*

Courts accepted the early applications of television technology to court proceedings enthusiastically.<sup>19</sup> While acknowledging the importance of

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17. See Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89, 93 (2002) (statement of Scalia, J.).

18. 541 U.S. 36 (2004).

19. See, e.g., *In re San Juan Dupont Plaza Hotel Fire Litig.*, 129 F.R.D. 424 (D.P.R. 1989).

The main purpose of the satellite transmission option is to provide the jury and this Court with live testimony rather than with the droning recitation of countless transcript pages of deposition testimony read by stand-in readers in a boring monotone. The reading of depositions also gives rise to ludicrous objections concerning whether the reader may interpret the tone and mood of the questions and answers and whether the reader may or may not give inflection to certain words or passages. The PSC [(the plaintiffs)] argues that live testimony as opposed to deposition readings will facilitate more comprehensive factual determinations by the jury as well as help it assess the credibility of witnesses. . . .

. . . [T]he futuristic aspects of the PSC proposal need not be perceived as a threat. . . .

. . . [T]he Court favors entering the new age of communications technology with the use of satellite-transmitted "live" testimony.

*Id.* at 425-26 (ignoring the Confrontation Clause because all the legal proceedings arising out of the fire in question were civil); see also *Kansas City v. McCoy*, 525 S.W.2d 336, 339 (Mo. 1975). In its brief opinion in *McCoy*, a criminal case, the Missouri Supreme Court

the Confrontation Clause, criminal courts found that VTC satisfied the defendants' right to confront the witnesses against them because the defendants could see, hear, and cross-examine the witnesses, and the witnesses could see, hear, and respond to the defendants.<sup>20</sup> This initial enthusiasm was tempered, however, by the Supreme Court's decision in *Maryland v. Craig*.<sup>21</sup> In *Craig*, a child abuse defendant challenged the constitutionality of a Maryland law allowing the child victim to appear via one-way closed circuit television to avoid being in the same room as, and looking at, the defendant.<sup>22</sup> The Court held that the use of one-way closed circuit television was an acceptable limitation on a defendant's confrontation right only upon a case-specific finding that such a limitation was necessary to promote an important public policy.<sup>23</sup> While *Craig* did not consider the use of two-way VTC testimony,<sup>24</sup> *Craig's* requirement that a court make a case-specific finding of necessity for an important public policy before allowing one-way closed circuit television testimony gave pause to courts considering two-way VTC testimony.<sup>25</sup> In *Craig*, the Court summarized the substantive goals of the Confrontation Clause: cross-examination of the witness by the defendant, testimony under oath,

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considered simply the ability of the witness to see and hear and to be seen and heard. *See id.* The *McCoy* court stated:

While Dr. Yoong was not physically present in the courtroom, his image and his voice were there; they were there for the purpose of examination and cross-examination of the witness as much so as if he were there in person; they were there for defendant to see and hear and, by the same means, simultaneously for him to be seen and heard by the witness; they were there for the trier of fact to see and hear and observe the demeanor of the witness as he sat miles, but much less than a second, away responding to questions propounded by counsel.

The court did not err in the admission of this evidence by use of closed circuit television.

*Id.* In reference to the Confrontation Clause, the Missouri Supreme Court quoted an 1895 United States Supreme Court decision, apparently finding the quote to speak for itself: "A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and further than the safety of the public will warrant." *Id.* at 338 (quoting *Mattox v. United States*, 156 U.S. 237, 242 (1895)). That enthusiasm has not been entirely lost by some judges. *See, e.g.*, *FTC v. Swedish Match N. Am.*, 197 F.R.D. 1, 2 (D.D.C. 2000) ("[T]here is no practical difference between live testimony and contemporaneous video transmission . . .").

20. *E.g.*, *McCoy*, 525 S.W.2d at 338-39.

21. 497 U.S. 836 (1990).

22. *Id.* at 840-42.

23. *Id.* at 852-53 (concluding that Maryland's statute requiring a case-specific finding of unacceptable emotional harm to a child testifying against an alleged abuser met this standard).

24. *Craig*, 497 U.S. at 840.

25. *See infra* notes 88, 92-97 and accompanying text. *Craig* exemplifies one such important public policy: saving a child-abuse victim from further trauma; the Supreme Court was satisfied that the state trial court had engaged in the requisite case-specific finding of necessity. *Craig*, 497 U.S. at 857.

and the ability of the fact-finder to evaluate the witness.<sup>26</sup> This outline has been an important element of federal criminal jurisprudence regarding VTC testimony.<sup>27</sup> After the *Craig* decision, VTC testimony was no longer an easy replacement for the testimony of a physically present witness; instead, it became a question of constitutional rights.<sup>28</sup>

### B. VTC Outside of the Federal Courts

Jurisdictions outside the federal court system employ VTC testimony in a fairly unrestricted manner.<sup>29</sup> When weighing the importance of hearing all the evidence against the weaknesses of VTC testimony as compared to the testimony of physically present witnesses, many non-federal courts take a very liberal approach toward allowing VTC testimony.<sup>30</sup> The International Criminal Tribunal for the Former Yugoslavia exemplifies this attitude.<sup>31</sup> The founding statute of the International Criminal Court reflects a similar attitude.<sup>32</sup> And this willingness to use VTC technology is not limited to foreign courts. For instance, in 2002, the Michigan legislature created a “cyber court.”<sup>33</sup> The authorizing statute requires “all hearings and proceedings to be conducted by means of electronic communications, including, but not limited to, video and audio conferencing.”<sup>34</sup> This

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26. *Craig*, 497 U.S. at 845-46 (citing *California v. Green*, 399 U.S. 149, 158 (1970)).

27. *See, e.g.*, *United States v. Benson*, 79 F. App'x 813, 820-21 (6th Cir. 2003). In deciding whether VTC testimony violated a defendant's Sixth Amendment rights, the Sixth Circuit looked to the goals of the Confrontation Clause, as reiterated from a line of Supreme Court cases in *Craig*. *Id.* Following *Craig* closely, the court listed these goals as (1) ensuring testimony was given under oath; (2) guaranteeing an opportunity for cross-examination; (3) ensuring the ability of the fact-finder to evaluate the trustworthiness of the witness; and (4) reducing the likelihood that a witness might incorrectly accuse an innocent defendant. *Id.* (citing *Craig*, 497 U.S. at 845-46).

28. *See infra* notes 88, 92-97 and accompanying text. The Federal Rules of Civil Procedure also came to reflect the general understanding that VTC testimony was less than equivalent to live, in-court testimony. *See infra* note 36 and accompanying text.

29. *See, e.g.*, *State v. Sewell*, 595 N.W.2d 207 (Minn. Ct. App. 1999) (extending the Minnesota criminal rule of procedure regarding depositions to allow for VTC testimony); *Prosecutor v. Mrksic*, Case No. IT-95-13/1, Decision on Defence Motions for Video-Conference Link (Apr. 29, 1998) (holding that fairness to defendants allowed use of VTC testimony from witnesses unwilling or unable to travel for good reasons).

30. *See, e.g., infra* text accompanying notes 31-33.

31. *See, e.g., Mrksic*, Case No. IT-95-13/1.

32. Rome Statute of the International Criminal Court art. 68, July 17, 1998, 2187 U.N.T.S. 3 (1998) (allowing the use of VTC testimony).

33. MICH. COMP. LAWS ANN. § 600.8001 (West Supp. 2006).

34. *Id.* § 600.8011(3). Unfortunately for this experiment, a loss of funding and irreconcilable differences over the court's nature and location (e.g., partially physical versus purely electronic) led to an abandonment of the project. E-mail from Marcus Dobek, Dir., Judicial Info. Sys., Mich. Supreme Court to author (Nov. 3, 2005, 18:10:00 EST) (on file with Catholic University Law Review); *see also* Phillip L. Ellison, *Cyber Court: A Law but Not a Reality* (July 17, 2006), <http://www.quagmiresolutions.com/content/press/?id=1153157015>.

effort stands as an extreme example of the enthusiasm for VTC technology outside the federal courts.

### C. Live Remote Testimony and Federal Civil Law

In federal civil trials, to which the Confrontation Clause does not apply,<sup>35</sup> Rule 43 of the Federal Rules of Civil Procedure controls any motion to use VTC testimony.<sup>36</sup> In *Air Turbine Technology, Inc. v. Atlas Copco AB*,<sup>37</sup> the District Court for the Southern District of Florida carefully interpreted the requirements of this rule.<sup>38</sup> The plaintiff, Air Turbine Technology, moved for the district court to compel the defendant, Atlas Copco AB, to provide witnesses via VTC.<sup>39</sup> While acknowledging that Rule 43 allows for remote testimony by contemporaneous transmission, the court stressed the rule's requirement of "good cause shown in compelling circumstances."<sup>40</sup> While concluding that it lacked the power to compel testimony from foreign witnesses, such as the defendant's,<sup>41</sup> the court again emphasized the requirement of compelling circumstances.<sup>42</sup> The court rejected the plaintiff's argument that the use of depositions, instead of VTC, gave the defendant a tactical advantage<sup>43</sup> and held that advantage or disadvantage in litigation does not satisfy the compelling circumstances requirement.<sup>44</sup> The court in *Air Turbine* stressed that not only could it not force foreign witnesses to testify, but that the compelling circumstances requirement had not been satisfied, and thus denied the plaintiff's VTC motion.<sup>45</sup>

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35. U.S. CONST. amend. VI ("In all *criminal* prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." (emphasis added)).

36. FED. R. CIV. P. 43(a) ("The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.").

37. 217 F.R.D. 545 (S.D. Fla. 2003).

38. *Id.* at 546-47.

39. *Id.* at 546.

40. *Id.* (quoting FED. R. CIV. P. 43(a)).

41. *Id.* The court cited *In re San Juan Dupont Plaza Hotel Fire Litigation*, 129 F.R.D. 424, 425 (D.P.R. 1990), which held that VTC testimony could be compelled, but found this case unpersuasive, as it was unable to find a single additional case supporting the proposition that compelling VTC testimony was any different from compelling in-court testimony. *Air Turbine*, 217 F.R.D. at 546. Moreover, as courts cannot compel non-United States citizens living outside the United States to testify by normal means, the court held it did not have the power to compel such witnesses to testify by VTC. *Id.* (citing *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950) (holding that aliens residing outside the United States cannot be compelled to testify)).

42. *Air Turbine*, 217 F.R.D. at 545.

43. *Id.*

44. *Id.*

45. *Id.* at 546-47.



Other courts in federal civil litigation, however, have downplayed the compelling circumstances requirement.<sup>46</sup> For instance, in *FTC v. Swedish Match North America*,<sup>47</sup> the U.S. District Court for the District of Columbia relied on a series of Ninth Circuit decisions that ignored the Rule 43 requirement of good cause in compelling circumstances to hold that requiring a witness to travel from Oklahoma to Washington, D.C. was a sufficiently serious inconvenience to satisfy Rule 43.<sup>48</sup> The court focused entirely on good cause<sup>49</sup> and failed to even mention the compelling circumstances requirement—save for a footnote that simply quoted the entirety of Rule 43(a).<sup>50</sup> The *Swedish Match* court emphasized its favorable attitude toward VTC after its brief discussion of Rule 43.<sup>51</sup> The court stressed the superiority of VTC testimony over depositions, asserting that “there is no practical difference between live testimony and contemporaneous video transmission,” and claiming that the advisory committee notes to Rule 43 were too hostile to VTC, and as such, the court would disregard them.<sup>52</sup>

A recent Ninth Circuit case reiterates the Circuit’s approval of remote testimony, and appears to be the first time the Circuit considered civil VTC testimony specifically.<sup>53</sup> In *Adam v. Carvalho*, the Ninth Circuit made no mention of the Rule 43 requirement of good cause in compelling circumstances and only inquired whether the witness who testified via

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46. See *infra* notes 47-55 and accompanying text.

47. 197 F.R.D. 1 (D.D.C. 2000).

48. *Id.* at 2-3 (discussing *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000); *Alderman v. SEC*, 104 F.3d 285 (9th Cir. 1997); *Official Airline Guides, Inc. v. Churchfield Publ’ns*, 756 F. Supp. 1393 (D. Or. 1990), *aff’d sub nom.* *Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385 (9th Cir. 1993)). In *Beltran-Tirado*, the Ninth Circuit held that telephonic testimony was acceptable in immigration proceedings because it afforded sufficient cross-examination of a sworn witness, and also noted that it would be acceptable in civil proceedings under Rule 43. *Beltran-Tirado*, 213 F.3d at 1186. Three years earlier, in *Alderman*, the Ninth Circuit permitted the use of remote testimony without any mention of good cause or compelling circumstances, focusing instead only on the reliability of the testimony given by telephone. *Alderman*, 104 F.3d at 288 n.4. In *Official Airline Guides*, the U.S. District Court for the District of Oregon overruled objections against telephonic testimony from witnesses in the United Kingdom, finding that Rule 43 was satisfied because “the telephone testimony was made in open court and under oath.” *Official Airline Guides*, 756 F. Supp. at 1398 n.2. The Ninth Circuit affirmed the decision, making no mention of the district court’s failure to consider Rule 43’s good cause and compelling circumstances requirements. *Official Airline Guides*, 6 F.3d at 1385-86.

49. *Swedish Match*, 197 F.R.D. at 2.

50. *Id.* at 2 n.1.

51. *Id.* at 2.

52. *Id.* (citing *Beltran-Tirado*, 213 F.3d at 1186).

53. *Adam v. Carvalho*, 138 F. App’x 7, 8 (9th Cir. 2005). The Ninth Circuit quickly dismissed the civil rights appeal of the plaintiff, who had argued that his civil rights had been violated when the defendants’ attorney had been allowed to discriminate against white jurors in voir dire. *Id.* at 8.

VTC was out of state and subject to cross-examination.<sup>54</sup> This case reemphasizes the Ninth Circuit's willingness to ignore the compelling circumstance requirement of Rule 43 and focus instead on the witness' taking of an oath, subjection to cross-examination, and out-of-state location.<sup>55</sup>

Even this brief examination of federal civil cases illustrates that despite a federal rule of civil procedure clearly on point federal courts still disagree about the proper use of VTC testimony in civil litigation. Unfortunately, the Federal Rules of Criminal Procedure do not have any rule regarding the use of VTC whatsoever.<sup>56</sup> If a seemingly clear rule of civil procedure can still lead to dissonance among the federal courts, the lack of consistency in both reasoning and result in federal criminal cases should come as little surprise.<sup>57</sup>

#### D. Dissonant VTC Decisions in Federal Criminal Trials

A defendant's right to confront witnesses is guaranteed by the Confrontation Clause of the Sixth Amendment.<sup>58</sup> The application of this right, however, has not been so clear.<sup>59</sup> The Supreme Court once again highlighted this point in *Crawford v. Washington*.<sup>60</sup>

Before *Crawford*, the Confrontation Clause was viewed as, ultimately, a substantive guarantee that all testimony against a defendant was reliable.<sup>61</sup> When federal courts evaluated VTC testimony in criminal cases before *Crawford*, they understood that satisfaction of the Confrontation Clause depended on ensuring reliable testimony.<sup>62</sup> The *Crawford* Court,

54. *Id.* at 8.

55. *Id.* ("Because [the witness] was a sworn, out-of-state witness, and his testimony was subject to cross-examination, the videoconference complied with the requirements of Federal Rule of Civil Procedure 43(a).").

56. *See supra* note 12 and accompanying text.

57. *See infra* Part I.D.

58. U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .").

59. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 60 (2004).

60. *Id.* ("Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales.").

61. *See, e.g., Maryland v. Craig*, 497 U.S. 836, 846 (1990). Justice O'Connor, writing for the Court, quoted from a succession of cases that emphasized that the fundamental goal of the Confrontation Clause is assuring the reliability of witness testimony. *See, e.g., id.* ("[T]he right to confrontation is a functional one for the purpose of promoting reliability in a criminal trial . . ." (alteration in original) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987))); *see also Lee v. Illinois*, 476 U.S. 530, 540 (1986) ("[T]he confrontation guarantee serves . . . symbolic goals . . . [and] promotes reliability . . ."); *Dutton v. Evans*, 400 U.S. 74, 89 (1970) (plurality opinion) ("[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the [testimony].'" (quoting *California v. Green*, 399 U.S. 149, 161 (1970))).

62. Until the *Crawford* decision in 2004, courts maintained an interpretation of the Confrontation Clause that was ultimately concerned with reliability. *See Crawford*, 541

however, held that the Sixth Amendment's Confrontation Clause was a purely procedural guarantee, one demanding actual confrontation, and not a guarantee into which one could read substantive goals such as reliability, in subversion of the procedural guarantee.<sup>63</sup> *Crawford* also held that where a witness is unavailable to testify at trial, prior testimonial statements of that witness are admissible only if the defendant "had a prior opportunity to cross-examine" the witness.<sup>64</sup> *Crawford* profoundly changed Confrontation Clause jurisprudence, and thus the jurisprudence of VTC testimony,<sup>65</sup> but there is disagreement about the extent of *Crawford*'s impact on VTC; this is well illustrated by the warring footnotes of the majority and dissenting opinions in *United States v. Yates*.<sup>66</sup>

Even before *Crawford*, however, there was significant controversy regarding the implementation of VTC testimony in federal criminal trials.<sup>67</sup> With neither clear Supreme Court precedent nor an easily applicable federal rule of criminal procedure, the federal courts have diverged significantly on their concerns with VTC, the authority on which they have relied, and, ultimately, the results of their VTC decisions.<sup>68</sup>

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U.S. at 40-42; *see also* *United States v. Gigante*, 166 F.3d 75, 80 (2d Cir. 1999); *United States v. Shabazz*, 52 M.J. 585, 592-94 (N-M. Ct. Crim. App. 1999).

63. *Crawford*, 541 U.S. at 61 ("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 . . .").

64. *Id.* at 59.

65. *See* *United States v. Yates*, 438 F.3d 1307, 1329-33 (11th Cir. 2006) (en banc) (Marcus, J., dissenting) (arguing that (1) *Crawford* distinguishes between testimony by witnesses available to appear in court and witnesses who are unavailable; (2) *Crawford* only requires cross-examination for unavailable witnesses; (3) witnesses who testify via VTC are unavailable as defined in *Crawford*; and, thus, (4) VTC testimony is constitutional because the defendant can cross-examine the witness); *see also id.* at 1326-27 (Tjoflat, J., dissenting).

66. *Yates*, 438 F.3d at 1314 n.4; *id.* at 1327 n.11 (Tjoflat, J., dissenting); *id.* at 1330 n.2 (Marcus, J., dissenting).

67. *See infra* Part I.D.1.

68. *See infra* Part I.D.1.

### 1. *Different Concerns, Different Rules, Different Results*<sup>69</sup>

In *United States v. Shabazz*,<sup>70</sup> reliability was the fundamental issue in the Navy-Marine Corps Court of Criminal Appeals discussion of VTC testimony.<sup>71</sup> In *Shabazz*, the government's key witness testified from California via VTC in a maiming and drug distribution court-martial in Japan, as she was unwilling to return to Japan because of physical safety concerns.<sup>72</sup> The defendant alleged on appeal that this key witness had been coached during her testimony via VTC and that recordings of her testimony proved this to be the case.<sup>73</sup> The appellate court found that the trial judge had failed to ensure the reliability of the VTC testimony, and held that VTC testimony is constitutionally inadmissible without a guar-

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69. Discussion of VTC testimony in the federal courts frequently occurs, as in *Craig*, in the context of child abuse cases. See *Maryland v. Craig*, 497 U.S. 836 (1990). However, unlike the federal criminal cases discussed in this subsection, Congress has established a statute governing the use of VTC testimony in child abuse cases. See 18 U.S.C. § 3509 (2000). Because this Comment examines the proper rule to be used for VTC testimony in federal criminal trials, it will generally avoid child abuse cases because the question has already been answered in that particular context and further examination would be fruitless. Nevertheless, it is worth noting that the Eighth Circuit has looked to *Craig* for guidance when interpreting 18 U.S.C. § 3509. See *United States v. Bordeaux*, 400 F.3d 548, 552 (8th Cir. 2005). The Eighth Circuit has held that the *Craig* standard applies regardless of the two-way or one-way nature of the VTC testimony in child abuse cases. *Id.* at 554. Thus, the circuit expressly disregarded *Gigante's* distinction between the one-way and two-way forms of VTC. *Id.* at 554-55 (citing *Gigante*, 166 F.3d at 81). Furthermore, the Eighth Circuit has expressed the same concerns as many other courts regarding VTC, such as the psychological impact of testimony via television and the more practical, logistical challenges. *Id.* (“[A] defendant watching a witness through a monitor will not have the same truth-inducing effect as an unmediated gaze across the courtroom. . . . [Assuming] a two-way system might conceivably capture the essence of the face-to-face confrontation . . . whether it actually did would turn on . . . a myriad of hard logistical questions . . .”). Indeed, the Eighth Circuit has hewed so strongly to the *Craig* standard that it has held that 18 U.S.C. § 3509(b)(1)(B)(i) is unconstitutional because it allows the use of VTC testimony whenever the child is unable to testify because of an unspecified fear rather than the specific harmful fear of the defendant required by *Craig*. See *id.* at 553. Although the Eighth Circuit has only discussed VTC testimony in the context of child abuse cases, *Bordeaux* suggests strongly that, like the Eleventh Circuit in *Yates*, the Eighth Circuit would look to the *Craig* rule when deciding the constitutionality of VTC testimony in all federal criminal trials. *Id.* at 554 (“[A] ‘confrontation’ via a two-way closed circuit television is not constitutionally equivalent to a face-to-face confrontation.”).

70. 52 M.J. 585 (N-M. Ct. Crim. App. 1999).

71. See *id.* at 594. Although the American military justice system certainly incorporates rules different from the civilian criminal justice system, at the time of *Shabazz* the military rules and the civilian rules of procedure were substantially identical regarding VTC testimony—they both were (and remain so up to this point) silent on the issue. Compare R.C.M. 914A (allowing remote testimony by children under limited circumstances, but silent regarding adult remote testimony), with FED. R. CRIM. P. 26 (remaining silent regarding the use of remote testimony after the failure of the proposed Rule 26(b)).

72. *Shabazz*, 52 M.J. at 590-91.

73. *Id.* at 588.

antee of reliability.<sup>74</sup> The court concluded that the trial judge had failed to protect the defendant's Confrontation Clause rights, and set aside the portion of the conviction related to the VTC testimony.<sup>75</sup> Notably, the court assumed that the standard that must be met for using VTC testimony is one of necessity.<sup>76</sup> The *Shabazz* court's primary concern, however, and the focus of its decision, was the fundamental importance of reliability when evaluating VTC testimony.<sup>77</sup>

In *United States v. Gigante*, the Second Circuit joined other courts in evaluating the propriety of VTC testimony.<sup>78</sup> The district court had held a hearing to determine if VTC was appropriate to use for a witness who was both fatally ill and in the Federal Witness Protection Program.<sup>79</sup> The district court was satisfied that the government had proven by clear and convincing evidence the need for the witness to testify by VTC.<sup>80</sup> On appeal, the defendant argued that *Craig* required a case-specific finding of necessity to further an important public policy whenever a defendant's Confrontation Clause right is being limited and that the district court's test was insufficient.<sup>81</sup> The Second Circuit disagreed, holding that *Craig* applied only to one-way video and that the use of two-way VTC distinguished the instant case from *Craig*.<sup>82</sup> The Second Circuit instead focused on Rule 15 of the Federal Rules of Criminal Procedure, and reasoned that the exceptional circumstances requirement for Rule 15 depositions should be extended to VTC testimony.<sup>83</sup> Satisfied with the lower court's finding of exceptional circumstances, the Second Circuit held that the use of VTC testimony in *Gigante* was proper.<sup>84</sup> Moreover, the court stated

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74. *Id.* at 594. This focus on reliability reflects the pre-*Crawford* emphasis on the substantive goals of the Confrontation Clause. See *supra* notes 62-65 and accompanying text.

75. *Shabazz*, 52 M.J. at 594-95.

76. See *id.* at 594 (indicating that judges should consider several criteria in "determining whether denial of face-to-face confrontation at trial is necessary to further an important public policy").

77. *Id.* ("Not knowing the extent of the taint upon her testimony, and Mrs. White being the key witness to the maiming charge, we cannot find harmless error in this case. Finding material prejudice to a substantial right of the appellant, we will provide relief . . .").

78. *United States v. Gigante*, 166 F.3d 75, 78-82 (2d Cir. 1999).

79. *Id.* at 79.

80. *Id.* at 79-80.

81. See *id.* at 80-81. For a discussion of *Craig*, see *supra* Part I.A.

82. *Gigante*, 166 F.3d at 80-81.

83. *Id.* at 81; see *infra* note 134.

84. *Gigante*, 166 F.3d at 81-82. The Second Circuit used a two-part test for exceptional circumstances: "It is well-settled that the 'exceptional circumstances' required to justify the deposition of a prospective witness are present if that witness's testimony is material to the case and if the witness is unavailable to appear at trial." *Id.* at 81 (quoting *United States v. Johnpoll*, 739 F.2d 702, 709 (2d Cir. 1984)). The court made no explicit mention of materiality, and emphasized the fatal illness of the VTC witness in determining

that VTC testimony better protected the defendant's Confrontation Clause rights than the legally available alternative, a deposition.<sup>85</sup> Although the Second Circuit held that VTC testimony in this particular situation did not violate the defendant's rights, it did note that VTC testimony should not be a frequent replacement for in-court testimony.<sup>86</sup>

In *United States v. Nippon Paper Industries*, the government prosecuted a Japanese fax paper manufacturer for price-fixing and moved to allow a witness to either testify via VTC or give a videotaped deposition.<sup>87</sup> The District Court for the District of Massachusetts allowed testimony to be taken by VTC after both parties consented, but expressed "serious concerns" about the use of the technology.<sup>88</sup> The court emphasized that witnesses would only be present via a television screen, which would lack the

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unavailability. *Id.* at 81-82. "Unavailability is defined by reference to Rule 804(a) of the Federal Rules of Evidence, which includes situations in which a witness 'is unable to be present or to testify at the hearing because of . . . physical or mental illness or infirmity.'" *Id.* at 81 (omission in original) (quoting FED. R. EVID. 804(a)(4)).

85. *Id.* at 81 (noting that VTC allowed the jury to weigh the witness' credibility by observation, which would have been impossible with only a deposition).

86. *Id.* After discussing the superiority of VTC testimony over depositions despite certain limitations of VTC, the court emphasized:

Closed-circuit television should not be considered a commonplace substitute for in-court testimony by a witness. There may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony. However, two-way closed-circuit television testimony does not necessarily violate the Sixth Amendment. Because this procedure may provide at least as great protection of confrontation rights as Rule 15 [depositions], we decline to adopt a stricter standard for its use than the standard articulated by Rule 15.

*Id.*

87. *United States v. Nippon Paper Indus.*, 17 F. Supp. 2d 38, 38-39 (D. Mass. 1998). The defendant, Nippon Paper Industries, Co. (NPI), objected to the use of videotaped depositions, arguing that their use would be a violation of the Sixth Amendment. *Id.* at 39. In affirming that the defendant Japanese corporation was entitled to Confrontation Clause rights, the district court explained that NPI, "a Japanese corporation, is charged in a U.S. federal court with a *criminal* antitrust violation. As such, it is entitled to the same rights of confrontation as any U.S. defendant." *Id.* at 40. The court emphasized that depositions were rare, occurring only in "exceptional circumstances." *Id.* at 41 (quoting FED. R. CRIM. P. 15(a)). The court asserted that the use of depositions in place of live testimony should remain exceptional lest "trial by deposition . . . substitute for trial by confrontation, precisely what the Confrontation Clause was designed to avoid." *Id.* (citing *Stoner v. Sowers*, 997 F.2d 209 (6th Cir. 1993)). Holding that the need of the government to successfully prosecute a case did not satisfy the exceptional circumstances requirement, the court decided that no videotaped depositions would occur in *Nippon*. *Id.* at 42.

88. *Id.* The district judge acknowledged that "[d]espite the acceptance of . . . [such] testimony in certain, particularized cases, these issues might have counseled rejecting video teleconferencing had the defendant not effectively waived its objections. NPI, after all, agreed with video teleconferencing of witnesses. Thus, the ultimate propriety of video teleconferencing did not need to be resolved." *Id.* at 42-43 (referring to *Craig* and *Gigante* as cases in which VTC testimony was accepted).

impact of testimony by a physically present witness.<sup>89</sup> Despite this concern, the court allowed the VTC testimony because the defendant had “waived the principal components of its Confrontation Clause rights by agreeing to the appearance of witnesses through a videoscreen,” but noted that without this waiver the VTC testimony may not have been allowed.<sup>90</sup> This statement suggests that if the defendant had not consented, the court would have held VTC to be a violation of the defendant’s Confrontation Clause rights.<sup>91</sup>

While the *Nippon* court hinted that VTC testimony might violate a defendant’s Confrontation Clause rights, the Eleventh Circuit held explicitly that such testimony violated the defendants’ right to confrontation in *United States v. Yates*.<sup>92</sup> In *Yates*, two Australian witnesses were unwilling

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89. *Id.* at 42 & n.9. “Studies have suggested that television and videoscreens necessarily present antiseptic, watered down versions of reality. Much of the interaction of the courtroom is missed.” *Id.* at 42 (footnote omitted).

The court also related a valuable anecdote regarding the lessened ability of jurors to evaluate witnesses when testimony is only via VTC:

In a telling scene in the movie “Twelve Angry Men,” the jurors were discussing the testimony of an old man who claimed to have heard a fight in the apartment above him, and then a loud noise, like a body hitting the floor. He reported that he ran to his apartment door just in time to see the defendant running down the stairs. One of the jurors, himself an elderly man, reminded the others about the way the elderly witness had walked to the stand before testifying; dragging one of his feet, he walked in a labored fashion, his gait slowed by some disability. It was an observation that would have been missed if the only aspect of the witness that the jurors saw was his face.

*Id.* at 42 n.9.

90. *Id.* at 42-43.

91. *Id.*

92. *United States v. Yates*, 438 F.3d 1307, 1319 (11th Cir. 2006) (en banc). The Eleventh Circuit had considered VTC testimony before and allowed it, in *Harrell v. Butterworth*, 251 F.3d 926, 930 (11th Cir. 2001). In *Harrell*, however, VTC testimony was allowed because the Eleventh Circuit was satisfied that the lower courts had properly applied the *Craig* standard. *Id.*; see also *Yates*, 438 F.3d at 1313. It is noteworthy that *Harrell* was a habeas case, and thus only required the court to decide whether the allowance of VTC was “not contrary to, nor an objectively unreasonable application of, federal law as determined by the Supreme Court.” *Yates*, 438 F.3d at 1313.

A recently affirmed habeas case, with a tortured procedural history in the United States District Court for the Western District of Kentucky, also concluded that the *Craig* standard was controlling, and ultimately ordered habeas relief due to the state court’s failure to consider *Craig*. *Gentry v. Deuth (Gentry I)*, 381 F. Supp. 2d 614, 626 (W.D. Ky. 2004), vacated, 381 F. Supp. 2d 630 (W.D. Ky. 2004), habeas motion granted, 381 F. Supp. 2d 634 (W.D. Ky. 2004), aff’d, 456 F.3d 687 (6th Cir. 2006). In *Gentry I*, the federal district court examined the constitutionality of a Kentucky state court’s allowance of VTC testimony by five expert witnesses against the defendant in a DUI and second-degree manslaughter case. *Gentry I*, 381 F. Supp. 2d at 616. After admonishing the relevant state courts for their insufficient discussion of the Confrontation Clause, the court found *Craig* to be binding Supreme Court precedent in defendant *Gentry*’s habeas petition. *Id.* at 622. Accordingly, the court proceeded with an extensive discussion of *Craig*. *Id.* at 622-24. The court highlighted *Craig*’s requirement of a case-specific finding of necessity, and found that Kentucky failed to make the requisite case-specific finding that VTC testimony by the five

to travel to the United States to testify against the defendants, but were willing to testify via VTC.<sup>93</sup> The U.S. District Court for the Middle District of Alabama allowed the testimony, and the defendants appealed.<sup>94</sup> Unlike the Second Circuit in *Gigante*, the Eleventh Circuit applied the *Craig* rule, which requires the alternative form of testimony to be “neces-

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experts was necessary for an important public policy. *Id.* at 624. Indeed, the witnesses testified by VTC rather than in court only because the witnesses preferred not to make the trip to court. *Id.* The federal court here again excoriated the state court: “The court made no attempt to conduct an evidentiary hearing, nor did it make any specific findings regarding the situation. At most, it simply offered that the legality of the two-way, closed circuit television system was being litigated in the state courts.” *Id.* Asserting that “[s]omething more than a generalized notion of convenience, merely an implicit one at that, must be shown before the preference for direct confrontation can be overcome,” the federal district court held that the use of VTC testimony was a violation of the defendant’s Confrontation Clause rights. *Id.* at 624, 626.

In addition, the court rejected the prosecution’s reliance on *Gigante*. *Id.* at 624-25. The court emphasized that because Gentry’s case was a habeas petition the court was only concerned with Supreme Court precedent, not the decisions of intermediate federal courts. *Id.* (“*Gigante* . . . is not the clearly established precedent of the United States Supreme Court. As such, the federal courts may not rely on it to brush aside what is clearly established Supreme Court precedent.”). Looking beyond the limited scope of law relevant in habeas cases, the *Gentry I* court found unpersuasive the *Gigante* distinction between one-way VTC testimony and two-way, much like the Eleventh Circuit in *Yates*. *Id.* at 625; see also *Yates*, 438 F.3d at 1312-13. In arguing against this distinction, the *Gentry I* court emphasized the Supreme Court’s 2002 rejection of the proposed amendment to Federal Rule of Criminal Procedure 26. *Gentry I*, 381 F. Supp. 2d at 625-26; see also *infra* notes 137-42 and accompanying text (discussing this rejection and the accompanying statements by the Justices). Admitting that Justice Scalia’s separate statement to Congress rejecting the proposed amendment was not binding authority, the court nevertheless stated that it would be “unwise to follow the same path as the Judicial Conference [the proponents of the rule] and attempt to cling to *Gigante* with the hope that the strict requirements of *Craig* can be avoided. They cannot.” *Gentry I*, 381 F. Supp. 2d at 626.

Despite finding a violation of the defendant’s Sixth Amendment rights, the *Gentry I* court deemed the constitutional violation harmless error and upheld the defendant’s conviction. *Id.* at 627. Two months later, however, the same court, in an opinion written by the same judge, reversed itself, held that the VTC testimony was not harmless error, and consequently issued a conditional writ of habeas corpus. *Gentry v. Deuth (Gentry II)*, 381 F. Supp. 2d 630, 634 (W.D. Ky. 2004). After serving her sentence, the defendant returned to the federal district court to enforce the conditional habeas writ against the collateral consequences of her criminal convictions, namely, the loss of her operator’s license and her registration as a convicted felon. *Gentry v. Deuth (Gentry III)*, 381 F. Supp. 2d 634, 636 (W.D. Ky. 2004). Observing that the Commonwealth of Kentucky had failed to retry the defendant and had abandoned its appeal of the earlier conditional habeas writ, the court made the conditional writ absolute and overturned the defendant’s conviction. *Id.* at 638. Finally, in July 2006, the Sixth Circuit affirmed the district court’s decision against a jurisdictional challenge. *Gentry v. Deuth (Gentry IV)*, 456 F.3d 687, 690 (6th Cir. 2006).

93. *Yates*, 438 F.3d at 1310. The court could not force the witnesses to testify because the witnesses were “beyond the government’s subpoena powers.” *Id.* The defendants in *Yates* were defending themselves from a host of charges stemming from their operation of an Internet pharmacy. *Id.* at 1309-10.

94. *Id.* at 1310.



sary to further an important public policy.”<sup>95</sup> The court in *Yates* could find no compelling reason to use VTC testimony,<sup>96</sup> and thus, without the requisite important public policy, disallowed the use of VTC testimony.<sup>97</sup>

In *Shabazz*, the appeals court overturned the lower court’s use of VTC testimony because of a pressing, specific question of reliability.<sup>98</sup> In *Gigante*, the Second Circuit affirmed the lower court’s use of VTC testimony by extending Rule 15 of the Federal Rules of Criminal Procedure, regarding depositions, to the use of VTC testimony and finding the requirements of that rule satisfied.<sup>99</sup> In *Nippon*, the court allowed VTC testimony because both parties consented, despite the court’s hints that VTC testimony might otherwise violate the Confrontation Clause.<sup>100</sup> And, finally, in *Yates*, the Eleventh Circuit rejected the Second Circuit’s analogy to Rule 15 and instead applied the *Craig* rule to two-way VTC, and held that VTC testimony violated the defendants’ Confrontation Clause rights because there had been no case-specific finding that VTC was necessary to further an important public policy.<sup>101</sup> These cases illustrate that, without clear guidance from a federal rule of criminal procedure, the federal courts have come to conflicting decisions via varying rationales regarding the use of VTC testimony in criminal cases.<sup>102</sup>

## II. RECONCILING VTC TESTIMONY WITH THE CONFRONTATION CLAUSE

### A. VTC Testimony Limits a Defendant’s Confrontation Clause Rights

Even courts that accept VTC testimony acknowledge that it limits a defendant’s right to confrontation.<sup>103</sup> VTC allows for certain hallmarks of confrontation—the witness can generally be seen by everyone in the courtroom and the witness can be cross-examined in real time—but, for several reasons, it is not true confrontation, and, thus, its use must be allowed only in strictly limited situations.<sup>104</sup>

95. *Id.* at 1314. *Craig* also requires the alternative means of testimony to be reliable. *Id.* (citing *Maryland v. Craig*, 497 U.S. 836, 850 (1990)).

96. *Id.* at 1318.

97. *Id.* at 1316-18.

98. *See supra* notes 70-77 and accompanying text.

99. *See supra* notes 78-86 and accompanying text.

100. *See supra* notes 87-91 and accompanying text.

101. *See supra* notes 92-97 and accompanying text.

102. *See supra* Part I.D.1.

103. *See, e.g.*, *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999); *United States v. Nippon Paper Indus.*, 17 F. Supp. 2d 38, 42-43 (D. Mass. 1998).

104. *See Maryland v. Craig*, 497 U.S. 836, 850 (1990) (“[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 . . .”).

### 1. The Word “Confronted”

The Sixth Amendment is plain: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>105</sup> The constitutionality of VTC testimony in criminal trials thus turns on the word “confronted.” And the Supreme Court seems to have already rejected the argument that the definition of confront incorporates a meeting via television.<sup>106</sup> Two individuals looking at two different television screens in two different locations are simply not confronting each other physically face-to-face—no matter what is on the screens. The Constitution promises defendants more than just the right to look at moving pictures of the witnesses against them. Because it fails to provide actual confrontation,<sup>107</sup> the use of VTC testimony abridges the Confrontation Clause rights of defendants, and consequently, its use should be strictly limited in federal criminal cases.<sup>108</sup>

### 2. Extra-Textual Concerns

VTC testimony raises more than just semantic questions regarding the Confrontation Clause. It also presents questions that are both more concrete than the semantics issue (such as problems with transmission reliability and sizes of television screens) and more esoteric (such as the psychological impact of the medium on witnesses and jurors).<sup>109</sup>

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105. U.S. CONST. amend. VI.

106. Cf. Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89, 94 (2002) (statement of Scalia, J.) (“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. As we made clear in *Craig*, 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.” (citations omitted)).

107. Justice Scalia stated: “Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.” *Id.*

108. E.g., *Craig*, 497 U.S. at 850 (“[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.”).

109. Nancy Gertner, *Videoconferencing: Learning Through Screens*, 12 WM. & MARY BILL RTS. J. 769, 789 (2004). Judge Gertner inquired:

What information does it convey? What information is lost? What is its impact on the atmosphere in the courtroom? To what degree does it hurt, or help the juror’s ability to understand trial issues? To what degree does it assist the jury in its role as an active decisionmaker? And finally, what do we gain, or more importantly, lose, when trials look like the evening news?

*Id.* Even the Second Circuit in *Gigante*, which upheld the use of VTC testimony, expressed concern that “[t]here may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony.” *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999).

*a. Psychological Concerns Regarding the Difference Between Television and Reality*

The use of VTC raises concerns about how differences between testimony from a television and testimony from a physically present witness might affect a jury's evaluation of the witness.<sup>110</sup> The psychological separation from reality provided by television is particularly important.<sup>111</sup> As Judge Gertner expressed in *Nippon*:

Real time testimony would provide the Court with the simultaneity of a live witness.

Nevertheless, notwithstanding the advantages of video teleconferencing, especially as compared with video-taped depositions, [I] had serious concerns. The testimony of the witness would still be mediated via videoscreen. Studies have suggested that television and videoscreens necessarily present antiseptic, watered down versions of reality. Much of the interaction of the courtroom is missed.<sup>112</sup>

Judge Gertner expanded on her concerns about the psychological impact of VTC testimony at trial in 2004, at William and Mary's International Conference on the Legal and Policy Implications of Courtroom Technology.<sup>113</sup> In particular, she reiterated her earlier concerns regarding the impact of VTC on a jury's ability to evaluate the witness and come to a unified theory of the facts on which they could decide a defendant's guilt or innocence.<sup>114</sup> These psychological issues are not easily understood, but it seems clear that there are psychological intangibles that differentiate virtual confrontation via VTC from actual, physical confrontation.<sup>115</sup>

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110. Gertner, *supra* note 109, at 773. Judge Gertner explained:

My concerns are grounded in part, but only in part, on the Constitution's Confrontation Clause. . . . [M]y concerns are also empirical, drawing on social science research about communication, and my own experience. In fact, I want to consider the impact of something decidedly old-fashioned . . . . I want to consider the impact of presenting important testimony through videoconferencing on the "gravitas" of the courtroom.

*Id.*

111. See *infra* notes 112-15 and accompanying text.

112. *United States v. Nippon Paper Indus.*, 17 F. Supp. 2d 38, 42 (D. Mass. 1998) (footnote omitted) (citing L.J. Shrum, Robert S. Wyer, Jr. & Thomas C. O'Guinn, *The Effects of Television Consumption on Social Perceptions: The Use of Priming Procedures to Investigate Psychological Processes*, 24 J. CONSUMER RES. 447 (1998)).

113. Gertner, *supra* note 109, at 769.

114. *Id.* at 770.

115. See *id.* at 784-85; Fredric I. Lederer, *The Road to the Virtual Courtroom? A Consideration of Today's—and Tomorrow's—High-Technology Courtrooms*, 50 S.C. L. REV. 799, 835-36 (1998) ("Important testimony at trial is increasingly given by faces in televisions, albeit live interactive faces, and we are beginning to see more and more remote judges and counsel. Could it be that as we improve efficiency we risk minimizing the hu-

*b. Functional Formality*

Concerns about the psychological impact of VTC are not simply limited to how jurors may react to testimony that “look[s] like the evening news.”<sup>116</sup> Judge Gertner, at the forefront of the discussion related to the propriety of VTC, has also expressed concern that VTC causes a significant loss of courtroom formality.<sup>117</sup> She and other judges and commentators believe that this loss of courtroom formality harms the fact-finding process.<sup>118</sup> For instance, Chief Judge Edmondson of the Eleventh Circuit expressed grave concern in his original *Yates* concurrence about the informality, and even the legality, of an oath administered internationally over television.<sup>119</sup> The Tenth Circuit has similarly discussed how the formalities and pressures of stepping into a courtroom affect a witness and his or her testimony.<sup>120</sup> Giving testimony via VTC lacks the pressure and formality of testifying while actually sitting on the witness stand.<sup>121</sup> Cross-examination via VTC lacks the adversarial impact it enjoys in person because the witness is separated from the cross-examining lawyer by distance and technology.<sup>122</sup> And, as *Shabazz* illustrated, a wide variety of activities could occur off-camera that keep the witness disengaged from the formality and pressure of trial, or even prompt the witness on how to

manness that has characterized our trials? Absent future experimental work, we cannot even hazard a guess as to the reaction of jurors or the general public.” (footnote omitted)).

116. Gertner, *supra* note 109, at 789.

117. *Id.* at 784. “Testimony in a courtroom, in the gravitas of that setting, has an impact on all participants. We are used to looking at screens, in our bedrooms and living rooms, our offices, the train station, in restaurants. The court, however, is different as seen with [the ceremony’s formality].” *Id.*

118. *E.g., infra* note 119 and accompanying text; *see also* Lederer, *supra* note 115, at 820 (“[T]ransmission . . . lacks the traditional judicial surroundings thought to convey the seriousness of court testimony.”).

119. *United States v. Yates*, 391 F.3d 1182, 1189-91 (11th Cir. 2004) (Edmondson, C.J., concurring).

120. *United States v. Carter*, 973 F.2d 1509, 1513 (10th Cir. 1992) (“Will the formality of the courtroom, the oath, and the penalties of perjury change the witness’ decision? What is the importance of the expected truthful testimony? What is the importance of allowing witness intimidation to succeed? Any experienced trial attorney has encountered a witness who has changed his testimony between the final interview and trial.”).

121. *E.g., Yates*, 391 F.3d at 1191 (Edmondson, C.J., concurring) (“I mistrust the notion that many people think that talking to a television . . . counts for much.”); *United States v. Nippon Paper Indus.*, 17 F. Supp. 2d 38, 42 (D. Mass. 1998) (“[T]estimony of the witness would still be mediated via videorecording. Studies have suggested that television and videorecordings necessarily present antiseptic, watered down versions of reality. Much of the interaction of the courtroom is missed.” (footnote omitted)).

122. The Supreme Court has emphasized repeatedly the importance of effective cross-examination. *See, e.g., Lilly v. Virginia*, 527 U.S. 116, 124 (1999) (plurality opinion); *California v. Green*, 399 U.S. 149, 158 (1970) (calling cross-examination “the greatest legal engine ever invented for the discovery of truth” (internal quotation marks and citation omitted)).

most effectively respond to cross-examination.<sup>123</sup> These concerns further highlight the superiority of physical confrontation over the virtual confrontation provided by VTC.

*c. Practical Differences*

In addition to the psychological divide between television and reality and the similar impact caused by a loss of courtroom formality, there are practical elements of in-person testimony that are lost when VTC testimony is used.<sup>124</sup> Most importantly, the camera cannot perceive, and the television screen cannot display, many of the details that would be evident if the witness were physically in the courtroom.<sup>125</sup> The jury's inability to see the entire witness may limit its ability to evaluate that witness' credibility and value as evidence—impairing an important function of the jury in criminal trials.<sup>126</sup> The Supreme Court has noted the fundamental importance of avoiding the wrongful implication of defendants by witnesses and the efficacy of face-to-face confrontation in achieving this,<sup>127</sup>

123. See *supra* notes 70-77 and accompanying text.

124. See, e.g., *United States v. Gigante*, 166 F.3d 75, 80 (2d Cir. 1999). In *Gigante*, the defendant complained that the witness was unable to see him as the camera was pointed solely at the defendant's attorney and not at the defendant. *Id.* at 80 n.1; see also *United States v. Bordeaux*, 400 F.3d 548, 555-57 (8th Cir. 2005) (holding that two-way closed-circuit television testimony by a child abuse victim violated the *Craig* rule and the Confrontation Clause). The *Bordeaux* court asked: "How big must the monitor be? Where should it be placed? Where should the camera focused on the defendant be placed?" *Id.* at 555; see also *supra* note 92.

125. See *supra* notes 89, 124 and *infra* notes 126-29 and accompanying text.

126. See Gertner, *supra* note 109, at 786. Judge Gertner states:

Studies have demonstrated that facial expressions—which video screens easily display—are the least “leaky”; that is, the easiest channel [of communication] to control by the witness bent on deception; the body is less controllable or “leakier” than other channels of communication; and the voice (speech hesitations, speech errors, and the pitch of the speaker’s voice) is the “leakiest” of the three channels. This was so [in the studies] even with witnesses highly motivated to lie.

While videoscreens show all aspects—the face, the body, the voice—they do so with varying degrees of success. Depending upon the quality of the transmission, you see the witness’s face, and hear the tone of voice. The screen necessarily limits the jurors’ ability to see the witness’s body, and the relationship of all three channels of nonverbal expression. Plainly, the image can be orchestrated—by decisions about lighting, the size of the image, the perspective.

Nevertheless, whatever the combination, it is clear that in live testimony, face-to-face transmission plainly increases the information available to the fact-finder . . . detection of deception is solely a function of the accessibility of the fact-finder to the witness and his behavior.

*Id.* (footnotes omitted).

These purely practical concerns can be exacerbated by the use of VTC with foreign witnesses. The *Nippon* jurors, for instance, reported great difficulty in following the VTC testimony of the Japanese witnesses because of the language barrier, despite translation. *Id.* at 788.

127. *Maryland v. Craig*, 497 U.S. 836, 846 (1990).

but the limits of VTC technology can keep defendants and witnesses from properly seeing each other—or even from seeing each other at all.<sup>128</sup> Furthermore, the question of what is going on around the witness, outside of the camera's view, can cause entire testimony, and even a conviction, to be thrown out, as in *Shabazz*.<sup>129</sup> These practical issues are yet more evidence that confrontation via VTC is imperfect confrontation at best.

*B. Competing Efforts at Reconciliation, the Proposed Amendment to Rule 26, and Crawford*

While VTC testimony is neither the constitutional nor functional equivalent of the testimony of physically present witnesses,<sup>130</sup> the Supreme Court has held repeatedly that the Confrontation Clause is not an absolute guarantee of physical, face-to-face confrontation.<sup>131</sup> With this limited guidance, the federal courts have taken three different approaches to reconciling VTC testimony with the Confrontation Clause.

Courts holding that VTC testimony violates the Confrontation Clause have generally based their decision on the rule announced in *Craig*, and found the testimony unconstitutional because it was not necessary for an important public policy.<sup>132</sup> Alternatively, those allowing testimony by VTC have either: (a) applied the *Craig* rule but with a different interpretation of “necessary for an important public policy”;<sup>133</sup> or (b) looked to Rule 15 of the Federal Rules of Criminal Procedure, the rule controlling the use of depositions, for guidance.<sup>134</sup> This dissonance stems from uncer-

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128. *Gigante*, 166 F.3d at 80 & n.1. This problem includes not just picture clarity problems, but also, as in *Gigante*, situations where the witness simply cannot see the defendant because the camera is not pointed at the defendant. *Id.* The Second Circuit was aware of this issue, but ruled against the defendant because the defendant had waived his right to have the camera pointing at him. *Id.*

129. *United States v. Shabazz*, 52 M.J. 585, 594, 595 (N-M. Ct. Crim. App. 1999).

130. *See supra* part II.A.

131. *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985) (per curiam); *Ohio v. Roberts*, 448 U.S. 56, 69 (1980); *see also* *Kentucky v. Stincer*, 482 U.S. 730, 739-42 (1987); *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965).

132. *See, e.g., supra* notes 92-97 and accompanying text. *But see Shabazz*, 52 M.J. at 594 (finding reliability so lacking that the court did not need to choose between the *Gigante* standard and the *Craig* standard).

133. Although the district court in *Yates* used the *Craig* rule, the circuit court found that the district court misread the “important public purpose” requirement. *United States v. Yates*, 438 F.3d 1307, 1315-16 (11th Cir. 2006) (en banc). “[T]he prosecutor’s need for the video conference testimony to make a case and to expeditiously resolve it,” the Eleventh Circuit held, was not the sort of important public purpose required by the *Craig* rule, despite such an averment by the district court. *Id.*

134. Federal Rule of Criminal Procedure 15, used by the *Gigante* court, limits the use of depositions in federal criminal trials and states:

(A) When Taken.

tainty about both the proper legal standard that should be applied and the manner of its application.<sup>135</sup>

The Supreme Court's rejection of a proposed amendment to the Federal Rules of Criminal Procedure may eliminate some of that uncertainty. The majority of cases in which VTC testimony was found to be an acceptable limitation of the Confrontation Clause were decided before the Supreme Court rejected the proposed amendment to Rule 26.<sup>136</sup> This amendment would have allowed VTC testimony without any showing that it is necessary to further an important public policy, and instead would have effectively codified *Gigante's* analogy to Rule 15 and deposition testimony.<sup>137</sup>

(1) In General. 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. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data.

....  
 (e) Manner of Taking. Unless these rules or a court order provides otherwise, a deposition must be taken and filed in the same manner as a deposition in a civil action, except that:

(1) A defendant may not be deposed without that defendant's consent.

(2) The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial.

(3) The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.

FED R. CRIM. P. 15.

The federal courts generally do not favor presenting evidence by depositions. The district judge in *Nippon* explained that videotaped depositions are "the exception and not the rule," and that "should these events occur with any regularity, trial by deposition would substitute for trial by confrontation, precisely what the Confrontation Clause was designed to avoid." *United States v. Nippon Paper Indus.*, 17 F. Supp. 2d 38, 41 (D. Mass. 1998) (citing *Stoner v. Sowders*, 97 F.2d 209 (6th Cir. 1993)).

135. See *supra* Part I.D.

136. See, e.g., *United States v. Gigante*, 166 F.3d 75, 75 (2d Cir. 1999).

137. See Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89, 93 (statement of Scalia, J.). The theory behind the proposed amendment was inspired by *Gigante*. *Id.* at 94. The proponents of the amendment believed that VTC was an attractive alternative to depositions that preserved confrontation because it was two-way, unlike the one-way, closed circuit television in *Craig*. *Id.* The proposed rule would have read as follows:

Rule 26. Taking Testimony

(a) *In General*. In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§ 2072-77.

(b) *Transmitting Testimony from a Different Location*. 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:

In joining the Court's decision to reject the proposed rule, Justice Scalia filed a separate statement that provides some guidance about the reasoning of the otherwise silent majority.<sup>138</sup> Justice Scalia argued that the proposed amendment's limitations on the use of VTC testimony were insufficient.<sup>139</sup> In addition to Justice Scalia's statement, Justice Breyer,

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(1) the requesting party establishes exceptional circumstances for such transmission;

(2) appropriate safeguards for the transmission are used; and

(3) the witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)-(5).

*Id.* app. at 99 (dissenting statement of Breyer, J.). In addition to acknowledging its reliance on *Gigante* and the distinction between one-way and two-way VTC, the committee suggested several procedural safeguards in its accompanying committee note, but insisted any such safeguards would be in the discretion of the trial court:

Deciding what safeguards are appropriate is left to the sound discretion of the trial court. The Committee envisions that in establishing those safeguards the court will be sensitive to a number of key issues. First, it is important that the procedure maintain the dignity and decorum normally associated with a federal judicial proceeding. . . . Second, it is important to insure the quality and integrity of the two-way transmission itself. . . . Third, the court may wish to use a surrogate, such as an assigned marshal or special master, as used in *Gigante*, to appear at the witness's location to ensure that the witness is not being influenced from an off-camera source. . . . Fourth, the court should ensure that the court, counsel, and jurors can clearly see and hear the witness during the transmission [and vice versa]. . . . Fifth, the court should ensure that the record reflects the persons who are present at the witness's location. Sixth, the court may wish to require that representatives of the parties be present at the witness's location. Seventh, the court may inquire of counsel, on the record, whether additional safeguards might be employed. Eighth, the court should probably preserve any recording of the testimony, should a question arise about the quality of the transmission. Finally, the court may consider issuing a pretrial order setting out the appropriate safeguards employed under the rule.

*Id.* app. at 102-03 (citation omitted).

The reliance on *Gigante* rather than *Craig* and the distinction between one-way and two-way VTC seem to have been the Supreme Court's key reasons for rejecting the proposed amendment. See *infra* note 139. Leaving procedural safeguards to the discretion of trial courts may also insufficiently protect a defendant's Confrontation Clause rights, but the Court did not explicitly indicate that sentiment in its rejection of the amendment. See generally Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89 (failing to discuss the issue of procedural safeguards).

138. Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. at 93-96 (statement of Scalia, J.).

139. *Id.* at 94. Justice Scalia stated:

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. As we made clear in *Craig*, 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 protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.

*Id.* (citation omitted).



joined by Justice O'Connor, separately dissented from the Court's decision to reject the amendment.<sup>140</sup> The dissent argued that allowing VTC testimony under a deposition standard is reasonable, and that the amended rule would satisfy *Craig*.<sup>141</sup> As with Justice Scalia's statement, the dissent illustrates that the Court seemed to accept the *Craig* rule as the proper rule—although the dissent believed the proposed amendment was at least as good as the *Craig* rule.<sup>142</sup> The rejection of the proposed amendment strongly suggests that the standard for allowing VTC testimony should be the higher “case-specific finding of necessity for an important public policy” standard rather than the “exceptional circumstances” standard; the Eleventh Circuit's *Yates* decision is further evidence of this.<sup>143</sup>

Despite the Supreme Court's statements when the Court rejected proposed Rule 26, the proper standard for allowing VTC testimony is still unclear.<sup>144</sup> Certainly the rejection of the 2002 amendment to Rule 26 strongly suggests that any new rule must require more than the proposed amendment's exceptional circumstances test.<sup>145</sup> But, unfortunately, that does not transform into a uniform federal rule or Supreme Court decision that provides lower federal courts with sufficient guidance regarding the acceptable use of VTC testimony in criminal trials.<sup>146</sup> Furthermore, even if the only interpretation of the Supreme Court's rejection of proposed

140. *Id.* at 96 (dissenting statement of Breyer, J.).

141. *Id.* at 96-97.

142. *Id.*

Justice Scalia believes that the present proposal does not much concern itself with the limitations on the use of out-of-court statements set forth in *Maryland v. Craig*. . . . I read the Committee's discussion differently . . . [T]he Committee refers to *Maryland v. Craig* five times. It begins by stating that “arguably” its test is “at least as stringent as the standard set out in [that case].” It devotes a lengthy paragraph to explaining why it believes that its proposal satisfies *Craig*. . . .

*Id.* (second alteration in original) (citation omitted). Justice Breyer also points to the Eleventh Circuit's decision in *Harrell* as support for the sufficiency of the proposed amendment. *Id.* at 97. However, the Eleventh Circuit itself later stated, in *Yates*, that it considered *Harrell* to have properly applied the *Craig* standard of a case-specific finding of necessity for an important public policy—not the lower standard of exceptional circumstances envisioned in the proposed amendment Justice Breyer championed. *United States v. Yates*, 438 F.3d 1307, 1313 (11th Cir. 2006) (en banc).

143. *Yates*, 438 F.3d at 1314-15 (discussing the Supreme Court's 2002 rejection of the proposed Rule 26(b)).

144. If it were certain, one would not have seen the frequent, competing comparisons in *Yates* between Rule 15 depositions and VTC testimony. *E.g.*, *Yates*, 438 F.3d at 1336 (Marcus, J., dissenting) (“The Confrontation Clause expresses no preference between substitute methods that place the defendant in the physical presence of the witness, such as Rule 15 depositions, and methods where the defendant is not physically present, such as two-way video testimony.”).

145. *See supra* notes 138-43 and accompanying text.

146. *See supra* Part I.D.

Rule 26 is that the *Craig* standard must apply, the Court did not provide any guidance concerning what important public policies a rule limiting VTC testimony should consider.<sup>147</sup>

The application of *Crawford* to VTC could also confuse any of the clarity provided by the rejection of proposed Rule 26. The dissenting opinions in *Yates* both argued that, because the witnesses testifying via VTC were unavailable (because they were beyond the subpoena power of the court),<sup>148</sup> and because *Crawford* only requires prior opportunity for cross-examination in order to admit the testimonial evidence of unavailable witnesses, the VTC testimony in *Yates* was constitutional because the unavailable witnesses were cross-examined.<sup>149</sup> Both dissents added that *Craig* was inapplicable because in *Craig*, the witness was available, unlike the witnesses in *Yates*.<sup>150</sup> Accordingly, it seems that a constitutional rule regarding VTC based on *Crawford* would only require a witness to be unavailable,<sup>151</sup> and that VTC allow for the cross-examination of that unavailable witness.

With a variety of approaches taken by the lower federal courts, and limited, possibly even conflicting, Supreme Court guidance, the need to establish an unambiguous uniform rule reconciling the Confrontation Clause with VTC testimony is abundantly clear.

### III. WHAT RULE SHOULD APPLY, AND HOW SHOULD IT BE APPLIED?

The use of VTC testimony in federal criminal trials raises questions about the text and meaning of the Confrontation Clause and about how well VTC can satisfy the clause's fundamental guarantee. Any federal rule of criminal procedure or definitive Supreme Court decision must minimize the impact of VTC testimony on a criminal defendant's Confrontation Clause rights. Federal criminal VTC jurisprudence has developed three potential rules: (1) *Gigante*'s unavailable witness and exceptional circumstances standard; (2) the *Yates* dissents' unavailable witness and cross-examination standard based on *Crawford*; and (3) *Craig*'s case-specific finding that VTC is necessary for an important public policy standard.

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147. See generally Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89 (2002) (making no mention of what may or may not be an important public policy).

148. *Yates*, 438 F.3d at 1326 (Tjoflat, J., dissenting); *id.* at 1336 (Marcus, J., dissenting).

149. *Id.* at 1329-33, 1336 (Marcus, J., dissenting).

150. *Id.* at 1326 (Tjoflat, J., dissenting); *id.* at 1331 (Marcus, J., dissenting).

151. *Id.* at 1329-33 (Marcus, J., dissenting). Judge Marcus defined unavailability as the failure of good faith efforts by the prosecution to bring the witness to trial. *Id.* at 1336. The Second Circuit in *Gigante* looked to Rule 804(a) of the Federal Rules of Evidence. *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999).

The *Gigante* standard has already been rejected by the Supreme Court as being “of dubious validity under the Confrontation Clause.”<sup>152</sup> The *Gigante* standard relies on an analogy to depositions, but the analogy fails.<sup>153</sup> At a deposition, the defendant is physically in the same place as the witness and able to confront the witness face-to-face,<sup>154</sup> thus satisfying the defendant’s right to confrontation. This does not hold true for VTC testimony.<sup>155</sup> Furthermore, the rule’s exceptional circumstances requirement is insufficient.<sup>156</sup> Such a requirement is reminiscent of the compelling circumstances requirement that has been ineffective in federal civil trials; and such ineffectiveness in criminal trials would likely lead to frequent, unacceptable violations of defendants’ rights.<sup>157</sup> Even the Supreme Court Justices who supported the codification of the *Gigante* standard recognized that *Craig* is the ultimate touchstone of VTC’s constitutionality.<sup>158</sup> Considering all of this, it should be expected that the only standard that will withstand Supreme Court review is the *Craig* rule and, as such, the *Gigante* rule must be rejected.

Although the *Crawford*-based test that the *Yates* dissenters advocated was developed after the rejection of proposed Rule 26, the statements of Justices Scalia and Breyer illustrate the inadequacy of such a test, and the imperative of employing the *Craig* test to two-way VTC.<sup>159</sup> The *Yates* dissenters relied on the jurisprudence of hearsay in their argument,<sup>160</sup> but

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152. Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89 at 93 (statement of Scalia, J.).

153. *Id.* at 94-95; *Yates*, 438 F.3d at 1312-13.

154. FED R. CRIM. P. 15(c).

155. *See supra* Part II.A.

156. *Cf.* Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. at 94 (statement of Scalia, J.).

157. *Compare* *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999) (stating that the exceptional circumstances requirement is met simply by the materiality of an unavailable witness’ testimony), *with* *FTC v. Swedish Match N. Am.*, 197 F.R.D. 1, 2-3 (D.D.C. 2000) (citing *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000); *Alderman v. SEC*, 104 F.3d 285 (9th Cir. 1997); *Official Airline Guides, Inc. v. Churchfield Publ’ns*, 756 F. Supp. 1393 (D. Or. 1990), *aff’d sub nom.* *Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385 (9th Cir. 1993)) (recognizing the unimportance of the compelling circumstances requirement); *see also infra* notes 168-69.

158. Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. at 96-97 (dissenting statement of Breyer, J.) (“Justice Scalia believes that the present proposal does not much concern itself with the limitations on the use of out-of-court statements set forth in *Maryland v. Craig*. . . . I read the Committee’s discussion differently . . . . [T]he Committee refers to *Maryland v. Craig* five times. It begins by stating that ‘arguably’ its test is ‘at least as stringent as the standard set out in [that case].’ It devotes a lengthy paragraph to explaining why it believes that its proposal satisfies *Craig* . . . .”).

159. *See infra* notes 160-63.

160. *E.g.*, *United States v. Yates*, 438 F.3d 1307, 1325-27 (11th Cir. 2006) (en banc) (Tjoflat, J., dissenting) (finding fault in majority’s analysis of “the testimony as if it were given in court, as opposed to what it really is—hearsay”).

VTC testimony is transmitted in real-time into the courtroom—it is contemporaneous testimony imperfectly confronted, not a prior hearsay statement subject to *Crawford*.<sup>161</sup> Moreover, the test proposed by the *Yates* dissenters distinguishes the facts of *Craig* and declaims its test.<sup>162</sup> Yet, Justice Scalia, Justice Breyer, and even the proponents of the rejected Rule 26 all seem in agreement that *Craig* must be considered.<sup>163</sup> A test based on *Crawford* would overextend the definition of hearsay and ignore significant statements about the importance of *Craig* in evaluating live testimony from a witness not present in the courtroom.

It is the *Craig* rule that should be applied to VTC testimony.<sup>164</sup> The reasoning expressed by both Justice Scalia and Justice Breyer in the Supreme Court's rejection of the proposed amendment to Rule 26 of the Federal Rules of Criminal Procedure illustrates this point.<sup>165</sup> The “necessary to further an important public policy” standard is by no means limited to the facts of *Craig*: as the Supreme Court has explicitly stated in *Craig* and in *Coy v. Iowa*, and strongly suggested in its rejection of the proposed Rule 26, *any time* a defendant cannot *physically* confront an accusatory witness, that exception to the Confrontation Clause must be necessary for an important public policy.<sup>166</sup> And thus, because VTC does not allow a defendant to physically confront accusatory witnesses, this standard must apply. By strictly limiting the use of confrontation via VTC in place of physical confrontation, the *Craig* rule best strikes the

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161. See *id.* at 1314 n.4 (majority opinion) (“No doubt the Government passes on this [hearsay] argument because it recognizes 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.”); Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. at 94 (statement of Scalia, J.) (distinguishing between live testimony given by a witness during a trial from outside the courtroom and out-of-court prior statements); see also *White v. Illinois*, 502 U.S. 346, 358 (1992).

162. *Yates*, 438 F.3d at 1325-26 (Tjoflat, J., dissenting) (arguing that the application of the *Craig* test is inappropriate because VTC testimony is hearsay and thus not in the same “constitutional context” as *Craig*); *id.* at 1332 (Marcus, J., dissenting) (claiming that the facts of *Yates* were “so far removed from the original scope of *Craig* as to render *Craig* inapplicable”).

163. Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. at 93-95 (statement of Scalia, J.); *id.* at 96-99 (dissenting statement of Breyer, J.); *id.* app. at 99-104 (quoting the advisory committee notes explaining the constitutional theory of the proposed amendment to Rule 26 and citing *Craig* repeatedly).

164. See *supra* notes 138-43 and accompanying text.

165. See *supra* notes 138-43 and accompanying text.

166. *Maryland v. Craig*, 497 U.S. 836, 850 (1990) (“[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 . . .” (emphasis added)); *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) (noting that exceptions to the Confrontation Clause should apply “only when necessary to further an important public policy”); see also Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. at 93-94 (statement of Scalia, J.).

necessary balance between VTC testimony and the Confrontation Clause.

When it comes to application of this rule, it is fundamentally important that it is not as flexibly or creatively interpreted as Rule 43 of the Federal Rules of Civil Procedure,<sup>167</sup> as such flexibility is likely to result in “necessity” or “important public purpose” being read out of the rule.<sup>168</sup> Furthermore, it should be emphasized that the conviction of more criminals, the convenience of witnesses, and the concepts of general efficiency and expedience are not important public policies within the meaning of the rule.<sup>169</sup> Important public policies, such as the maintenance of a witness’ physical safety, should, on the other hand, be expressly considered.<sup>170</sup>

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167. See *Adam v. Carvalho*, 138 F. App’x 7, 8 (9th Cir. 2005); *Beltran-Tirado v. INS*, 213 F.3d 1179, 1185 (9th Cir. 2000); *Alderman v. SEC*, 104 F.3d 285, 288 n.4 (9th Cir. 1997). The Ninth Circuit focused on the witness’ taking of an oath, subjection to cross-examination, and out-of-state location. While this approach seemed to reflect the goals of the American adversarial process, such a test abrogates a clear rule of procedure. The advisory committee notes to Federal Rule of Civil Procedure 43 require “good cause shown in compelling circumstances” for the use of VTC testimony, not simply a sworn, out-of-state witness who is subject to cross examination. FED. R. CIV. P. 43 advisory committee’s note. Any proposed federal rule of criminal procedure or Supreme Court decision regarding VTC must take into account the danger or such flexible interpretation and guard against it. It is undesirable, at best, to have the lower federal courts reading away the requirements of a federal rule of *criminal* procedure, or even suggesting that the drafters are just wrong, as the court in *Swedish Match* did in the civil context. *FTC v. Swedish Match N. Am.*, 197 F.R.D. 1, 2 (D.D.C. 2000) (“I appreciate that the Advisory Committee Notes . . . are more hostile than I am . . . . [T]he courts are much more receptive to this new technology than the Advisory Committee.”). Therefore, *Swedish Match* and the Ninth Circuit cases illustrate that any federal rule or Supreme Court decision should be clear and strict in order to discourage any creative interpretation.

168. See, e.g., *Carvalho*, 133 F. App’x at 8 (disregarding the compelling circumstances requirement).

169. See, e.g., *Craig*, 497 U.S. at 867 (Scalia, J., dissenting) (“[M]ore convictions of guilty defendants . . . is not an unworthy interest, but it should not be dressed up as a humanitarian one.”); *United States v. Yates*, 438 F.3d 1307, 1316 (11th Cir. 2006) (en banc) (“[U]nder the circumstances of this case . . . 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.”).

170. Although this Comment has argued for rejecting the *Gigante* test based on Rule 15 in favor of the *Craig* important public policy test, the ultimate result in *Gigante* would likely have been the same under the *Craig* test. The allowance of VTC testimony in *Gigante* certainly seemed necessary to protect the physical safety of the witness. *United States v. Gigante*, 166 F.3d 75, 81-82 (2d Cir. 1999) (allowing a witness in the last stages of inoperable cancer and under the protection of the Federal Witness Protection Program to testify against an alleged member of the Mafia via VTC). In *Craig*, the Supreme Court considered the witness’ emotional safety as an important public policy. *Craig*, 497 U.S. at 857 (holding that protecting a child witness from trauma is an important public policy that passes constitutional muster). The protection of a witness’ physical health and safety ought to be considered. Assuming this, it seems likely that the Second Circuit in *Gigante* would have found the *Craig* standard satisfied, just as it did the standard under Rule 15.

It also remains absolutely vital to ensure the reliability of all VTC testimony.<sup>171</sup> And reliability means more than assuring that no one off-camera is prompting the witness. Reliability concerns should primarily be focused on retaining as many elements of actual confrontation as possible.<sup>172</sup> This includes a guaranteed opportunity to cross-examine any witness testifying by VTC, utilizing VTC so that all involved (especially the jury, the defendant, and the witness) may see and hear as much of each other as possible and as clearly as possible, and ensuring that the

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The same is true of the Sixth Circuit case of *United States v. Benson*, which relied on the *Gigante* decision rather than the *Craig* test. *United States v. Benson*, 79 F. App'x 813, 821 (6th Cir. 2003) (holding that “[t]he same reasoning applies in this case” as in *Gigante*). As in *Gigante*, the appellate issue in *Benson* was, *inter alia*, the use of the VTC testimony of a witness incapable of travel. *Id.* at 820. The defendants (who had been convicted of a Ponzi scheme by the trial court) challenged the VTC testimony of 85-year-old Zelda Greger. *Id.* at 821. Ms. Greger suffered from extensive health problems, and was under the care of a gastrologist after serious stomach surgery left her underweight and fatigued. *Id.* at 820-21. Although the Sixth Circuit eschewed the *Craig* standard of a case-specific finding of necessity for the accomplishment of an important public policy in favor of the less rigorous *Gigante* standard, it emphasized that Ms. Greger had testified in district court about her serious health problems and her inability to travel. *Id.* The Sixth Circuit was satisfied that it would have been physically dangerous for Ms. Greger to testify in court and approved the use of VTC. *Id.* at 821.

A third case, albeit in a state court, also focused on the inability of the witness to testify in court due to physical safety concerns. *See State v. Sewell*, 595 N.W.2d 207, 211 (Minn. Ct. App. 1999). In *Sewell*, a Minnesota murder case, the defendant appealed his conviction on the grounds that, *inter alia*, the use of VTC violated his Confrontation Clause rights. *Id.* at 209. In *Sewell*, the challenged testimony was given via VTC by William Hurt, a resident of Arizona who had recently undergone surgery for a broken neck. *Id.* at 211. Mr. Hurt's doctor informed the trial court that travel from Arizona to Minnesota would result in Mr. Hurt's inability to return to Arizona for three months, which would interfere with a necessary second surgery. *Id.* The trial court ruled that Mr. Hurt was unable to testify in court because of this serious medical issue. *Id.* at 211, 213. On appeal, the defendant did not challenge this ruling. *Id.* The appellate court was satisfied with this finding and the trial court's reliance on Minnesota rules and federal civil rules regarding depositions in its allowance of VTC testimony. *Id.* at 211-13. The Minnesota court stressed the demand of reliability and the four substantive goals of the Confrontation Clause as set forth by the Supreme Court in *Craig*. *Id.* at 212-13. This focus on the substantive goals of the Confrontation Clause has been rejected since the *Sewell* decision. *See supra* note 63 and accompanying text. Nevertheless, the result in *Sewell*, *Gigante*, and *Benson*, might ultimately be the same because the courts very likely would find that VTC testimony was necessary for an important public purpose.

In *Craig*, the Supreme Court was satisfied that protecting a child from emotional harm was a sufficiently important public policy. It seems to follow that protecting witnesses from physical harm, as in *Gigante*, *Benson*, and *Sewell*, should satisfy any VTC Confrontation Clause test based on *Craig*. *Cf. Craig*, 497 U.S. at 855 (“[P]rotecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure.”).

171. *Cf. supra* notes 70-77 and accompanying text; *see also Craig*, 497 U.S. at 850 (noting further that “the reliability of the testimony [must be] otherwise assured”).

172. *See supra* Part II.A.2.

judge is available to rule on objections.<sup>173</sup> Essentially, courts must take every step to make VTC testimony as identical to in-person testimony as possible.<sup>174</sup> Unfortunately, the other issues—the intangibles that concern Judge Gertner and others—do not lend themselves to such analysis. Rather, as Judge Gertner suggests, they should be the subjects of significant psychological study.<sup>175</sup>

Ultimately, any federal rule of criminal procedure or Supreme Court decision regarding VTC testimony should meet two major goals. First, the rule must allow the admission of VTC testimony only upon a case-specific finding that it is necessary to further an important public policy (which does not include prosecutorial expedience or witness convenience), or upon a defendant's consent. And second, the rule must ensure that when trial courts employ VTC testimony, they use the technology in a manner that emulates to the fullest possible extent testimony given by a physically present witness, and thus preserve as many elements of actual confrontation as possible.

The federal courts recognize that VTC does not perfectly satisfy the Confrontation Clause, but it is nevertheless a valuable tool for introducing testimony at trial in a manner as similar as possible to testimony given by a physically present witness.<sup>176</sup> Because of its significant value in certain circumstances, VTC testimony should not be banned outright, but because it does not provide for actual face-to-face confrontation,<sup>177</sup> there must be strict limits on its use.<sup>178</sup> The best rule would allow VTC testimony only upon a case-specific finding that the VTC testimony is necessary to achieve an important public policy (such as protecting a witness' physical health and well-being), or upon a defendant's consent. Any lesser standard impermissibly sacrifices a defendant's confrontation right and the basic importance of testimony by physically present witnesses on the altar of prosecutorial expediency and witness convenience. At the other extreme, an absolute ban on VTC testimony ignores the value of a limited and careful application of this powerful technology.

#### IV. CONCLUSION

The tension between opportunities afforded by VTC testimony and the traditions and safeguards of the American criminal justice system has yet

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173. *E.g.*, *Craig*, 497 U.S. at 845-46.

174. *Cf. id.* at 846 (holding that it takes "the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings" to satisfy the Sixth Amendment).

175. Gertner, *supra* note 109, at 789.

176. *See supra* note 1; *see also* *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999) (finding that VTC allowed for otherwise unavailable testimony to be received in court subject to cross-examination).

177. *See supra* Part II.A.

178. *See supra* Part III.

to be satisfactorily resolved. Federal courts are far from unanimous in their approaches to resolving this tension.<sup>179</sup> Unanimity is, however, desirable.<sup>180</sup> A federal rule of criminal procedure or a Supreme Court decision could create this unanimity.<sup>181</sup> A Supreme Court decision on constitutional grounds, rather than just an amendment to the federal criminal rules, however, could also standardize the implementation of VTC by the fifty states, which have been utilizing the technology to varying degrees.<sup>182</sup> A Supreme Court decision might also reign in any tendencies to expansively read a federal rule of criminal procedure by publishing the Su-

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179. See *supra* Part II.B.

180. One of the main purposes of the original establishment of all the various federal rules was to establish uniformity throughout the federal judiciary. *E.g.*, *Hanna v. Plumer*, 380 U.S. 460, 472 (1965); *Lumbermen's Mut. Cas. Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963); *Boggs v. Blue Diamond Coal Co.*, 497 F. Supp. 1105, 1112 (E.D. Ky. 1980). If uniformity was not desirable, uniform rules would not have been imposed on the federal courts.

181. See *United States v. Whitted*, 454 F.2d 642, 644 (8th Cir. 1972) (noting that the Federal Rules of Criminal Procedure have "the force and effect of law and are binding upon the lower federal courts"); see also *United States v. Igoe*, 331 F.2d 766, 768 (7th Cir. 1964); *Ochoa v. United States*, 167 F.2d 341, 345 (9th Cir. 1948). Decisions of the Supreme Court involving federal law, obviously, are binding precedent on the entire federal judiciary. See, *e.g.*, *United States v. Duncan*, 413 F.3d 680, 684 (7th Cir. 2005) ("[I]t *certainly* is not our role . . . to overrule a decision of the Supreme Court or even to anticipate such an overruling by the Court." (emphasis added)); *United States v. Mashburn*, 406 F.3d 303, 308 (4th Cir. 2005) ("[O]ur duty 'is not to predict what the Supreme Court might do but rather to follow what it has done.'" (quoting *West v. Anne Arundel County*, 137 F.3d 752, 757 (4th Cir. 1998))); *United States v. Davis*, 260 F.3d 965, 969 (8th Cir. 2001) ("It is our role to apply Supreme Court precedent as it stands, and not as it may develop."); *Kitowski v. United States*, 931 F.2d 1526, 1529 (11th Cir. 1991) ("[W]e *clearly* have no authority to overrule a decision of the [United States] Supreme Court" (emphasis added)).

182. See, *e.g.*, Gerald G. Ashdown & Michael A. Menzel, *The Convenience of the Guillotine?: Video Proceedings in Federal Prosecutions*, 80 DENV. U. L. REV. 63, 78-79 (2002); Charles Wood, *It's a Busy Year in Videoconferencing for Montana Lawyers*, MONT. LAW., June-July 2005, at 7, 7; *supra* notes 33-34 and accompanying text. Ashdown and Menzel give a succinct comparison of California, Missouri, and Florida in their article:

[U]nder a California statute, only initial appearances and arraignments may be conducted via video. In contrast, a Missouri statute permits the use of video teleconferences for initial appearances, waiver of preliminary hearings, arraignment on an information or indictment where a plea of not guilty is entered, any pretrial or post-trial proceeding that does not permit the cross-examination of witnesses, and sentencing after a plea of guilty. Under the California statute, defendants must execute a written waiver before they can make their initial appearance or be arraigned by video teleconference. In Missouri, waiver is required only for arraignments where the defendant will enter a plea of guilty and sentencings following a conviction at trial; the defendant's consent is not required for all other video proceedings authorized under the Missouri statute. In Florida, the law regarding video proceedings is more restrictive than in California with respect to the procedures that can be conducted by video, limiting the use of video proceedings to arraignments, but the law is less restrictive with respect to the consent required of the defendant.

Ashdown & Menzel, *supra*, at 78-79 (footnotes omitted).



preme Court's rationale for its announced rule.<sup>183</sup> On the other hand, a Supreme Court decision could be less flexible than a federal rule, and might keep courts from taking advantage of future technological advancements that could significantly improve the quality of confrontation allowed by VTC.<sup>184</sup> Regardless, a uniform rule such as that proposed in this Comment is needed in federal criminal trials.

VTC testimony will not be the last time technology has the potential to change justice in the United States. The manner in which VTC testimony is incorporated into federal criminal trials could influence how new technology will be viewed and assimilated by courts in the future. This consideration makes any final decision about the use of VTC testimony all the more important.

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183. A definitive statement by the Court would prevent a failure of uniformity akin to the courts' interpretation of Rule 43 of the Federal Rules of Civil Procedure. That is, the failure of uniformity that has resulted from federal courts interpreting the rule however they see fit, which has led to results opposite to those that the drafters of the rule intended. *Cf. supra* notes 36-55 and accompanying text.

184. The Court would have more difficulty overturning a constitutional decision than it would amending a federal rule. *Compare* *Dickerson v. United States*, 530 U.S. 428, 429 (2000) (“[E]ven in constitutional cases, the doctrine [of *stare decisis*] carries such persuasive force that we have always required a departure from precedent to be supported by some special justification.” (quotations omitted)), *with* Amendments to the Federal Rules of Criminal Procedure, 207 F.R.D. 89 (2002) (containing nearly 300 pages of changes to the Federal Rules of Criminal Procedure for that year).