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Virtually Face-to-Face: The Confrontation Clause and the Use of Two-Way Video Testimony

INTRODUCTION

Technological advancements have touched many aspects of our society, including the way we communicate with one another, the way we conduct business, and the way we entertain ourselves. Technology has also had an impact in the legal field.¹ E-mail provides lawyers with the luxury of immediate and constant contact with clients, the ability to exchange documents instantaneously with clients and opposing counsel, and the convenience of electronically filing documents with courts.² Technological advancements, however, have raised questions concerning the extent that such improvements will affect courtrooms. One issue that has been raised is the use of live two-way video testimony in criminal trials.

The Confrontation Clause of the Sixth Amendment states that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”³ This clause, which is only applicable to criminal prosecutions, is incorporated in the Due Process Clause of the Fourteenth Amendment, thus making it binding among the states.⁴ The right to confront ones accusers has also long been held as an important aspect of a fair trial.⁵

There are several variations of electronic witness testimony in

1. Richard L. Marcus, *E-Discovery & Beyond: Toward Brave New World or 1984?*, 25 REV. LITIG. 633, 638 (2006).

2. *Id.* at 639.

3. U.S. CONST. amend. VI.

4. Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 101 (1972).

5. See *infra* Part II.

criminal trials. First, the United States Supreme Court has held that under a “case-specific finding of necessity, the Confrontation Clause does not prohibit a [s]tate from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case.”⁶ Under this procedure, rather than testify in the courtroom, the child witness is examined in a separate room by the prosecutor and defense counsel during the trial.⁷ The examination is recorded and displayed on a video monitor for those in the courtroom to observe.⁸ Although the defendant can see the witness, the witness cannot see the defendant.⁹ The procedure permits the defendant to communicate electronically with defense counsel, and objections and rulings are made as though the child witness was present in the courtroom.¹⁰ Two-way closed circuit testimony is essentially the same set up and procedure, except the witness can see the defendant over a video monitor set up in the room where the witness is testifying.

While the Supreme Court has approved the use of one-way closed circuit television in child sexual abuse cases,¹¹ it has yet to hear a case concerning the use of live two-way video testimony. The circuit courts of appeals, however, are split on the issue. The Second Circuit held that the two-way closed-circuit television procedure, which permitted an ill witness in the Federal Witness Protection Program to testify from a remote location, did not violate the defendant’s right of confrontation.¹² More recently, however, the Eleventh Circuit held that witness testimony provided via two-way video conference at trial violated the defendant’s right of confrontation.¹³

In 2002, the Supreme Court considered a proposal to amend Rule 26(b) of the Federal Rules of Criminal Procedure that would have expressly permitted testimony via video transmission.¹⁴ The

6. *Maryland v. Craig*, 497 U.S. 836, 860 (1990).

7. *Id.* at 841.

8. *Id.*

9. *Id.* at 841-42.

10. *Id.* at 842.

11. *Id.* at 860.

12. *United States v. Gigante*, 166 F.3d 75, 80-82 (2d Cir. 1999).

13. *United States v. Yates*, 438 F.3d 1307, 1315-19 (11th Cir. 2006).

14. Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89, 93 (2002) [hereinafter *Amendments*] (statement of Scalia, J.).

proposal provided:

In the interest of justice, the court may authorize contemporaneous, two-way video presentation in open court of testimony from a witness who is at a different location if:

- (1) the requesting party establishes exceptional circumstances for such transmission;
- (2) appropriate safeguards for the transmission are used; and
- (3) the witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)-(5).¹⁵

The Court declined to adopt the proposal, however, for failure to “limit the use of testimony via video transmission to instances where there has been a case-specific finding that it is necessary to further an important public policy.”¹⁶ In commenting on the proposal, Justice Scalia not only disagreed with the proposal’s acceptance of video conference testimony whenever the parties were unable to take a deposition pursuant to Federal Rule of Criminal Procedure 15, but also with the Advisory Committee’s suggestion that two-way video presentation “may be used generally as an alternative to depositions.”¹⁷ Thus, the Court rejected the proposed amendment, but more on the basis that it permitted liberal use of video transmission testimony, not because it would necessarily violate defendants’ right to confrontation in exceptional cases.¹⁸

This comment proposes that live two-way video testimony is constitutional under the Sixth Amendment for several reasons. First, its use is consistent with the goals and protections intended by the common law right of confrontation as it has been used throughout history. Second, the procedure is more protective of

15. *Id.* at 99 (appendix to statement of Breyer, J.).

16. *Id.* at 93 (statement of Scalia, J.) (internal quotations marks omitted).

17. *Id.* Rule 15 permits parties to substitute live witness testimony with a witness’s deposition when there are “exceptional circumstances” and it is “in the interest of justice” to do so. FED. R. CRIM. P. 15(a)(1).

18. *See Amendments, supra* note 14, at 93-94 (statement of Scalia, J.).

defendants' interests under the Confrontation Clause than currently accepted methods of presenting testimony, such as Rule 15 depositions and evidentiary hearsay exceptions. Finally, the use of live two-way video testimony takes advantage of modern technology, making criminal trials more cost-efficient and convenient, and increases foreign witness participation in trials with foreign components not otherwise under the jurisdiction of United States courts.

HISTORY

There is some debate over the origins of the Confrontation Clause. Some scholars suggest that the right of confrontation became a common law right as a result of the Sir Walter Raleigh trial.¹⁹ Others claim that Raleigh's trial provides merely a "convenient but highly romantic myth"²⁰ rather than the impetus for the Sixth Amendment.²¹

The concept of confrontation can be traced back to biblical times.²² Over two thousand years ago, as Governor Festus and King Agrippa discussed the proper treatment of the prisoner Paul, Festus stated: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face[-]to[-]face, and have license to answer for himself concerning the crime laid against him."²³ At a trial arranged by Festus, Paul's accusers confronted him and "laid many and grievous complaints against [him], which they could not prove."²⁴

Face-to-face confrontation was also prevalent during the Roman Empire.²⁵ The Roman Emperor Trajan instructed the Governor of Bithynia that in prosecuting Christians "anonymous accusations must not be admitted in evidence as against any one, as it is introducing a dangerous precedent, and out of accord with

19. See FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT* 104 (1951).

20. Graham, *supra* note 4, at 100 n.4.

21. *Id.* at 104 n.23 ("[T]he Sixth Amendment was a reaction to the then-recent form of trial in the vice-admiralty courts . . .").

22. Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 384 (1959).

23. Acts 25:16 (King James); Pollitt, *supra* note 22, at 384.

24. Acts 25:7 (King James); Pollitt, *supra* note 22, at 384.

25. Pollitt, *supra* note 22, at 384; see also *Coy v. Iowa*, 487 U.S. 1012, 1015 (1988).

the spirit of our times.”²⁶

Confrontation surfaced in sixteenth century England when the English established a jury system in which jurors decided a defendant's guilt or innocence by applying the facts presented.²⁷ Under this system, witnesses were sworn and asked to look upon the prisoner.²⁸ The witness then made his accusations against the accused face-to-face, which the jury would consider in deciding whether the accused was guilty or innocent.²⁹

Despite confrontation's crucial role in England's early judicial system, whether it was an absolute right was hotly debated.³⁰ Originally, confrontation extended only to ordinary trials in the assizes.³¹ In an attempt to protect the innocent, Parliament enacted a statute in 1552 that required two accusers to be brought before persons accused of treason.³² But because Parliament had little influence at the time, the Crown ignored the statute, thus “proof of treason usually consisted of confessions exacted from alleged coconspirators under torture,” as the Sir Walter Raleigh trial demonstrates.³³

Raleigh was prosecuted in 1603 for the crime of high treason and accused of plotting to make Arabella Stuart the Queen of England.³⁴ The only evidence to support his conviction was a document containing the confession of an alleged coconspirator named Lord Cobham, whose confession was obtained by torture.³⁵ Raleigh, representing himself, demanded confrontation: “The proof of the [c]ommon [l]aw is by witness and jury; let Cobham be here, let him speak it. Call my accuser before my face, and I have done.”³⁶ Raleigh's request, however, was not honored, and he was convicted and executed.³⁷ Interestingly, Lord Cobham's

26. Pollitt, *supra* note 22, at 384 (quoting JOHN LORD O'BRIAN, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 62 (1955)).

27. Jacqueline Miller Beckett, Note, *The True Value of the Confrontation Clause: A Study of Child Sex Abuse Trials*, 82 GEO. L.J. 1605, 1609 (1994).

28. *Id.*

29. *Id.*

30. *Id.* at 1610.

31. *Id.*

32. *Id.* (citing Pollitt, *supra* note 22, at 388 n.26).

33. Pollitt, *supra* note 22, at 388; *see also* Beckett, *supra* note 27, at 1610.

34. Graham, *supra* note 4, at 99-100; Pollitt, *supra* note 22, at 388.

35. Graham, *supra* note 4, at 100; Pollitt, *supra* note 22, at 388.

36. Graham, *supra* note 4, at 100.

37. Pollitt, *supra* note 22, at 389.

confession proved to be false, as he recanted in a letter to Raleigh.³⁸

Political prisoners did not receive the right of confrontation until the John Lilburne trial, a man also known as "Freeborn John."³⁹ Lilburne, a Quaker minister, was accused of illegally smuggling books into England that attacked bishops.⁴⁰ At trial, Lilburne refused to answer questions regarding the activity of others in relation to the crime.⁴¹ Instead, he proclaimed:

I know it is warrantable by the law of God, and I think by the law of the land, that I may stand on my just defence, and not answer your interrogatories, and that my accusers ought to be brought face to face, to justify what they accuse me of.⁴²

For his silence, the Star Chamber sentenced him "to [a] fine, to stand in the pillory, to be whipped, and to stay in jail until he was willing to answer questions."⁴³ But in a subsequent assembly with Charles I, Parliament demanded Lilburne's release, stating that his sentence was "illegal, and against the liberty of the subject: and also bloody, cruel, barbarous, and tyrannical."⁴⁴ As a result, England provided its accused with the right to confrontation.⁴⁵

The right to confrontation, however, did not travel with the English colonists to America, probably because many of them lacked training in the law.⁴⁶ Furthermore, problems inherent in traveling to distant and unknown lands to colonize prompted the colonial leaders to favor swift and rigorous execution of judgments.⁴⁷ Thus, the right to confrontation had to develop over time in the American colonies.

The Salem witch trials were influential in establishing the right to confrontation in the American legal system.⁴⁸ In the

38. Graham, *supra* note 4, at 100; Pollitt, *supra* note 22, at 388.

39. Pollitt, *supra* note 22, at 389.

40. *Id.*

41. *Id.*

42. *Id.* at 389-90.

43. *Id.* at 390.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Beckett, *supra* note 27, at 1612 (citing WITCH-HUNTING IN

1600s, the existence of witches was such a concern in Massachusetts that officials tortured individuals to learn the identity of alleged witches.⁴⁹ Many were accused of being witches based on these largely unsupported accusations.⁵⁰ Once accused, the suspected witches were “tried [before] a special tribunal . . . in Salem without the opportunity to face their accusers, and hanged.”⁵¹ Judge Saltonstall, one of the judges on the tribunal, was so concerned with the methods and criteria used to convict the alleged witches that he resigned.⁵²

This tragic story, stained with false convictions and death, finally ended when the Massachusetts legislature got involved.⁵³ Troubled by the Salem witch trials, Reverend Increase Mather, Massachusetts Colony’s Ambassador to England, insisted that the Massachusetts legislature remedy the situation.⁵⁴ In response, the legislature issued a mandate requiring the tribunal to provide the accused with an opportunity to face his accusers before final conviction.⁵⁵ As a result, the accusations decreased substantially, because many were unwilling to face those they were accusing.⁵⁶ The lack of evidence which ensued caused the Governor to dismiss the Salem tribunal on October 29, 1692.⁵⁷

Many of the other colonies also realized the importance of confrontation. The Carolinas were one of the first colonies to adopt confrontation as a rule of procedure.⁵⁸ Connecticut used a jury system that incorporated the right to confront one’s accusers.⁵⁹ Moreover, the New Hampshire General Assembly recognized confrontation in a series of criminal laws, and New York, New Jersey, and Pennsylvania later followed.⁶⁰

SEVENTEENTH-CENTURY NEW ENGLAND 8 (David D. Hall ed., 1st ed. 1991) [hereinafter WITCH-HUNTING]).

49. *Id.* (citing WITCH-HUNTING, *supra* note 48, at 8).

50. *Id.*

51. *Id.* (citing THE SALEM WITCHCRAFT PAPERS (Paul Boyer & Stephen Nissenbaum eds., 1977)).

52. *Id.* (citing WITCH-HUNTING, *supra* note 48, at 9).

53. *Id.* at 1612-13.

54. *Id.* at 1612 & n.53 (citing WITCH-HUNTING, *supra* note 48, at 9).

55. *Id.* at 1612-13 (citing WITCH-HUNTING, *supra* note 48, at 130).

56. *Id.* at 1613 (citing WITCH-HUNTING, *supra* note 48, at 130).

57. *Id.*

58. *Id.* (citing Pollitt, *supra* note 22, at 395).

59. *Id.* (citing Pollitt, *supra* note 22, at 393).

60. *Id.*

Furthermore, the notion of confrontation played a part during the years leading up to the American Revolution. In 1774, the First Continental Congress published *Address to the Inhabitants of Quebec* to justify the American cause to the French settlers.⁶¹ The address stated:

The next great right is that of trial by jury. This provides, that neither life, liberty, nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen and peers of his vicinage, who from that neighborhood may reasonably be supposed to be acquainted with his character, and the characters of the witnesses, upon a fair trial, and full inquiry, face to face, in open court, before as many of the people as [choose] to attend, shall pass their sentence upon oath against him.⁶²

Prior to the Declaration of Independence on July 4, 1776, the Second Continental Congress recommended that the states set up new government structures to better serve their constituents.⁶³ Following the recommendation, Virginia's Bill of Rights provided:

In all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury.⁶⁴

Following Virginia's initiative, Pennsylvania's constitution provided that "in all prosecutions for criminal offences, a man hath a right to . . . demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favour, and a speedy public trial."⁶⁵ Delaware, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire also adopted similar clauses in their state constitutions.⁶⁶

Although the United States Constitution of 1778 provided for

61. Kenneth Graham, *Confrontation Stories: Raleigh on the Mayflower*, 3 OHIO ST. J. CRIM. L. 209, 218 (2005); Pollitt, *supra* note 22, at 398.

62. Graham, *supra* note 61, at 218; Pollitt, *supra* note 22, at 398.

63. Pollitt, *supra* note 22, at 398.

64. *Id.*

65. *Id.*

66. *Id.*

trials by jury in all criminal cases, the right to confrontation was only given in cases of treason.⁶⁷ Many states objected and wanted more procedural safeguards.⁶⁸ Patrick Henry, fighting against ratification in Virginia, maintained that without certain procedural safeguards, Congress may resort to civil law instead of common law, or even torture to obtain confessions.⁶⁹ Several states, including Virginia, New York, Massachusetts, and New Hampshire, agreed to ratify the Constitution if the first Congress proposed a federal Bill of Rights.⁷⁰ As a result of the ensuing compromise, the Sixth Amendment was born and the right to confrontation was formally entrenched in the American legal system.⁷¹

CONFRONTATION CLAUSE AS INTERPRETED BY THE COURTS

The Supreme Court acknowledged in its earliest interpretations that the right of confrontation is not absolute, as it “must occasionally give way to considerations of public policy and the necessities of the case.”⁷² One of the oldest exceptions to confrontation is the hearsay exception.⁷³ As early as 1895, the Supreme Court considered in *Mattox v. United States* whether the defendant’s constitutional right to confrontation had been violated by admitting to the jury prior testimony of two deceased witnesses.⁷⁴ There, after a jury convicted the defendant of murder, the Court reversed the district court’s judgment pursuant to defendant’s writ of error and remanded the case for a new trial.⁷⁵ Because two government witnesses died during interim, at the second trial the government introduced into evidence “a transcribed copy of the reporter’s stenographic notes of their

67. *Id.* at 399.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 399-400.

72. *Mattox v. United States*, 156 U.S. 237, 243 (1895).

73. Cathleen J. Cinella, Note, *Compromising the Sixth Amendment Right to Confrontation* – *United States v. Gigante*, 32 SUFFOLK U. L. REV. 135, 143 (1998) (citing Michael G. Clarke, Comment, *Illinois' Confrontation with the Use of Closed Circuit Testimony in Child Sexual Abuse Cases: A Legislative Approach to the Supreme Court Decision of People v. Fitzpatrick*, 15 N. ILL. U. L. REV. 719, 722-23 (1995)).

74. *Mattox*, 156 U.S. at 240.

75. *Id.* at 237-38.

testimony [from the first] trial.”⁷⁶ The Court held that this procedure did not violate the defendant’s constitutional right to confrontation because “[t]he substance of the constitutional protection [was] preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination.”⁷⁷

Since *Mattox*, the Court has continued to delineate how hearsay evidence may be admitted without violating the Confrontation Clause. In *California v. Green*,⁷⁸ the Court considered whether the admission of a witness’s prior testimony from a preliminary hearing violated the defendant’s right to confrontation.⁷⁹ The Court recognized that while the Confrontation Clause and the hearsay rules are designed to serve similar principles, the Confrontation Clause is not merely a codification of the common law hearsay rules and exceptions.⁸⁰ In any event, the Court held that “the Confrontation Clause is not violated by admitting a declarant’s out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination.”⁸¹ This is because the essential elements of confrontation have been adequately preserved; the witness is under oath and subject to cross-examination for the jury to observe.⁸²

Following *Green*, the Court again considered whether the admission of hearsay testimony violated the Confrontation Clause in *Ohio v. Roberts*.⁸³ This time, however, the witness whose testimony the prosecution admitted into evidence did not testify at trial.⁸⁴ In such a case, the Court found that the Confrontation Clause requires the prosecution to first “demonstrate the unavailability of . . . the declarant whose statement it wishes to use against the defendant.”⁸⁵ A witness is not unavailable unless the prosecution has made a good-faith effort to produce him at

76. *Id.* at 240.

77. *Id.* at 244.

78. 399 U.S. 149 (1970).

79. *Id.* at 155.

80. *Id.* at 155-56.

81. *Id.* at 158.

82. *Id.*

83. 448 U.S. 56 (1980).

84. *Id.* at 58-60.

85. *Id.* at 65.

trial.⁸⁶ Next, if the prosecution meets this burden, the statement can be admitted only if there is an “indicia of reliability” that serves the “underlying purpose to augment accuracy in the fact-finding process by ensuring the defendant an effective means to test adverse evidence.”⁸⁷ The reliability requirement is satisfied if the evidence “falls within a firmly rooted hearsay exception,” or possesses “particularized guarantees of trustworthiness.”⁸⁸ The Court held that the defendant’s right to confrontation was not violated because the prosecution showed that the witness was constitutionally unavailable,⁸⁹ and because defense counsel cross-examined the witness at the preliminary hearing, thus providing the transcript with an indicia of reliability.⁹⁰

Then, in the landmark case *Crawford v. Washington*,⁹¹ the Court expounded the relationship between hearsay and the Confrontation Clause. In that case, Michael Crawford was charged with assault and attempted murder for stabbing a man who allegedly tried to rape his wife, Sylvia.⁹² Crawford claimed he acted in self-defense, but Sylvia’s statement to police contradicted his account of the incident.⁹³ The state marital privilege prevented the prosecution from compelling Sylvia to testify in court without Crawford’s consent, but the trial court allowed the prosecution to introduce Sylvia’s tape-recorded statement to the police.⁹⁴ With this evidence, the prosecution successfully convinced the jury that Crawford did not act in self-defense.⁹⁵

The Court reversed Crawford’s conviction, finding that the introduction of Sylvia’s statement violated the Confrontation Clause.⁹⁶ In order to preserve the integrity of the Sixth

86. *Id.* at 74 (citing *Barber v. Page*, 390 U.S. 719, 724-25 (1968)).

87. *Id.* at 65.

88. *Id.* at 66.

89. *Id.* at 74-77.

90. *Id.* at 67-73.

91. 541 U.S. 36 (2004).

92. *Id.* at 38-40.

93. *Id.* Specifically, Crawford told the police that the victim had something in his hands before Crawford stabbed him, while Sylvia recalled that the victim carried nothing. *Id.*

94. *Id.* at 40.

95. *Id.* at 40-41.

96. *Id.* at 68-69.

Amendment, the Court – in concluding that the reliability prong of the *Roberts* standard was vague and manipulative – created a new rule.⁹⁷ The Court held that an out-of-court statement that is “testimonial” in nature may not be admitted in criminal cases unless the declarant is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine him.⁹⁸ Thus, the defendant’s opportunity to cross-examine his accusers is at the core of the Confrontation Clause.

In addition to hearsay exceptions, the Court created another exception to face-to-face confrontation after a series of child sexual abuse cases. In the first case, *Coy v. Iowa*,⁹⁹ the Court considered whether the placement of a screen between testifying child victims and the defendant at trial violated the defendant’s constitutional right to confrontation.¹⁰⁰ Coy was charged and convicted of sexually assaulting two thirteen-year-old girls.¹⁰¹ The trial court granted the state’s motion for the placement of a screen between the defendant and the witness stand during the children’s testimony.¹⁰² Once lighting adjustments were made, Coy could dimly see the children through the screen as they testified, but

97. *Id.* at 67-68.

98. *Id.* at 68. In providing a rough sketch of what is testimonial, the Court stated that “it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Id.* The introduction of nontestimonial hearsay, however, is controlled by state law and *Roberts*. *Id.*

The Court subsequently held that out-of-court “[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency,” *Davis v. Washington*, 547 U.S. 813, 822 (2006), while testimonial statements are ones made under “circumstances objectively indicat[ing] that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Id.*

99. 487 U.S. 1012 (1988).

100. *Id.* at 1014. The child witnesses were allowed to testify behind a screen pursuant to Iowa law. *Id.* The statute provided in part that “[t]he court may require a party be confined [sic] to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child’s testimony, but does not allow the child to see or hear the party.” *Id.* at 1014 n.1.

101. *Id.* at 1014-15.

102. *Id.* at 1014.

they could not see him at all.¹⁰³ On appeal before the Court, Coy argued that the procedure deprived him of his right to face-to-face confrontation with adverse witnesses.¹⁰⁴ The Court agreed, and reversed his conviction.¹⁰⁵

Writing for the majority, Justice Scalia focused on the importance of requiring face-to-face confrontation.¹⁰⁶ Scalia noted that physical confrontation makes it less likely that a witness will lie on the stand as “[i]t is always more difficult to tell a lie about a person to his face than behind his back,”¹⁰⁷ and even if the witness does lie, it will likely be less convincing when recited before the defendant.¹⁰⁸ Furthermore, the trier of fact will have a better opportunity to draw its own conclusions on the veracity of the testimony based on the witness’s demeanor.¹⁰⁹ Therefore, because the children could not see Coy through the screen as they testified, the procedure violated Coy’s right to confrontation.¹¹⁰

While the Court noted that the “rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests,”¹¹¹ it declined to address whether there were any exceptions.¹¹² Rather, the Court expressed that if any exceptions existed, they would be permitted “only when necessary to further an important public policy.”¹¹³ Because there were no individualized findings justifying a need for special protection of the child witnesses, no plausible exception to the defendant’s right to confrontation existed.¹¹⁴

In a concurring opinion, Justice O’Connor opined that rights under the Confrontation Clause “may give way in . . . appropriate

103. *Id.* at 1014-15.

104. *Id.* at 1015.

105. *Id.* at 1022.

106. Justice Scalia’s opinion was joined by Justices Brennan, White, Marshall, Stevens, and O’Connor. *Id.* at 1013.

107. *Id.* at 1019 (internal quotation marks omitted).

108. *Id.*; *see also id.* at 1020 (face-to-face confrontation “may confound and undo the false accuser, or reveal the child coached by a malevolent adult”).

109. *See id.* at 1019 (“The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions.”).

110. *Id.* at 1020.

111. *Id.*

112. *Id.* at 1021.

113. *Id.*

114. *Id.*

case[s] to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony."¹¹⁵ She suggested that the use of one- or two-way closed-circuit television for introducing child witness testimony – even if it does not adhere to the general requirement of face-to-face confrontation – may not violate the Confrontation Clause because such procedures may be necessary to further the compelling state interest of protecting child witnesses.¹¹⁶

Two years later, Justice O'Connor wrote the majority opinion for the decision that recognized the exception to the Confrontation Clause for child sexual abuse cases.¹¹⁷ In *Maryland v. Craig*, Sandra Craig was convicted of several sexual offenses involving a six-year old girl.¹¹⁸ Prior to trial, the state moved to have children who Craig allegedly abused testify via one-way closed circuit television as permitted by a Maryland statute.¹¹⁹ Craig objected, arguing that the procedure violated her rights under the Confrontation Clause.¹²⁰ The trial court overruled her objection and granted the state's request because it found that the children would suffer severe emotional distress if they testified in the courtroom.¹²¹ Additionally, the trial court noted that the procedure preserved the values confrontation promoted: permitting the defendant to observe and cross-examine the witnesses while the jury watched.¹²²

On appeal, the Court examined the Confrontation Clause, noting that the clause's central concern "is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."¹²³ The Court reiterated the four essential

115. *Id.* at 1022 (O'Connor, J., concurring).

116. *Id.* at 1023-25.

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

118. *Id.* at 840, 843.

119. *Id.* at 840.

120. *Id.* at 842.

121. *Id.* at 842-43. The Maryland Court of Appeals reversed the trial court's judgment, holding that while the Sixth Amendment does not require face-to-face confrontation between the defendant and his accusers, the state failed to make a sufficient showing that the statutory procedure should be invoked in lieu of confrontation. *Id.* at 843.

122. *Id.* at 842.

123. *Id.* at 845.

elements imposed by the Confrontation Clause: (1) personal examination of witnesses, who are (2) testifying under oath, (3) subject to cross-examination, and (4) observed by a jury that will assess their credibility.¹²⁴ While the Court reaffirmed the importance of face-to-face confrontation – “the core of the values furthered by the Confrontation Clause”¹²⁵ – the Court also recognized that it is not an indispensable condition of the Sixth Amendment.¹²⁶ In other words, the Confrontation Clause does not provide an *absolute* right to face-to-face confrontation, but rather “a *preference* that must occasionally give way to considerations of public policy and the necessities of the case.”¹²⁷ In short, face-to-face confrontation should be dispensed with only when “necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.”¹²⁸

In applying this test to Maryland’s one-way closed circuit television procedure, the Court first found that the procedure sufficiently assured the reliability of the fact-finding process because the testifying child had to be competent, was placed under oath, cross-examined, and could be observed by the judge, jury, and the defendant.¹²⁹ Next, the Court held that the state’s interest in protecting children in child abuse cases from the trauma of testifying is adequately important to justify the use of procedures that dispense with the defendant’s right to face-to-face confrontation, as long as the state makes a sufficient showing of necessity.¹³⁰ The finding of necessity is case-specific, and requires the trial court to determine whether the procedure (or one-way closed circuit television) is necessary to protect the particular child witness.¹³¹ Additionally, necessity requires a finding that the child witness would be traumatized by the defendant’s

124. *Id.* at 845-46 (citing *California v. Green*, 399 U.S. 149, 158 (1970)).

125. *Id.* at 847 (quoting *Green*, 399 U.S. at 157).

126. *Id.*

127. *Id.* at 849 (emphasis added) (internal quotation marks omitted) (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)). For instance, the admission of certain hearsay statements of absent declarants at trial does not violate a defendant’s right to confrontation. *Id.* at 847-48.

128. *Id.* at 850.

129. *Id.* at 851-52.

130. *Id.* at 855.

131. *Id.*

presence, not by courtrooms in general.¹³² Such trauma must be more than “mere nervousness or excitement or some reluctance to testify.”¹³³

USE OF CLOSED-CIRCUIT TESTIMONY OUTSIDE OF MINORS AND SEXUAL ASSAULT CASES

The use of alternative forms of testimony in child abuse cases has risen dramatically since *Craig*.¹³⁴ The federal government and nearly all states have enacted statutes providing for alternatives to face-to-face confrontation when necessary to shield child witnesses or other sensitive witnesses.¹³⁵ The protections provided by these statutes vary according to age, the nature of the underlying crime, and the extent of the victim’s vulnerability.¹³⁶

Craig dealt only with child witnesses and their susceptibility to psychological trauma due to their immaturity. While *Craig* permits a defendant’s right to confrontation to succumb to important state interests regarding child witnesses, the Court is yet to hear a case involving the use of alternative techniques with adult witnesses. Indeed, cases in the lower courts with adult witnesses testifying via closed-circuit television or videotape since *Craig* have been sparse.¹³⁷ But several states do have statutes that allow certain adults to testify via closed-circuit television, such as victims of physical attacks, victims of sexual abuse, and mentally infirm crime victims.¹³⁸

Several circuit courts have heard cases concerning closed-circuit testimony by adult witnesses, with various results. The Second Circuit considered the use of two-way closed circuit

132. *Id.* at 856.

133. *Id.* (quoting *Wildermuth v. State*, 530 A.2d 275, 289 (Md. 1987)). The Court added that the Maryland statute met this constitutional standard because it required a showing that the child witness would suffer “serious emotional distress such that the child cannot reasonably communicate.” *Id.* (quoting MD. CODE ANN., CTS. & JUD. PROC. §9-102(a)(1)(ii) (1989) (current version at MD. CODE ANN., CRIM. PROC. § 11-303(b)(1) (LexisNexis 2001 & Supp. 2007))).

134. *See, e.g.*, *Cinella*, *supra* note 73, at 152 & n.114.

135. *See* Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 HOUS. L. REV. 1003, 1020-24 tbl.1 (2003).

136. *Id.* at 1019 n.130.

137. *Cinella*, *supra* note 73, at 152.

138. Chase, *supra* note 135, at 1020 & n.134.

television testimony in *United States v. Gigante*.¹³⁹ In that case, the government charged Vincent Gigante with violating the Racketeer Influenced and Corrupt Organizations Act (RICO), RICO conspiracy, conspiracy to murder, extortion conspiracy, and a labor payoff conspiracy.¹⁴⁰ Because Gigante was affiliated with the New York Mafia, the government's case naturally consisted mainly of testimony from former mafia members, which included Peter Savino, a former associate.¹⁴¹ At the time of Gigante's trial, Savino was in the Federal Witness Protection Program and in the final stages of an inoperable, fatal cancer at an undisclosed location where he was being medically supervised.¹⁴² Per the government's request, the trial judge held a hearing and found, based on medical reports and testimony, that Savino could not appear in court due to his poor health.¹⁴³ Therefore, the trial judge permitted Savino to testify via two-way closed-circuit television at trial.¹⁴⁴ The procedure allowed the jury, defense counsel, judge, and defendant to see and hear Savino on video screens in the courtroom, and Savino could likewise see and hear the participants in the courtroom on a video screen from where he was testifying.¹⁴⁵ After the jury convicted Gigante, he challenged the procedure on appeal, claiming it violated his Sixth Amendment right to confrontation and that no compelling government interest justified the deprivation of this right.¹⁴⁶

The Second Circuit upheld the defendant's convictions and found that the trial court's use of two-way closed-circuit testimony did not violate Gigante's Sixth Amendment right to confrontation.¹⁴⁷ Despite the court's admonishment that closed-circuit television testimony "must be carefully circumscribed," it

139. 166 F.3d 75 (2d Cir. 1999).

140. *Id.* at 78.

141. *Id.* at 78-79.

142. *Id.* at 79.

143. *Id.* at 79-80. Specifically, a medical physician testified that it would be "medically unsafe" for Savino to travel to New York to testify. *Id.* at 79.

144. *Id.* at 80.

145. *Id.* There was some dispute as to whether Savino could see Gigante, but defense counsel waived the argument. *Id.* at 80 n.1. When the trial judge specifically asked defense counsel if he wanted the camera placed so that the defendant could "look directly eye-to-eye" with Savino, defense counsel responded that it was unnecessary. *Id.*

146. *Id.* at 79.

147. *Id.* at 81-82.

found that its use effectively preserved Gigante's confrontation rights.¹⁴⁸ First, the court noted that the closed-circuit procedure used for Savino's testimony preserved all of the necessary elements of in-court testimony: "Savino was sworn [under oath]; he was subjected to full cross-examination; he testified in full view of the jury, court, and defense counsel; and [he] gave this testimony under the eye of Gigante himself."¹⁴⁹ Next, the court found that *Craig* did not apply, because while *Craig* restricted the use of one-way closed-circuit television testimony to instances in which the witness could not view the defendant, the trial judge in Gigante's case utilized a two-way system that effectively preserved face-to-face confrontation.¹⁵⁰ Free from *Craig*, the court held that "[u]pon a finding of exceptional circumstances, . . . a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice."¹⁵¹ Savino's terminal cancer diagnosis and participation in the Federal Witness Protection Program, along with Gigante's own poor health and inability to travel for a distant deposition, presented exceptional circumstances, and therefore Savino's testimony did not violate Gigante's right to face his accuser.¹⁵²

Contrary to *Gigante*, the recent decision of *United States v. Yates* from the Eleventh Circuit held that trial testimony via two-way closed-circuit television violated the defendant's Sixth Amendment rights.¹⁵³ There, Anton Puztai and Anita Yates faced charges of mail fraud, conspiracy to defraud the United States, conspiracy to commit money laundering, and several prescription-drug-related offenses arising out of their involvement in an internet pharmacy.¹⁵⁴ In a pre-trial motion, the government moved to permit two witnesses to testify at trial from Australia through live two-way video conference.¹⁵⁵ The government argued that the two witnesses were "essential witnesses to the government's case-in-chief," and although the witnesses agreed to testify by video conference, they were unwilling travel to the

148. *Id.* at 80.

149. *Id.*

150. *Id.* at 80-81.

151. *Id.* at 81.

152. *Id.* at 81-82.

153. *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006).

154. *Id.* at 1309-10.

155. *Id.* at 1310.

United States and were beyond the government's power of subpoena.¹⁵⁶ The defendants opposed the motion, arguing that the testimony would deny them face-to-face confrontation and thus violate their Sixth Amendment rights.¹⁵⁷ The trial court granted the government's motion because the two-way video conference procedure allowed the defendants and witnesses to see each other during the testimony, thus preserving the defendants' right to confrontation.¹⁵⁸ The trial court also found that the government had an "important public policy of providing . . . [this] crucial evidence, and that the [g]overnment also ha[d] an interest in expeditiously and justly resolving the case."¹⁵⁹ Similar to *Gigante*, the witnesses were sworn under oath and acknowledged that their testimony was subject to penalty for perjury.¹⁶⁰ As the witnesses testified via video conference, the defendants, jury, and judge could see them, and the witnesses could likewise see everyone in the temporary courtroom.¹⁶¹ At the conclusion of the trial, the jury found the defendants guilty on all counts.¹⁶²

On appeal to the Eleventh Circuit, the defendants argued that the video conference testimony violated their Sixth Amendment right to confrontation under *Craig* because it was not necessary to further an important public policy.¹⁶³ In response, the government argued that *Craig* did not apply for two reasons: (1) the witnesses testified via two-way rather than one-way video conference, and (2) because two-way video conference testimony protects defendants' confrontation rights more than depositions permitted under Federal Rule of Criminal Procedure 15,¹⁶⁴ whenever deposition testimony is admissible, two-way video

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* (citations and internal quotations marks omitted).

160. *Id.*

161. *Id.* The trial was temporarily moved to the United States Attorney's office for the video conference because the courtroom lacked the proper video equipment. *Id.*

162. *Id.*

163. *Id.* at 1312. For *Craig's* holding, see *supra* Part III.

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

conference testimony should be as well.¹⁶⁵ In rejecting both arguments, the court noted that *Craig* provided “the proper test for admissibility of two-way video conference testimony,”¹⁶⁶ and further emphasized that the Eighth, Sixth, Ninth, and Tenth Circuits agreed.¹⁶⁷

Next, the court found that the trial court failed to apply the *Craig* test, which required an evidentiary hearing to determine whether an important public policy existed that necessitated the denial of physical, face-to-face confrontation at trial, and whether the reliability of the testimony was otherwise guaranteed.¹⁶⁸ In examining the trial court’s decision, the court held:

[While] [t]he [g]overnment’s interest in presenting the fact-finder with crucial evidence is . . . an important public policy[,] . . . under the circumstances of this case (which include the availability of a Rule 15 deposition), 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 [d]efendants’ rights to confront their accusers face-to-face.¹⁶⁹

In other words, the court found it significant that the witnesses could have been deposed pursuant to Rule 15, which would have guaranteed the defendants an opportunity to confront their accusers face-to-face at the deposition.¹⁷⁰

In his dissent, Judge Tjoflat disagreed with the majority’s analysis and holding, stating that “[i]t is beyond reproach that there is an important public policy in providing the fact-finder with crucial, reliable testimony and instituting procedures that ensure the integrity of the judicial process.”¹⁷¹ Indeed, as Tjoflat

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

166. *Id.* at 1313 (citing *Harrell v. Butterworth*, 251 F.3d 926, 930 (11th Cir. 2001)).

167. *Id.* See, e.g., *United States v. Bordeaux*, 400 F.3d 548, 554-55 (8th Cir. 2005); *United States v. Moses*, 137 F.3d 894, 897-98 (6th Cir. 1998); *United States v. Quintero*, 21 F.3d 885, 892 (9th Cir. 1994); *United States v. Farley*, 992 F.2d 1122, 1125 (10th Cir. 1993).

168. *Yates*, 438 F.3d at 1315 (citing *Maryland v. Craig*, 497 U.S. 836, 850, 855 (1990)).

169. *Id.* at 1316.

170. *Id.* at 1316-17. See also FED. R. CRIM. P. 15(c).

171. *Id.* at 1320 (Tjoflat, J., dissenting).

emphasized, these are the same public policies the *Craig* Court found important enough to uphold the use of the one-way closed circuit television procedure.¹⁷² Moreover, he argued that the majority's position regarding the possibility of implementing a Rule 15 deposition was irrelevant as to the necessity of using the two-way video conference procedure in furthering the important public policy of providing reliable evidence at trial.¹⁷³ In fact, because the two procedures are "not equivalent," the trial court has the discretion to determine whether a deposition is an inadequate replacement for trial testimony.¹⁷⁴ According to Tjoflat, this is exactly what the trial court did in making a carefully "considered determination that live, two-way video transmission of unavailable witnesses' testimony was necessary to further the[se] important public polic[es] . . . that *Craig* demands."¹⁷⁵

Tjoflat also opined that the majority failed to properly analyze the two-way video conference procedure. The court assessed the testimony as if it were given in court, as opposed to hearsay, which involves out-of-court statements.¹⁷⁶ Under *Crawford*, testimonial statements of witnesses not present at trial are admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."¹⁷⁷ Tjoflat found that while the witnesses' statements in this case were undeniably testimonial, they satisfied *Crawford* because the defendants were given a full opportunity to cross-examine the otherwise unavailable witnesses.¹⁷⁸ Thus, he concluded that the two-way video conference procedure "passes constitutional muster."¹⁷⁹

Judge Marcus also dissented, arguing that the two-way video conference procedure "fully comported with the text, historical purpose, and modern understanding of the Confrontation Clause," and that the majority erroneously applied *Craig*.¹⁸⁰ Even if *Craig*

172. *Id.* at 1322.

173. *Id.*

174. *Id.* at 1323.

175. *Id.* at 1325.

176. *Id.* at 1325-26.

177. *Id.* at 1326 (quoting *Crawford v. Washington*, 541 U.S. 36, 59 (2004)).

178. *Id.* at 1326-27.

179. *Id.* at 1327.

180. *Id.* at 1327 (Marcus, J., dissenting).

did apply to this case, however, Marcus believed the two-way video conference procedure was necessary to obtain the testimony of the foreign witnesses.¹⁸¹ Furthermore, he contended that the procedure satisfied the Confrontation Clause because "Yates and Pusztai had every opportunity to cross-examine the witnesses against them, and those witnesses testified under oath and under the gaze of the defendants, the judge, and the jury."¹⁸² He artfully suggested that the majority's conception of the Confrontation Clause imposed a "one-size-fits-all requirement," in that so long as there is a face-to-face meeting between the defendant and the witness, it is sufficient regardless of whether the meeting takes place in the courtroom or in a Rule 15 deposition.¹⁸³ Like Tjoflat, Marcus also relied on *Crawford*, stating that if a face-to-face meeting is not possible due to the true unavailability of the witness, the Confrontation Clause imposes a "less stringent confrontation requirement," requiring only that the defendant have an opportunity to cross-examine the witness.¹⁸⁴ Moreover, Marcus advocated that cross-examination under the two-way video conference procedure is more effective than a Rule 15 deposition because it allows the trier of fact to observe the witness's demeanor.¹⁸⁵ In conclusion, he stated that "the majority's holding . . . disserves the Constitution and slights the paramount public interest of admitting competent and reliable testimony into evidence in criminal trials."¹⁸⁶

THE CONSTITUTIONALITY OF TWO-WAY VIDEO TESTIMONY

Two-way video conference testimony in criminal trials is constitutional because it provides the necessary protections and upholds the goals intended by the Confrontation Clause. The procedure is also more protective of defendants' right to confrontation than other accepted methods of testimony, such as Rule 15 depositions. Further, two-way video testimony is superior to one-way video testimony, which the Supreme Court has already

181. *Id.*

182. *Id.* at 1328.

183. *Id.* at 1332-33.

184. *Id.* at 1333.

185. *Id.* at 1334.

186. *Id.* at 1336.

deemed constitutional.¹⁸⁷ This alternative testimonial procedure should not be limited to situations similar to the facts in *Craig*, but instead should apply in situations “where necessary to further an important state interest, [while maintaining] the truth-seeking or symbolic purposes of the Confrontation Clause.”¹⁸⁸

Video conference testimony fulfills the requirements of the Confrontation Clause as intended throughout history. As exemplified by Paul’s trial in biblical times, the prosecution of Christians under Roman Emperor Trajan, the trials of Sir Walter Raleigh and Freeborn John in seventeenth century England, and by the Salem witch trials in colonial America, the main goals of the right to confrontation were (1) to afford the defendant the opportunity to receive accusations directly from the mouth of his accuser, (2) to prevent false accusations against the defendant by those unwilling to state such allegations to the defendant’s face, and (3) to allow the judge and jury to view the demeanor of the witnesses testifying.¹⁸⁹ Each of these goals is safeguarded by the two-way video testimony procedure.

First, live video conference testimony provides the defendant the opportunity to see the witness displayed upon the television screen set up in the courtroom as the witness testifies. This allows the defendant to hear the allegations directly from the witness – rather than a mere a second-hand account of the witness’s testimony – helping ensure that the testimony is accurate and the accusations are real. Second, the witness can see the defendant while testifying, which helps prevent false accusations. Specifically, a witness will likely be less inclined to provide false testimony if he must look upon the defendant, even if it is only through a television monitor. Third, the video conference procedure allows the judge and jury to observe the witness over the television screen, providing them with the opportunity to observe the witness’s demeanor to determine his credibility and the truthfulness of his testimony.

Some might argue that it is more difficult to judge the truthfulness and reliability of a witness testifying on a television screen. While truthfulness and reliability have long been

187. *Maryland v. Craig*, 497 U.S. 836, 860 (1990).

188. *Id.* at 852.

189. *See supra* Part II.

considered goals of confrontation, psychological research has shown that "most people can do no better than chance in determining when a person is telling the truth from observing [him] in telling the story."¹⁹⁰ Further, video communication has become ever more incorporated into our daily lives: corporations and firms use video conferencing to hold meetings in two cities at once, and friends and family members use cameras connected to their computers to communicate live over the internet everyday.¹⁹¹ Thus, there is certainly no reason to believe that jurors observing a witness testifying via televised video conference would be any more or less capable of making accurate determinations regarding the reliability of the testimony.¹⁹²

Video conference testimony also fulfills the four elements established in *Craig*: (1) personal examination, (2) testimony under oath, (3) cross-examination of the witness by defense counsel, and (4) observation of the witness by the jury.¹⁹³ The first element of personal examination prevents the usage of depositions or *ex parte* affidavits against the defendant.¹⁹⁴ Video conference testimony satisfies this element because it subjects the witness to personal examination by the parties for the defendant to fully observe. Next, the witness is placed under oath prior to the commencement of his testimony. Although the witness is not physically in the courtroom, he is placed under oath at a remote location by the same procedure he would be subjected to if he were

190. Marcus, *supra* note 1, at 681.

191. See, e.g., Michel Marriott, *Waving Hello, From a Distance*, N.Y. TIMES, Nov. 25, 2004, at G1; Thomas C. Hayes, *Doing Business Screen to Screen*, N.Y. TIMES, Feb. 21, 1991, at D1.

192. Marcus, *supra* note 1, at 682.

193. See *Craig*, 497 U.S. at 845-46. The test delineated in *Craig* is an expansion of the purposes of confrontation set forth in *California v. Green*, 399 U.S. 149, 158 (1970). The *Green* Court noted that confrontation:

(1) insures that the witness will give his statements under oath – thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth;' (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Id. *Craig* borrowed the first element, personal examination, from *Mattox*, 156 U.S. 237, 242 (1895).

194. *Mattox*, 156 U.S. at 242-43.

in the courtroom giving his testimony.¹⁹⁵ Third, the defendant has the same opportunity to cross-examine the witness testifying via video conference that he would if the witness was in the courtroom. There is nothing lost when witnesses are cross-examined during this procedure because the defense counsel may still look directly at the witness during the examination, and the witness may likewise look directly at the defense counsel and the defendant just as he could if he were sitting in the courtroom. Finally, the jury is given a full opportunity, and quite possibly a *better* opportunity, to view the witness and his demeanor during video conference testimony, because the witness is projected onto a television or screen, potentially presenting him in a larger and closer light than the jurors would otherwise be able to see with the witness on the stand.

Nowhere in the text of the Sixth Amendment do the words “face-to-face” or “physical” appear.¹⁹⁶ In fact, the text of the Confrontation Clause only requires the “right . . . to be confronted with the witnesses against [the defendant].”¹⁹⁷ As scholar Akhil Reed Amar noted, “in a Constitution ratified by, subject to, and proclaimed in the name of, the people, it would be unfortunate if words generally could not be taken at face value.”¹⁹⁸ The concept of “face-to-face” confrontation is met by the use of live, two-way video conference testimony because both the defendant and the witness can see each other as the witness testifies.

Critics of the two-way video conference procedure claim that confrontation was meant to afford the defendant the opportunity to be in the physical presence of the testifying witness. Justice Scalia stated in *Coy* that “the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.”¹⁹⁹ On the other hand, the concurrence and dissent both noted that the Confrontation Clause could not

195. See, e.g., *Harrell v. Butterworth*, 251 F.3d 926, 931 (11th Cir. 2001) (court found that use of satellite procedure satisfied the oath safeguard of the Confrontation Clause because the witnesses were placed under oath by the court clerk at the satellite location).

196. See U.S. CONST. amend. VI.

197. *Id.*

198. AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 127-28 (1997).

199. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (citing *Kentucky v. Stincer*, 482 U.S. 730, 748-50 (1987) (Marshall, J., dissenting)).

literally require physical presence because that would be inconsistent with deeply rooted hearsay exceptions.²⁰⁰ The *Craig* Court further clarified that “the word ‘confronted,’ . . . cannot simply mean face-to-face confrontation,” because it would prohibit the admission of hearsay statements made by absent declarants, contrary to the Court’s long history of hearsay jurisprudence.²⁰¹ If the Confrontation Clause was interpreted to mean physical presence in every situation, many long standing common law hearsay exceptions would become unconstitutional.²⁰² Thus, the Confrontation Clause “merely state[s] a principled *preference* for live testimony.”²⁰³

Two-way video testimony is more protective of the interests intended to be protected by the Confrontation Clause than already accepted methods of presenting testimony. Federal Rule of Criminal Procedure 15, for example, allows parties to substitute live witness testimony with deposition transcripts at trial.²⁰⁴ Under this rule, the testimony of the unavailable witness is taken either by stenographic or videographic record.²⁰⁵ Stenographic testimony is read to the jury, usually by having the attorney for the examining party read the deposition questions while another person plays the witness and reads the answers.²⁰⁶ If the acting witness makes any changes in tone of voice or reflects even a hint of emotion, the opposing party can object on the grounds that the reader is improperly interpreting the testimony.²⁰⁷ Under this method, the jury is deprived of the opportunity to assess the witness’s demeanor.²⁰⁸ As Justice White explained in *Green*, an

200. *Id.* at 1024-25 (O’Connor, J., concurring); *id.* at 1030 (Blackmun, J., dissenting).

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

202. *See* FED. R. EVID. 803 (listing twenty-three exceptions that apply regardless of whether the declarant is available and can testify in court in the physical presence of the defendant); FED. R. EVID. 804 (listing five exceptions that are applicable only when the declarant is unavailable).

203. AMAR, *supra* note 198, at 126.

204. *See* FED. R. CRIM. P. 15(f) (“A party may use all or part of a deposition as provided by the Federal Rules of Evidence.”); Lynn Helland, *Remote Testimony – A Prosecutor’s Perspective*, 35 U. MICH. J.L. REFORM 719, 721 (2002).

205. Helland, *supra* note 204, at 721.

206. *Id.*

207. *Id.*

208. *Id.*

important policy of the Confrontation Clause is to “permit[] the jury that is to decide the defendant’s fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.”²⁰⁹

Videographic depositions under Rule 15 are no better than their stenographic counterpart. Although videotaped depositions allow the jury to observe the witness’s demeanor, the deposition is usually taken weeks, months, or even years before trial, often because the same circumstances making the witness unavailable for trial require the deposition be taken far in advance.²¹⁰ And even if the witness can testify by the time of trial, most judges will not want to interrupt the trial to take a deposition.²¹¹ Moreover, both stenographic and videographic depositions deprive attorneys the opportunity to adapt their examinations to the evidence that is presented during the course of trial.²¹²

Live two-way video testimony corrects many of the problems associated with the already approved and widely used Rule 15 deposition procedure. It allows the trier of fact to observe the witness’s demeanor as he is questioned, and also permits attorneys to craft their examination in light of the evidence and testimony that has been presented at trial. Additionally, cross-examination is more effective under the two-way video conference procedure than with Rule 15 depositions because it allows the judge to rule on objections as they are raised and to supervise the course of questioning and counsel’s conduct.²¹³

Furthermore, two-way video testimony better serves the interests intended to be protected by the Confrontation Clause than the one-way closed-circuit television procedure approved in *Craig*.²¹⁴ It is superior because not only does it allow the defendant, the jury, and the judge to see the witness – just as one-way closed-circuit television – but it also allows the witness to see the defendant and the courtroom as he testifies. Thus, using two-way video testimony during trial “allows the witness to see the jury and the defendant, . . . achieving the Confrontation Clause’s

209. *California v. Green*, 399 U.S. 149, 158 (1970).

210. *Holland*, *supra* note 204, at 721-22.

211. *Id.* at 722.

212. *Id.*

213. *United States v. Yates*, 438 F.3d 1307, 1334 (Marcus, J., dissenting).

214. *See Maryland v. Craig*, 497 U.S. 836, 860 (1990).

important goal of bringing the accuser face[-]to[-]face with the accused *and* the factfinder, albeit through the medium of a television screen."²¹⁵

There are also numerous other advantages to using video conference testimony in criminal trials. The procedure is convenient, cost-effective, efficient, and comports with modern notions of globalization and technological advancements. Indeed, globalization has had a significant impact on the practice of federal criminal law.²¹⁶ As the means of travel and communication have progressed, it has become easier to engage in international commerce.²¹⁷ Yet consequently, crimes such as fraud, which at times may utilize international commerce, have increased.²¹⁸ Unfortunately, "the ability of nations to work together to prevent or prosecute international crime has lagged far behind the ability of the criminally inclined to exploit their new economic opportunities."²¹⁹ Therefore, it is often necessary in these cases to obtain evidence from any country in which the defendant may have conducted dealings in the course of committing the fraud.²²⁰ The prosecutor is often unable to subpoena key witnesses due to the fact that they are located outside of the United States and not subject to its jurisdiction.²²¹

Moreover, one of the greatest advantages to using live two-way video testimony is that it provides a better alternative for obtaining foreign witness testimony.²²² *Yates* is a good example of when two-way video testimony becomes important. In his dissent, Judge Tjoflat argued that two-way video testimony was necessary because the witnesses were beyond the subpoena power of the trial court, as they were citizens of, and resided in, Australia at the time of trial.²²³ With the advent of improved technology that makes it easier to conduct business and commerce globally, procedures like two-way video conference will become increasingly

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

216. Helland, *supra* note 204, at 723.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 724.

221. *Id.*

222. *Id.* at 723.

223. *United States v. Yates*, 438 F.3d 1307, 1324 n.6 (Tjoflat, J., dissenting).

important when foreign witnesses cannot be subpoenaed by courts. Two-way video testimony therefore presents the opportunity to obtain testimony from foreign witnesses in a manner that not only complies more fully with the Confrontation Clause than current methods – such as Rule 15 depositions – used by courts, but that is also more effective and efficient in today’s world.

Justice Scalia, among other critics, argues that video conference testimony “improperly substitute[s] ‘virtual confrontation’ for the real thing required by the Confrontation Clause in a criminal trial.”²²⁴ However, with the arrival of new technology, Americans have generally become increasingly less likely to participate in face-to-face interactions. Beginning with the telephone, where people no longer needed to meet face-to-face to verbally communicate, and expanded by the internet, people now regularly make decisions through digital communications.²²⁵ Further, studies have found that jurors respond the same to live witnesses as those testifying via video conference.²²⁶

CONCLUSION

Presenting testimony via two-way video conference is constitutional under the Confrontation Clause of the Sixth Amendment because it is consistent with the goals and protections intended by witness confrontation throughout history. It provides the defendant with the opportunity to see and hear the witness as he testifies, and the witness knows that the defendant is watching and listening. It further permits the judge and jury to observe the witness’s demeanor. Additionally, live two-way video testimony is more protective of the defendant’s right to confrontation than other currently accepted and widely used practices such as Rule 15 depositions and common hearsay exceptions under the Federal Rules of Evidence. Moreover, live two-way video testimony is superior to the one-way closed-circuit television procedure

224. Marcus, *supra* note 1, at 676 (citing *Amendments, supra* note 14, at 93-94 (statement of Scalia, J.)).

225. *Id.* at 682.

226. *Id.* at 676 (citing 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, 819 (1999)).

approved by the Supreme Court, and is more consistent with normal testimonial procedures. Finally, the two-way video conference procedure is more efficient and effective in the courtroom because it provides key witnesses who would otherwise be unable or unwilling to testify the opportunity to do so in a manner that still gives the defendant his basic right of confrontation. For these reasons, live two-way video testimony is consistent with the Confrontation Clause of the Sixth Amendment.

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