# COMPLYING WITH THE CONFRONTATION CLAUSE IN THE TWENTY-FIRST CENTURY: GUIDANCE FOR COURTS AND LEGISLATURES CONSIDERING VIDEOCONFERENCE-TESTIMONY PROVISIONS*

## I. INTRODUCTION

DEFENSE ATTORNEY [*holding an exhibit in front of a video monitor*]. Ms. Fileger, can you see this?

WITNESS [*testifying in a Florida courtroom from Nevada*]. I can, I can see it, but I can't see details of it.[1]

The age of technology is upon us. We can watch movies, surf the Internet, and listen to music on devices that fit neatly into our pockets. Even courts have embraced technological innovations, as attorneys can file briefs electronically, appear in appellate proceedings remotely, and use electronic multimedia in the courtroom.[2] This Comment addresses one specific issue involving the use of technology in the courtroom—whether prosecution witnesses may testify against criminal defendants at trial via videoconference technology.[3]

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1. Petition for Writ of Certiorari at 8, Junkin v. Florida, No. 12-475 (2012), *cert. denied*, 133 S. Ct. 670 (2012). In this exchange, the defense attorney was attempting to cross-examine a forensic witness who testified via videoconference technology regarding the contents of her report. *Id.* at 3–4. In addition to the witness's inability to read the exhibits upon which defense counsel based his questions, a delay in the video feed caused the witness and counsel to speak at the same time on several occasions. *Id.* at 8.

2. *See* Fredric I. Lederer, *The Effect of Courtroom Technologies on and in Appellate Proceedings and Courtrooms*, 2 J. APP. PRAC. & PROCESS 251, 252 (2000) (discussing the use of multimedia lower court records, hyperlinked briefs, electronic presentations, and appearance by two-way videoconference in appellate proceedings).

3. Accordingly, it does not consider other uses of technology in criminal cases, which may raise different but equally important constitutional issues. For example, a Sixth Amendment right-to-counsel issue may arise when an attorney appears at a proceeding via speakerphone or videoconference. *See, e.g.*, Wright v. Van Patten, 552 U.S. 120, 125–26 (2008) (per curiam) (noting that a habeas petitioner whose attorney appeared at his plea hearing via speakerphone raised a novel right to counsel issue but declining to overturn the state court's decision on other grounds). Similarly, a defendant's due process right to presence may be implicated when a judge or opposing counsel appears via videoconference. *See e.g.*, United States v. Burke, 345 F.3d 416, 426 (6th Cir. 2003) (holding that a defendant's due process right to presence was not violated when the judge participated in a pretrial suppression hearing via two-way videoconference). Finally, while the use of technology in appellate proceedings is widely embraced, the constitutionality of these measures has not been seriously tested. *See* Lederer, *supra* note 2, at 252 (discussing the use of multimedia lower court records, hyperlinked briefs, electronic presentations, and appearance by two-way videoconference in appellate proceedings).

One important check on the use of technology in criminal proceedings is, of course, the Bill of Rights. While it is safe to assume that the Founding Fathers did not contemplate the use of videoconference testimony by prosecution witnesses in 1791, the Sixth Amendment's Confrontation Clause plainly articulates the right of criminal defendants to "confront[]" adverse witnesses.[4]

Because the Supreme Court has held that physical presence is a component of this right to confrontation, legislatures or courts considering statutes or court rules that would admit videoconference testimony must identify when it is constitutional to substitute a witness's physical presence with the witness's virtual presence.[5] This Comment contends that legislatures and courts should move slowly towards the admissibility of videoconference testimony, at least when the defendant does not consent to its use, because "something is lost in . . . translation" when a witness testifies outside of a defendant's physical presence.[6] In most cases, the "something" that is lost prejudices the criminal defendant.[7]

As evidenced in the example above, substituting virtual presence for physical presence has practical implications—how can a defense attorney effectively cross-examine a witness who cannot read an exhibit?—but also metaphysical effects that are difficult to measure—will a witness be more likely to lie if he or she is not in the same room as the defendant?[8]

Parts II.A and II.B describe the mechanics of videoconference testimony and how its use implicates the Sixth Amendment. Parts II.C and II.D detail the Supreme Court's precedential and nonprecedential statements on the use of this technology in criminal trials. Part II.E discusses two procedural tools, waiver and notice-and-demand statutes, that play a significant role in Confrontation Clause litigation. Parts II.F and II.G describe Federal Rule of Criminal Procedure 15 and the four state provisions that explicitly admit videoconference testimony. Finally, Section II concludes with Part II.H, which outlines policy arguments for and against the use of this technology in criminal trials.

Section III vets the constitutionality and substantive merits approaches that legislatures or courts could take in crafting videoconference-testimony statutes or court rules. Part III.A submits that these rulemakers should seriously consider adopting procedural provisions, such as waiver or notice-and-demand provisions, because both

4. U.S. CONST. amend. VI.

5. This Comment refers to the rulemaking power of courts and legislatures because jurisdictions have enacted videoconference-testimony provisions either by statute or court rule. A statute is, of course, enacted by the state's legislature. *E.g.*, N.H. REV. STAT. ANN. § 516:37 (2013); MICH. COMP. LAWS ANN. § 600.2164a (2013). In other jurisdictions, however, courts adopt videoconference-testimony provisions as rules of criminal procedure pursuant to their own independent rulemaking power. *E.g.*, ALASKA R. CRIM. P. 38.3; IDAHO R. CRIM. P. 43.3. See *infra* note 88 for an explanation of the roles that the Supreme Court and Congress play in enacting Federal Rules of Criminal Procedure.

6. United States v. Bordeaux, 400 F.3d 548, 554 (8th Cir. 2005).

7. *Id.*

8. *See* Coy v. Iowa, 487 U.S. 1012, 1019 (1988) (noting in a case where a screen was placed between the defendant and witness that "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back,'" and that lies told in the physical presence of the defendant "will often be told less convincingly"); *Bordeaux*, 400 F.3d at 554 (commenting that "a defendant watching a witness through a monitor will not have the same truth-inducing effect as an unmediated gaze across the courtroom").

pass constitutional muster and have cognizable benefits for both the prosecution and defendant.

Part III.B argues that, in the absence of a defendant's consent, a constitutionally compliant statute or court rule must condition the admissibility of videoconference testimony upon the prosecution's ability to meet a legal standard that is at least as stringent as the one that the Supreme Court applied in *Maryland v. Craig*.[9] Consequently, a provision that admits this testimony per se or imposes a lower standard is unconstitutional.

Finally, Part III.B.3 concludes that the positions adopted in Parts III.A and III.B are not only consistent with Supreme Court precedent but are also sound from a policy perspective because virtual presence is simply not an adequate substitute for physical presence. Therefore, courts and legislatures considering the adoption of videoconference-testimony rules must take into account that such testimony comports with the Confrontation Clause only in the limited circumstances where either the defendant consents or the prosecution is able to meet a fairly stringent legal standard.

## II. OVERVIEW

This Section discusses the constitutional implications that arise when prosecution witnesses testify against criminal defendants via videoconference technology. It begins with a brief description of videoconference testimony and then discusses the particular Sixth Amendment issue that this form of testimony implicates. Next, this Section considers the Supreme Court's treatment of the issue in both its precedential and nonprecedential capacities. Afterwards, it reviews Federal Rule of Criminal Procedure 15 and the state statutes and court rules that admit videoconference testimony. Finally, this Section concludes with policy arguments for and against the use of such testimony in criminal trials.

### *A. Videoconference Testimony*

Videoconference technology allows witnesses to testify at trial without being physically located in the courtroom. This form of testimony goes by a variety of names,[10] but its method of presentation is largely uniform across most courtrooms.[11] In contrast to a traditional, in-person witness, the videoconference witness is not physically present in the courtroom, though "virtually present" through the use of

9. 497 U.S. 836 (1990). See *infra* Parts II.C.1 and II.C.2 for an in-depth discussion of the *Craig* test and how lower state and federal courts have applied it to subsequent Confrontation Clause challenges stemming from the use of videoconference testimony.

10. For example, it is called "video conference testimony" in an Alaska rule of criminal procedure, "video teleconference" in the Idaho and New Hampshire rules, "video communication" in Michigan's rule, and "video presentation" in a proposed Federal Rule of Criminal Procedure. MICH. COMP. LAWS ANN. § 600.2164a; N.H. REV. STAT. ANN. § 516:37; ALASKA R. CRIM. P. 38.3; IDAHO R. CRIM. P. 43.3; Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89 app. at 99 (2002). (Breyer, J., dissenting statement). For purposes of consistency, the practice will be referred to as "videoconference testimony" in this Comment.

11. See *infra* notes 12–16 and accompanying text for a discussion of the similarities in presenting videoconference testimony across jurisdictions.

technology that enables the witness and those in the courtroom to interact with each other in real time.[12]

To preserve the sense of presence, which, as will become evident, is an important constitutional component of a criminal trial, all jurisdictions require that the witness is able to both see and hear the courtroom proceedings in real time.[13] Similarly, the defendant, counsel, judge, jury, and audience must be able to see and hear the witness's testimony in the same manner.[14] Witness examination then takes place in the traditional order, subject to all of the rules governing in-person testimony.[15] Indeed, the Alaska rule emphasizes that videoconference testimony should replicate traditional testimony to the point that it is "as if the [virtual] witness were sitting in the courtroom's witness stand."[16]

While the ability for all parties to see and hear each other is the overarching requirement (and the fact that implicates the Sixth Amendment[17]), most jurisdictions impose additional standards designed to ensure the testimony's reliability.[18] For example, the Alaska rule requires that a witness testifying via videoconference be alone, save for the presence of a technician, to prevent witness coaching and ensure the technology is working properly.[19] Additionally, a previously proposed Federal Rule of Criminal Procedure on videoconference testimony gave the trial court the discretion to establish safeguards to ensure the accuracy and quality of the testimony.[20] The

12. Commonwealth v. Musser, 82 Va. Cir. 265, at *1 (2011). In a highly uncommon case, a federal district court permitted a witness's testimony to be taped and replayed to the jury because of the time difference between Japan (the location of the witness) and Massachusetts (the location of the case). United States v. Nippon Paper Indus. Co., 17 F. Supp. 2d 38, 43 (D. Mass. 1998).

13. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.2164a(1) (requiring that all "individuals appearing or participating" in the witness examination be able "to hear and speak to each other"); ALASKA R. CRIM. P. 38.3(c) (noting that technology must allow witness testifying via videoconference to "see and hear the courtroom proceedings, including the defendant, as if the witness were sitting in the courtroom's witness stand"); IDAHO R. CRIM. P. 43.3(1)(a)–(b) (providing that videoconference witness must be able to see the court, defendant, and counsel).

14. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.2164a(1) (providing that all parties must be able to "hear and speak to each other"); ALASKA R. CRIM. P. 38.3(c) (requiring the parties, judge, jury, and courtroom audience to see and hear the witness); IDAHO R. CRIM. P. 43.3(1) (stating the "court, defendant, counsel, jury, and others physically present in the courtroom" must be able to see the videoconference witness).

15. *See, e.g.*, N.H. REV. STAT. ANN. § 516:37(I) (stating that witness examination "shall proceed in the same manner as permitted at trial"); *Musser*, 82 Va. Cir. 265, at *1 (detailing the process as follows: "[t]he witness is sworn by an authorized officer in the witness's physical presence, then examined and cross-examined in the same way she would be if she were physically on the witness stand in the trial courtroom").

16. ALASKA R. CRIM. P. 38.3(c).

17. As discussed *infra* in Part II.B, the ability of the defendant to see and hear the witness is the only important interaction for purposes of the Confrontation Clause. Accordingly, the extent to which virtual presence adversely impacts the factfinder's ability to observe the demeanor of a witness or the witness's ability to fully appreciate the gravitas of the courtroom is not applicable to the Sixth Amendment issue that this Comment raises. Richard D. Friedman, *Remote Testimony*, 35 U. MICH. J.L. REFORM 695, 701–02 (2002). However, see *infra* Section II.H. for a discussion of how these factors bear on the wisdom of using such technology.

18. See *infra* notes 19–21 and accompanying text for a review of additional standards governing the presentation of videoconference testimony in select jurisdictions.

19. ALASKA R. CRIM. P. 38.3(c).

20. *See* Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89 app. at

committee note in support of the rule offered a few suggestions, including limiting the distractions in the room from which the witness is testifying and, like Alaska, dispatching a court employee to the witness's location to provide technical support.[21]

### *B. How Videoconference Testimony Implicates the Confrontation Clause*

The Sixth Amendment's Confrontation Clause is a rule of evidence that governs the admissibility of witness testimony in both state and federal criminal trials.[22] It provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[23] As the Supreme Court recently explained, the Confrontation Clause means that a "witness's testimony against a defendant is . . . inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination."[24]

Because a witness who testifies via videoconference offers evidence against a criminal defendant without being physically located in the courtroom, the constitutional question becomes whether this form of testimony preserves the defendant's right "to be confronted" by an adverse witness.[25] In other words, is physical presence an element of a defendant's right to confrontation, and, if so, when is it constitutional to substitute virtual presence for physical presence?

### *C. The Supreme Court's Videoconference-Testimony Jurisprudence*

#### 1. *Maryland v. Craig*: Videoconference Testimony in Child Abuse Cases

The Supreme Court's most direct statement on the constitutionality of videoconference testimony came in its 1990 decision, *Maryland v. Craig*. In that case, the defendant challenged a Maryland statute that permitted juvenile victims of sexual

99–102 (2002) (Breyer, J., dissenting statement) ("The revised rule envisions several safeguards to address possible concerns about the Confrontation Clause.").

21. *Id.* at 102.

22. *See* Pointer v. Texas, 380 U.S. 400, 403 (1965) (applying the Confrontation Clause to the states via the Due Process Clause of the Fourteenth Amendment). Because most, if not all, states have their own confrontation clause provisions, a defendant in state court may advance a challenge under both constitutions. *See, e.g.*, Commonwealth v. Atkinson, 987 A.2d 743, 745, 750 (Pa. Super. Ct. 2009) (finding that the use of videoconference testimony violated both commonwealth and federal constitutions).

23. U.S. CONST. amend. VI.

24. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309 (2009) (citing Crawford v. Washington, 541 U.S. 36, 54 (2004)). This latter situation refers to presenting testimony via pretrial deposition pursuant to FED. R. CRIM. P. 15, which is discussed *infra* in Part II.F.

25. Friedman, *supra* note 17, at 702. There are several other regularly litigated aspects of the Confrontation Clause. For example, does a "criminal prosecution" include pretrial proceedings? *See* Christine Holst, Note, *The Confrontation Clause and Pretrial Hearings: A Due Process Solution*, 2010 U. ILL. L. REV. 1599, 1603–13 (2010) (concluding that Supreme Court precedent on the Confrontation Clause's applicability to pretrial proceedings is rather unclear). Or what types of witness statements are "testimonial" and thus subject to the Confrontation Clause? *See generally* Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011); *Melendez-Diaz*, 557 U.S. 305; Davis v. Washington, 547 U.S. 813 (2006). In order to keep the focus on videoconference testimony, this Comment will not cover these issues in depth. Rather, the analysis in Section III will assume that the Confrontation Clause applies; that is, it will assume a witness is offering "testimonial" evidence against a defendant at a "criminal proceeding."

abuse to testify via one-way videoconference technology, whereby the defendant could see the witness, but the witness could not see the defendant.[26] In order to use this technology, the trial court was first required to make a case-specific finding that the child witness would suffer severe emotional distress as a result of being in the defendant's presence.[27]

In considering this facial challenge, the Court noted that a defendant's right to confrontation has traditionally involved four elements: (1) the testimony has been given under oath and (2) subject to cross-examination, (3) the factfinder has the ability to observe the demeanor of the witness,[28] and (4) the defendant was afforded a "face-to-face" confrontation with the witness.[29] This last element—and the one directly implicated by videoconference testimony—is based on the rationale that there is "something deep in human nature that regards face-to-face confrontation . . . as essential to a fair trial."[30]

Indeed, just two years earlier in *Coy v. Iowa*,[31] the Court held that a defendant's right to confrontation was violated when a trial judge permitted a screen to be placed between a child witness and the defendant.[32] The Court reasoned that face-to-face confrontation lessened the likelihood that the witness would lie under oath; and, even if the witness did lie, that lie would be less convincing if offered in direct view of the defendant.[33] Much like the rationale for cross-examination, *Coy* concluded that face-to-face confrontation has the unique effect of "ensur[ing] the integrity of the factfinding process."[34]

However, *Coy* left open the question of whether the Confrontation Clause guaranteed an "*absolute* right to a face-to-face meeting" between the defendant and witness.[35] The *Craig* Court answered this question in the negative and instead held that a face-to-face meeting is only a "preference" of the Confrontation Clause, which "must occasionally give way to considerations of public policy and the necessities of the case."[36] The Court then established a two-part test governing when a court may deviate from the face-to-face preference of the Confrontation Clause: (1) the denial of physical confrontation must be "necessary to further an important public policy," and (2) the testimony must be sufficiently reliable.[37]

The *Craig* Court held that the Maryland statute met this test, at least facially.[38] With respect to the reliability prong, the statute preserved the three other traditional

26. Maryland v. Craig, 497 U.S. 836, 840–42 (1990) (citing MD. CODE ANN. CTS. & JUD. PROC. § 9-102(a)(1)(ii) (1989) (current version at MD. CODE ANN. CRIM. PROC. § 11-303 (West 2012))).

27. *Id.* at 855–56.

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

29. *Id.* at 846 (citing Coy v. Iowa, 487 U.S. 1012, 1019–20 (1988)).

30. *Id.* at 847 (quoting *Coy*, 487 U.S. at 1017) (internal quotation mark omitted).

31. 487 U.S. 1012 (1988).

32. *Coy*, 487 U.S. at 1020–22.

33. *Id.* at 1019.

34. *Id.* at 1020 (quoting Kentucky v. Stincer, 482 U.S. 730, 736 (1987)).

35. *Craig*, 497 U.S. at 844.

36. *Id.* at 849 (quoting Mattox v. United States, 156 U.S. 237, 243 (1895)).

37. *Id.* at 850.

38. *Id.* at 851.

elements of the defendant's confrontation right, as the testimony was given under oath, subject to cross-examination, and in the view of the factfinder.[39] Addressing the public policy prong, the Court first reviewed its record of protecting the welfare of children who have been victims of sexual crimes.[40] The Court then concluded that the Maryland statute satisfied an important public policy because it required a case-specific finding that the juvenile witness would suffer emotional distress as a result of seeing the defendant.[41] Thus, while *Craig* set forth a general framework for determining when courts can constitutionally admit videoconference testimony, it remained to be seen whether this test would apply beyond the specific context of child-sex-abuse cases.

### 2. Application of the *Craig* Test to Subsequent Confrontation Clause Challenges in Federal and State Courts

While *Craig* was decided in the specific context of a child-sexual-abuse statute, most federal and state courts have applied its legal standard to cases involving other crimes.[42] The case law discussed in this section reveals that most courts find such technology "reliable," but they differ in their assessment of the public policy prong.

Notwithstanding the multitude of technical difficulties that could arise with videoconference testimony, courts rarely find that such testimony fails the reliability prong of the *Craig* test.[43] For example, the Eleventh Circuit found that testimony was reliable even though there was a one-second delay between the audio sound and video display and the witness looked at the video technician while testifying, not at the camera.[44] Similarly, a Minnesota appeals court rejected a defendant's argument that the technical quality of a videoconference was deficient when there was a delay between the questions and answers, which in one instance caused the witness to answer a question to which the trial judge had sustained an objection.[45] Despite these issues, most courts simply rely on the reasoning of the *Craig* Court—that videoconference testimony is reliable because it preserves the defendant's right to cross-examine the witness under oath and in the view of the factfinder.[46]

However, the lower courts' application of the public policy prong has not been as uniform. At least three circuit courts and three state supreme courts have sanctioned videoconference testimony for infirm witnesses whose health would not allow them to

39. *Id.*

40. *Id.* at 852–55.

41. *Id.* at 855–56.

42. See *infra* notes 44–50 and accompanying text for a review of cases applying the *Craig* test. The most notable exception is the Second Circuit case, *United States v. Gigante*, in which the defendant objected to the admissibility of two-way videoconference testimony. 166 F.3d 75, 79 (2d Cir. 1999). The *Gigante* court distinguished *Craig* on its facts by holding that it controlled only in cases involving one-way videoconference testimony. *Id.* at 81. The court ultimately admitted the testimony, but it did so by applying the standard required by FED. R. CRIM. P. 15, which governs pretrial depositions. *Id.*

43. See *infra* notes 44–46 and accompanying text for a discussion of cases applying *Craig*'s reliability prong.

44. Harrell v. Butterworth, 251 F.3d 926, 928–29 (11th Cir. 2001) (per curiam).

45. State v. Sewell, 595 N.W.2d 207, 212–13 (Minn. Ct. App. 1999).

46. *E.g.*, United States v. Abu Ali, 528 F.3d 210, 241–42 (4th Cir. 2008); People v. Wrotten, 923 N.E.2d 1099, 1102–03 (N.Y. 2009); Bush v. State, 193 P.3d 203, 215–16 (Wyo. 2008).

travel to the trial.[47] Another circuit found that the United States' interest in its national security excused a witness's physical presence.[48] Additionally, some courts have permitted the use of such testimony for foreign witnesses, particularly for those who live in locations beyond the United States' subpoena power, though others reject this practice.[49] On the other hand, the use of videoconference testimony to save money or for the sake of convenience does not meet this prong of the *Craig* test.[50]

Subsequent state and federal courts have therefore cemented *Craig*'s two-prong approach as the prevailing legal standard for evaluating Confrontation Clause issues that arise from the use of videoconference testimony in criminal trials. While most courts find this technology to be "reliable," many closely scrutinize whether its use serves an appropriate public policy.

### 3. Evaluating the Constitutionality of Videoconference Testimony in Light of Recent Supreme Court Confrontation Clause Jurisprudence

While *Craig* stands out as the Supreme Court's only definitive statement on the constitutionality of videoconference testimony, the issue of a witness's presence must be reevaluated in light of the Court's recent reinterpretation of the Confrontation Clause. Most generally, the trend set in place in 2004 by *Crawford v. Washington*[51] requires more prosecution witnesses to testify at trial. Because *Crawford* and its progeny place a greater burden on prosecutors to produce witnesses at trial, it is likely that jurisdictions may attempt to alleviate some of this burden by allowing prosecution witnesses to testify remotely.[52]

47. Horn v. Quarterman, 508 F.3d 306, 317 (5th Cir. 2007); United States v. Benson, 79 F. App'x 813, 820–21 (6th Cir. 2003); *Butterworth*, 251 F.3d at 931; Harrell v. State, 709 So. 2d 1364, 1369–70 (Fla. 1998); *Wrotten*, 923 N.E.2d at 1103; *Bush*, 193 P.3d at 215–16. *But see* United States v. Ganadonegro, No. CR 09–0312 JB, 2012 WL 400727, at *16 (D.N.M. Jan. 23, 2012) (holding that pregnant witness did not qualify as an infirm witness since her inability to travel was temporary).

48. *See Abu Ali*, 528 F.3d at 240–41 (permitting witness to testify from Saudi Arabia against defendant charged with conspiring to commit terrorists attacks against the United States and threatening to kill the President).

49. *Butterworth*, 251 F.3d at 928–29. In this habeas appeal, the Eleventh Circuit found that the state court did not unreasonably apply *Craig* by allowing one of the two witnesses to testify via videoconference because she was too sick to travel. *Id.* at 931. It reached the same conclusion on the state court's decision to allow both witnesses to testify via videoconference because they lived in Argentina, which is beyond the government's subpoena power, and they had no desire to return to the United States. *Id.*; *see also* Rogers v. State, 40 So. 3d 888, 890–91 (Fla. Dist. Ct. App. 2010) (finding the testimony of police officer appearing from China admissible under *Craig*). *But see, e.g.*, United States v. Yates, 438 F.3d 1307, 1315–16 (11th Cir. 2006) (en banc) (finding that the need to "expeditiously resolve" a case by admitting testimony from a foreign witness via videoconference technology did not meet the public policy prong of *Craig*).

50. *See* Commonwealth v. Atkinson, 987 A.2d 743, 750–51 (Pa. Super. Ct. 2009) (rejecting Commonwealth's request to permit a witness who was a prisoner in state penitentiary to testify remotely because "[w]hile efficiency and security are important concerns, they are not sufficient reasons to circumvent [defendant's] constitutional right to confrontation"); Commonwealth v. Musser, 82 Va. Cir. 265, at *4–5 (2011) (concluding that state's interest in saving money does not satisfy *Craig* test).

51. 541 U.S. 36 (2004).

52. *See, e.g.*, Michael Sluss, *Lawmakers Grapple with Forensics Ruling: A U.S. Supreme Court Decision Requires that Analysts Be Available to Testify in Criminal Trials*, ROANOKE TIMES, Aug. 13, 2009 (noting that Virginia legislature may expand the use of videoconference technology to ensure the availability of its forensic

In what has been described as a "pathmarking" Confrontation Clause case,[53] *Crawford* overturned the well-established practice of admitting out-of-court statements made by unavailable witnesses provided they bore "adequate 'indicia of reliability.'"[54] At issue in the case was the admissibility of a tape-recorded statement made to a police officer at the scene of the crime by a witness who later refused to testify at trial.[55]

In addressing this question, the Court reviewed the historical underpinnings of the Confrontation Clause and found that it had two primary purposes: first, to prevent the admission of ex parte statements at trial,[56] and second, to ensure that a witness making a testimonial statement against a defendant does so at trial.[57] However, if the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness, the statement is admissible.[58]

In light of these purposes, the *Crawford* Court found that the prior focus on "reliability" as a condition for admitting out-of-court testimonial statements was contrary to the demands of the Confrontation Clause.[59] The Court reasoned that a statement's "reliability" must be tested through cross-examination before the factfinder.[60] The framework previously established in *Ohio v. Roberts*,[61] on the other hand, permitted trial judges to decide whether a testimonial statement was sufficiently "reliable," a standard that *Crawford* described as "amorphous, if not entirely subjective."[62] Under this standard, if a statement were deemed "reliable," it could be offered against the criminal defendant (provided it was admissible under the applicable rules of evidence), who would have no opportunity to physically confront or cross-

analysts, who under *Crawford* and its progeny, including *Melendez-Diaz*, must now testify at trial).

53. Bullcoming v. New Mexico, 131 S. Ct. 2705, 2713 (2011).

54. Ohio v. Roberts, 448 U.S. 56, 66 (1980). In *Roberts*, the Court held that an unavailable witness's out-of-court statement is admissible if it bears an "adequate 'indicia of reliability,'" which is satisfied when it falls within a "firmly rooted hearsay exception" or bears a "particularized guarantee[] of trustworthiness." *Id.*

55. *Crawford*, 541 U.S. at 40.

56. The bellwether case describing the dangers of admitting ex parte evidence at criminal trials is the conviction and execution of Sir Walter Raleigh in the seventeenth century. *Id.* at 44. Raleigh was convicted of treason after his accomplice, Lord Cobham, implicated him through an out-of-court statement and letter. *Id.* At trial, Raleigh argued that in order for the accusations to be admissible, Cobham would need to testify to this effect before the jury. *Id.* The justices refused, and Raleigh was sentenced to death on the strength of Cobham's out-of-court statements. *Id.* One of Raleigh's trial judges later lamented that "the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh." *Id.* (quoting 1 DAVID JARDINE, CRIMINAL TRIALS 520 (1832)). Although dated, the trial of Raleigh still underscores a central goal of the Confrontation Clause: to prohibit the imposition of criminal punishment on the basis of ex parte evidence that has not been subject to direct and cross-examination in the courtroom. *See, e.g.*, Melendez-Diaz v. Massachusetts, 557 U.S. 305, 329 (2009) (stating that "[t]he Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits," which is precisely what occurred in Raleigh's case).

57. *Crawford*, 541 U.S. at 53–54.

58. *Id.* at 54.

59. *Id.* at 61–63. In order to illustrate *Roberts*'s infirmities, Justice Scalia noted that if the *Roberts* framework applied to the case of Sir Walter Raleigh, Lord Cobham's statement would have likely been admissible under a well-established hearsay exception. *Id.* at 62.

60. *Id.* at 61.

61. 448 U.S. 56 (1980).

62. *Crawford*, 541 U.S. at 62–63.

examine the declarant.[63]

The rule from *Crawford*—that a person who offers a testimonial statement against the defendant must do so at trial—implicates the issue of a witness's presence because witness testimony offered at trial is, of course, subject to the Confrontation Clause.[64] However, because this rule only applies to "testimonial" evidence, the Court has further clarified the definition of this term in several post-*Crawford* cases.[65] One of these cases, which involves whether testimony from a forensic analyst is "testimonial," is particularly relevant because several state statutes permit these types of witnesses to testify via videoconference.[66] In *Melendez-Diaz v. Massachusetts*,[67] the Court considered whether a report from a chemical analyst regarding the contents of a powdery substance seized from the defendant in a drug-trafficking case should be classified as "testimonial" evidence.[68] Massachusetts offered a variety of arguments that are essentially offshoots of a single theme: testimony from a chemical analyst should be treated differently than testimony given by other types of witnesses for purposes of the Confrontation Clause.[69]

Massachusetts first argued that chemical analysts are not "'accusatory' witnesses," and therefore their testimony should not be subject to the Confrontation Clause.[70] The Court rejected this argument based on a textual reading of the Constitution.[71] In comparing the language of two clauses of the Sixth Amendment, the Court concluded that the Constitution contemplates two types of witnesses—those "against the defendant" and those "in his favor."[72] Thus, forensic witnesses must fall into one of these categories, and even though these witnesses do not present evidence based on personal knowledge of the defendant's role in the crime itself, they most certainly qualify as witnesses against the defendant.[73] Accordingly, the Court concluded that chemical analysts, like lay witnesses, are subject to the Confrontation Clause because "there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation."[74]

Next, Massachusetts contended that testimony from lay witnesses differs from

63. *Id.* at 62.

64. *See* Holst, *supra* note 25, at 1601–03 (noting that the Confrontation Clause applies to witness testimony offered at trial).

65. *See, e.g.*, Bullcoming v. New Mexico, 131 S. Ct. 2705, 2717 (2011) (holding that blood-alcohol reports are testimonial for purposes of the Sixth Amendment); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 (2009) (holding that affidavits describing chemical analysis of drugs seized from defendant charged with distributing and trafficking cocaine are testimonial); Davis v. Washington, 547 U.S. 813, 822 (2006) (holding that information given to a police officer during an on-scene interrogation where there is no ongoing emergency is testimonial, while information given to a 911 operator during an emergency call is not).

66. *E.g.*, MICH. COMP. LAWS ANN. § 600.2164a(1) (2013); N.H. REV. STAT. ANN. 516:37(I) (2013); IDAHO R. CRIM. P. 43.3. See *infra* Part II.G for a detailed discussion of these provisions.

67. 557 U.S. 305 (2009).

68. *Melendez-Diaz*, 557 U.S. at 308–09.

69. *Id.* at 313–25.

70. *Id.* at 313.

71. *Id.* at 313–14.

72. *Id.* at 313.

73. *Id.* at 313–14.

74. *Id.* at 314.

scientific testimony because the latter is entirely objective, whereas the former is, by definition, based on the witness's subjective personal knowledge.[75] The Court viewed this argument as an attempt to resurrect *Roberts*'s "reliability" framework, so it disagreed as a legal matter.[76] The Court was similarly unpersuaded from a policy perspective because it did not agree with the assumption that chemical analysts present entirely objective testimony.[77] In the Court's opinion, subjecting these witnesses to cross-examination is the only way to disclose "an analyst's lack of proper training or deficiency in judgment."[78]

The last relevant argument advanced in *Melendez-Diaz* invited the Court to relax the requirements of the Confrontation Clause to "accommodate the necessities of trial and the adversary process."[79] The Court was once again unsympathetic to the Commonwealth's position, noting that many constitutional provisions, such as the Fifth Amendment privilege against self-incrimination, make criminal prosecutions more difficult.[80] However, this fact does not play any role in a constitutional analysis because the "Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience."[81]

*Crawford* and *Melendez-Diaz* impose additional burdens on prosecutors by requiring forensic analysts to testify *at trial*. This development directly implicates the issue of presence because the physical presence of any prosecution witness is at least a "preference" of the Confrontation Clause, which may only be excused upon meeting the *Craig* test.[82] The tension between state statutes that excuse the physical presence of forensic witnesses and the Confrontation Clause is discussed *infra* in Part III.B.2.

### *D. Nonprecedential Supreme Court Pronouncements on Videoconference Testimony*

Interestingly, two Supreme Court Justices have recently discussed the tension between videoconference testimony and the Confrontation Clause in two separate nonprecedential settings. In both a 2002 statement on a proposed Federal Rule of Criminal Procedure and a 2010 statement respecting the denial of a petition for writ of certiorari, Justices Scalia and Sotomayor, respectively, commented on the constitutionality of admitting videoconference testimony in all criminal trials by any witness.[83] Though lacking precedential value, their observations are valuable because they provide additional insight as to how the Court views the admissibility of this

75. *Id.* at 317. For example, FED. R. EVID. 602 requires that lay witnesses testify solely on the basis of their personal knowledge of the events that they perceived, while FED. R. EVID. 702(a) specifically permits expert witnesses to offer opinions based on their "scientific, technical, or other specialized knowledge."

76. *Melendez-Diaz*, 557 U.S. at 317.

77. *Id.* at 320–21.

78. *Id.* at 320.

79. *Id.* at 325 (internal quotation marks omitted).

80. *Id.*

81. *Id.*

82. Maryland v. Craig, 497 U.S. 836, 849 (1990). See *supra* Part II.C.2 for a review of how state and lower federal courts have applied the *Craig* test.

83. Wrotten v. New York, 130 S. Ct. 2520, 2520–21 (2010) (Sotomayor, J., statement respecting denial of certiorari); Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89, 93–96 (2002) (Scalia, J., statement).

testimony in instances beyond the fairly narrow context of juvenile witnesses in sexual abuse cases.

1. Proposed Federal Rule of Criminal Procedure 26(b)

In 2002, the Supreme Court considered a proposed Federal Rule of Criminal Procedure that would have admitted videoconference testimony in any criminal trial if three conditions were met.[84] First, the witness would need to be "unavailable" by virtue of death, illness, or absence from the court's jurisdiction.[85] The proponent of the testimony would then need to show that the videoconference testimony was "[i]n the interest of justice" and justified by "exceptional circumstances."[86] Finally, the court would be required to establish "appropriate safeguards" to ensure the technological quality of the testimony.[87]

After considering the proposal, the Court took the rare step of declining to transmit the rule to Congress.[88] Justice Scalia filed a statement supporting the denial, while Justice Breyer, with whom Justice O'Connor concurred, authored a dissenting statement.[89] In addition to debating how the Court should operate in its rulemaking capacity,[90] the statements offer competing views on the constitutionality of the

84. The full text of the proposed rule is as follows:

> *(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:
>
> (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).

Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. app. at 99 (Breyer, J., dissenting statement).

85. *Id.*; *see also* FED. R. EVID. 804(a)(4)–(5) (providing the definition of "unavailable" upon which the proposed rule relies).

86. Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. app. at 99 (Breyer, J., dissenting statement).

87. *Id.* The committee note appended to the proposed rule offered a few suggestions, such as limiting the distractions in the room from which the witness is testifying, using quality technology, and dispatching a court employee to the witness's location to ensure the technology is working properly. *Id.* app. at 102.

88. The Supreme Court has a unique role in the process of enacting federal rules of procedure. 1 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2 (4th ed. 2013). After a proposal makes its way through a number of committees, the Judicial Conference, which consists of senior circuit judges and district judges, then decides whether to transmit the proposal to the Supreme Court. *Id.* If the Judicial Conference does so, the Court then considers the proposal. *Id.* If the Court approves the proposal, it then transmits the proposal to Congress, which has seven months to act on the proposal. *Id.* If Congress does not take any action, the proposal becomes law. *Id.* However, if the Court rejects the proposal, Congress itself may adopt it, though its inaction will not result in the proposal becoming law. *Id.* As a general matter, the Court sometimes makes substantive or stylistic changes, but it often "approves the proposal as written." *Id.*

89. Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. at 93–96 (Scalia, J., statement); *id.* at 96–99 (Breyer, J., dissenting statement).

90. Most generally, Justice Breyer felt that it was inappropriate for the Court to overturn the unanimous approval of the Judicial Conference and its subcommittee. *Id.* at 97. Justice Scalia, however, noted that a vetting of a proposal's constitutionality is the "*foremost*" reason that the Court is involved in the review process, and therefore it was entirely appropriate to decline transmission on this ground. *Id.* at 95.

proposed rule.

Justice Scalia found that the proposed rule is "of dubious validity under the Confrontation Clause" for several reasons.[91] First, he felt that the proposed rule's legal standard, which required the government to show that the testimony was in the interest of justice and justified by exceptional circumstances, was less demanding than the *Craig* standard, which conditioned admissibility upon a case-specific finding that the testimony was reliable and necessary to further an important public policy.[92]

Second, Justice Scalia criticized the rule's implicit acceptance of the approach established in *United States v. Gigante*,[93] which posited that two-way videoconference testimony ensures that a witness confronts the defendant face-to-face.[94] In rejecting this premise, Justice Scalia noted that testifying in the defendant's physical presence is quite distinct from testifying "in a room that contains a television set beaming electrons that portray the defendant's image."[95] Thus, in Justice Scalia's view, virtual presence is simply not an adequate substitute for physical presence from a constitutional standpoint.

In connection with the view that only physical presence satisfies the face-to-face element of the Confrontation Clause, Justice Scalia added that if a witness is somehow unavailable for trial, the government has the option of deposing the witness pursuant to Federal Rule of Criminal Procedure 15.[96] This course of action is proper—and constitutionally defensible—because a defendant has a presumptive right to be physically present at a Rule 15 deposition but never has this right when a witness testifies via videoconference.[97]

Justice Scalia's last, and perhaps most fundamental point, was that videoconference testimony still has a place in criminal trials despite the Court's rejection of the proposed rule.[98] For example, a defendant can waive his right to confrontation if he consents to the use of such technology.[99] Thus, in his opinion, the sole issue raised by the rule proposal was whether the Court should interpret the Confrontation Clause in a way that would permit the government to offer videoconference testimony against a criminal defendant under the terms of the proposed rule.[100] In this instance, the Court declined to do so.[101]

91. *Id.* at 93.

92. *Id.*

93. 166 F.3d 75 (2d Cir. 1999).

94. Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. at 94 (citing *Gigante*, 166 F.3d at 81).

95. *Id.*

96. *Id.*

97. *Id.* at 94–95.

98. *Id.* at 95.

99. *Id.* See *infra* Parts II.E and III.A for detailed discussions of waiver and notice-and-demand provisions.

100. Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. at 95 (Scalia, J., statement).

101. Justice Breyer devoted a fair amount of his statement to the appropriate role of the Court in its rulemaking capacity, though he did briefly address the proposal's constitutionality. *Id.* at 97 (Breyer, J., dissenting statement). Unlike Justice Scalia, he deferred to the Rules Committee's conclusion that the legal

2. Justice Sotomayor's Statement Respecting a Denial of Certiorari in *Wrotten v. New York*

The second nonprecedential discussion of the admissibility of videoconference testimony cast doubt upon the prevailing view of the state and federal courts that the *Craig* test applies in Sixth Amendment challenges to the use of videoconference testimony. In a 2010 statement respecting a denial of certiorari for a New York case holding that an infirm witness could testify via videoconference upon a showing of necessity, Justice Sotomayor noted that "[t]he question is . . . not obviously answered by [*Craig*]" because "the use of video testimony in this case arose in a strikingly different context than in *Craig*."[102]

This statement suggests that Justice Sotomayor might favor applying a more stringent legal standard in cases that differ factually from *Craig*. Although a denial of a writ of certiorari lacks precedential value,[103] Justice Sotomayor's comments on the propriety of applying the *Craig* test to non-child-sexual-abuse cases may influence how the Court would approach a future challenge to the constitutionality of videoconference testimony.

*E. Waiver and Notice-and-Demand Statutes*

Waiver and notice-and-demand statutes are two procedural tools that enable the prosecution to use videoconference testimony without risking a Confrontation Clause challenge. It is well settled that a defendant may waive his right to confront adverse witnesses face-to-face and thus allow any witness—not just those who would satisfy the *Craig* test—to testify via videoconference.[104]

A notice-and-demand statute is an analogous procedural device that prevents a defendant from raising a substantive Confrontation Clause challenge. In the context of videoconference testimony, a notice-and-demand statute would require that the prosecution inform the defendant of its intention to use videoconference testimony at

standard imposed in the proposed rule is as stringent as the *Craig* test and therefore would be constitutional in all but "a limited subset of cases." *Id.*

102. Wrotten v. New York, 130 S. Ct. 2520, 2520 (2010) (Sotomayor, J., statement respecting denial of certiorari). Justice Sotomayor agreed with the denial of certiorari because the petitioner had appealed the case prematurely. *Id.* Justice Sotomayor reasoned that because the New York Court of Appeals remanded the case, the Court would either lack jurisdiction to hear the case under the final judgment rule, 28 U.S.C. § 1257(a) (2012), or, even if the Court had jurisdiction, it would not have the benefit of the lower court's factual determination. *Id.*

103. Indeed, as Justice Sotomayor observed in her statement, "'the Court's action does not constitute a ruling on the merits and certainly does not represent an expression of any opinion concerning the importance of the question presented." *Id.* at 2521 (quoting Moreland v. Fed. Bureau of Prisons, 547 U.S. 1106, 1107 (2006) (Stevens, J., statement respecting denial of certiorari)) (internal quotation mark omitted).

104. *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 314 n.3 (2009) (stating plainly that "[t]he right to confrontation may, of course, be waived"); United States v. Yates, 438 F.3d 1307, 1318 (11th Cir. 2006) (en banc) (noting that absent "waiver or case-specific findings of exceptional circumstances creating the type of necessity *Craig* contemplates . . . witnesses and criminal defendants should meet face-to-face"); People v. Buie, 817 N.W.2d 33, 46–47 (Mich. 2012) (holding that defendant waived his right to confrontation upon consenting to the use of videoconference testimony).

trial, after which the defendant must consent or object by a certain date.[105] For example, in Idaho, the proponent of videoconference testimony must give written notice twenty-eight days before the proceeding date, and the other side must voice any objections within fourteen days of the proceeding date.[106] The Court in *Melendez-Diaz* spoke approvingly of this procedural tool because the "defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so."[107]

Thus, while it is easy to become enmeshed in debating the constitutional merits of videoconference testimony, these procedural avenues are appealing because they provide easy defenses to Confrontation Clause challenges based on the use of videoconference testimony. If a defendant waived his Confrontation Clause rights or failed to object to the prosecution's notice that it intended to use videoconference testimony at trial in a timely manner, a court would rule against that defendant's subsequent Confrontation Clause challenge on procedural grounds.

### *F. Federal Rule of Criminal Procedure 15*

In addition to the rule proposal that would have admitted videoconference testimony in any criminal trial upon meeting certain conditions discussed *supra* in Part II.D.1, one other federal rule is relevant to the constitutionality of videoconference testimony. Because Federal Rule of Criminal Procedure 15 establishes an alternative to the general requirement that a testimonial witness must testify against a criminal defendant at trial, it is increasingly relevant after *Crawford*.[108] Since videoconference testimony and Rule 15 depositions both allow the prosecution to offer testimony at trial outside of the defendant's physical presence, many commentators predictably compare these two forms of testimony.[109]

105. *Cf. Melendez-Diaz*, 557 U.S. at 326–27 (explaining that a statute allowing for the presentation of forensic testimony via report rather than live testimony would require the prosecution to give advance notice of its intention to do so, at which point the defendant must object within the time period designated in the statute).

106. IDAHO R. CRIM. P. 43.3(2–3). The Idaho rule allows any party to introduce videoconference testimony, *id.*, but there is only a potential Confrontation Clause issue if the prosecution does so. If the defendant offered testimony via videoconference, the testimony would not be adversarial—i.e., not "against him [the criminal defendant]"—and thus not subject to the Confrontation Clause. U.S. CONST. amend. VI.

107. *Melendez-Diaz*, 557 U.S. at 326–27.

108. *See* Crawford v. Washington, 541 U.S. 36, 53–54 (2004) (holding that a witness is excused from offering testimony at trial if the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness). This rule authorizes parties to depose a witness before trial but only in "exceptional circumstances and in the interest of justice." FED. R. CRIM. P. 15(a)(1). The deposition is then read at trial and serves as the witness's testimony. Lynn Helland, *Remote Testimony—A Prosecutor's Perspective*, 35 U. MICH. J.L. REFORM 719, 721 (2002).

109. *See, e.g.*, Helland, *supra* note 108, at 721 (noting that proposed Rule 26(b) would be an improvement over Rule 15); Hadley Perry, Comment, *Virtually Face-to-Face: The Confrontation Clause and the Use of Two-Way Video Testimony*, 13 ROGER WILLIAMS U. L. REV. 565, 590–91 (2008) (arguing that videoconference testimony is more protective of defendants' Confrontation Clause rights than a Rule 15 deposition); Matthew J. Tokson, Comment, *Virtual Confrontation: Is Videoconference Testimony by an Unavailable Witness Unconstitutional?*, 74 U. CHI. L. REV. 1581, 1599–1601 (2007) (concluding that videoconference testimony is functionally superior to Rule 15 depositions).

There are two important distinctions between videoconference testimony and Rule 15 depositions: the defendant's right to presence and the time at which the proceedings occur.[110] Unlike videoconference testimony, Rule 15 preserves a defendant's right to be physically present at the deposition, regardless of where it takes place and whether the defendant is in custody.[111] If the defendant is in custody, an officer must take the defendant to the deposition unless he waives the right or engages in "disruptive conduct."[112] A defendant who is not in custody has the same right, though the rule establishes a waiver of that right if the government pays his expenses and he fails to appear at the deposition absent good cause.[113] The presumptive right to physical presence even extends to depositions taken outside of the United States and can only be rebutted if the court makes several case-specific findings.[114]

The two forms of testimony also differ with respect to timing. A Rule 15 deposition is taken before trial and outside of the presence of the judge or jury, whereas videoconference testimony takes place during the trial and in the "presence" of those in the courtroom.[115] Similarly, videoconference testimony is offered in real time, while the transcript of a Rule 15 deposition is simply read in the courtroom.[116]

In light of *Crawford*, which requires that testimonial witnesses appear at trial, or, if unavailable, that they are subject to cross-examination in the presence of the defendant,[117] Rule 15 depositions fall squarely into the debate over the admissibility of videoconference testimony. Many commentators find that the purported shortcomings of these pretrial depositions justify admitting videoconference testimony,[118] while some courts instead conclude that Rule 15 depositions provide a constitutionally permissible

110. See *infra* notes 111–16 and accompanying text for a discussion of these two distinctions.

111. FED. R. CRIM. P. 15(c)(1)–(2). Furthermore, the government bears the cost of ensuring this right in cases where it requests the deposition or the defendant cannot bear the expenses. *Id.* 15(d).

112. *Id.* 15(c)(1)(A), (B).

113. *Id.* 15(c)(2).

114. *Id.* 15(c)(3). This provision provides:

> The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case-specific findings of all the following:
>
> (A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;
>
> (B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;
>
> (C) the witness's presence for a deposition in the United States cannot be obtained;
>
> (D) the defendant cannot be present because:
>
> (i) the country where the witness is located will not permit the defendant to attend the deposition;
>
> (ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or
>
> (iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and
>
> (E) the defendant can meaningfully participate in the deposition through reasonable means.

*Id.*

115. Tokson, *supra* note 109, at 1599–600.

116. Helland, *supra* note 108, at 721.

117. Crawford v. Washington, 541 U.S. 36, 54–56 (2004).

118. See *supra* note 109 for several commentators' views.

way to introduce the testimony of witnesses who would otherwise be required to appear at trial.[119]

### *G. State Rules Permitting Videoconference Testimony*

To date, four states have taken the lead in enacting statutes or court rules permitting the use of videoconference testimony in criminal proceedings despite the lack of constitutional clarity on the issue.[120] In July 2012, Alaska enacted a rule of criminal procedure permitting any witness to testify via videoconference upon the parties' consent or, in the absence of consent, if the trial court makes specific findings that broadly mirror those established in *Craig*.[121] The proponent must establish that the witness is unavailable and that the use of videoconference testimony is "necessary to further an important public policy."[122] Once again tracking *Craig*, the rule explicitly provides that the testimony must be given under oath and be subject to cross-examination.[123]

Idaho, Michigan, and New Hampshire, on the other hand, only permit certain types of witnesses to testify via videoconference. In June 2011, Idaho enacted a rule permitting forensic testimony to be offered in this manner, thereby limiting the rule's application to a subset of expert witnesses.[124] Unlike the Alaska rule, the Idaho rule does not require the proponent of the testimony to meet any legal standard, though it must comply with certain requirements that ensure the quality and accuracy of the testimony.[125] Furthermore, Idaho has a notice-and-demand provision requiring that the proponent inform the court and opposing counsel of its intention to use videoconference testimony twenty-eight days before the proceeding date, at which point opposing counsel must indicate its consent or objection fourteen days before the proceeding date.[126]

The Michigan statute, adopted in June 2012, is broader than Idaho's rule in that it

119. *See, e.g.*, United States v. Yates, 438 F.3d 1307, 1314–15 (11th Cir. 2006) (en banc) (rejecting government's argument that videoconference testimony protects a defendant's right to confrontation better than a Rule 15 deposition does).

120. A similar phenomenon occurred before the Supreme Court decided *Maryland v. Craig*, 497 U.S. 836 (1990). In that instance, however, thirty-seven states had enacted statutes permitting victims in child abuse cases to testify by videoconference. *Id.* at 853.

121. ALASKA R. CRIM. P. 38.3(b).

122. *Id.* 38.3(b)(1)–(2).

123. *Id.* 38.3(b)(3).

124. IDAHO R. CRIM. P. 43.3. A separate provision under this rule allows for "telephone conference or video teleconference" testimony at (1) first or subsequent appearances; (2) bail hearings, arraignments, and plea hearings in misdemeanor cases; and (3) hearings where the defendant submits a not guilty plea in felony cases. *Id.* 43.1. Because these proceedings do not raise a Confrontation Clause issue, a detailed analysis of this provision is beyond the scope of this Comment. See *supra* note 3 for a summary of how the use of technology in these situations may implicate different constitutional issues.

125. *Id.* 43.3(1)(a)–(c). For example, everyone physically present in the courtroom, including the judge, jury, defendant, and counsel, must be able to see the testifying witness. *Id.* 43.3(1). Furthermore, the judge, defendant, and witness must be able to see and hear each other in real time, and the defendant must be able to communicate privately with his attorney during the witness examination. *Id.* 43.3(1)(a)–(c).

126. *Id.* 43.3(2)–(3).

permits all expert witnesses to testify via videoconference.[127] However, it is much more limited in practice because this form of testimony is only admissible upon the parties' consent.[128] Thus, unlike the Alaska and Idaho rules, the Michigan rule contains no alternative legal standard for admitting videoconference testimony over a party's objection.

New Hampshire combines elements of the Idaho and Michigan approaches in that it permits videoconference testimony by a specific group of expert and forensic witnesses.[129] However, this testimony is admissible in felony cases only upon the defendant's consent.[130] Consequently, in addition to distinguishing between expert and nonexpert witnesses, the New Hampshire statute also differentiates between felony and misdemeanor trials.[131]

### *H. Policy Arguments For and Against Videoconference Technology*

Placing constitutional concerns aside for the moment, it is useful to consider the policy-based merits and disadvantages of using videoconference testimony in criminal trials. Perhaps the most obvious argument in favor of using this (or any) technology is the fact that it results in cost savings for the government. For example, Philadelphia recently estimated that it saves $550,000 per month by conducting various criminal proceedings via videoconference.[132] These include preliminary arraignments, traffic violations, guilty plea hearings, stipulated trials, and negotiated sentencings.[133]

In criminal trials specifically, commentators find that securing testimony from foreign witnesses is becoming increasingly more important due to the development of a global economy and the threat of international terrorism.[134] The necessity of testimony from foreign witnesses is even more acute when the witness lives in a country where the United States lacks subpoena power.[135] Without the possibility of offering testimony via videoconference, the witness must agree to testify voluntarily and travel to the United States in order to do so.[136]

127. MICH. COMP. LAWS ANN. § 600.2164a(1) (2013).

128. *Id.*

129. N.H. REV. STAT. ANN. § 516:37(I) (2013). This statute applies to any scientist, criminalist, specialist, toxicologist, laboratory scientist, or "other person of similar expertise to testify as an expert witness." *Id.* § 516:37(I), (II).

130. *Id.* § 516:37(I).

131. *Id.* § 516:37(I), (II).

132. Julie Zauzmer, *There's More Video Conferencing in Courts, but Its Use Is Questioned*, PHILA. INQUIRER, Aug. 27, 2012. However, the cost of equipping a courtroom with this technology in Philadelphia was about $20,000. *Id.*

133. *Id.; see also* Adeshina Emmanuel, *In-Person Visits Fade as Jails Set Up Video Units for Inmates and Families*, N.Y. TIMES, Aug. 7, 2012, at A15 (reporting that the District of Columbia Department of Corrections saves $420,000 per year by conducting prison visitations via videoconference testimony).

134. Tokson, *supra* note 109, at 1581–82.

135. *See id.* at 1581 (noting that crimes such as fraud, money laundering, and drug trafficking are now international in scope and thus require testimony from foreign witnesses).

136. *See* Helland, *supra* note 108, at 723–25 (relating from his personal experience as a prosecutor how difficult it is to convince foreign witnesses to travel to the United States). Of course, in a federal case, the government could petition the court to preserve the testimony via a Rule 15 deposition. FED. R. CRIM. P. 15(a)(1).

Proponents of the technology also find that videoconference testimony is in many ways superior to a Rule 15 deposition, which is often the only other way for a federal prosecutor to present the testimony of a witness who is unavailable to testify at trial.[137] Whereas depositions are taken before trial without the judge or jury present, videoconference testimony permits the factfinder to assess the witness's demeanor (albeit by watching a video screen) and enables the judge to rule on objections in real time.[138] Furthermore, the witness can see the judge and jury, which some argue imparts on the witness the gravitas of the proceeding, while a deposition is likely taken in the less formal setting of an office or conference room.[139] In a related sense, the transcript of a Rule 15 deposition must be read in the courtroom without any emotion, and a party may successfully object to the narration on the grounds that the reader is "improperly interpreting" the witness's testimony.[140] Therefore, proponents argue that videoconference testimony preserves the spontaneity of live witness examination.[141]

Critics of the technology generally take exception to the premise that virtual presence is a meaningful substitute for physical presence. For example, one study found that bail amounts have increased by fifty-one percent since Cook County, Illinois, began conducting these hearings by videoconference.[142] This is particularly striking because, over the same time period, there has been only a thirteen percent increase in bail amounts levied at bail proceedings conducted in person.[143] Videoconference has also been used as a substitute for in-person prison visits, and prisoners' advocates contend that this lack of meaningful social contact has adversely impacted inmates with respect to reintegration and recidivism.[144]

Critics also argue that videoconference technology impairs effective cross-examination of the virtual witness.[145] For example, consider a situation where a defense attorney would like to ask questions rapidly as a matter of trial strategy, but there is a one-second lag time between his question and the time at which the witness hears it.[146] Similarly, in a case recently denied certiorari by the Supreme Court, the petitioner recounted the difficulty that his trial attorney encountered when cross-examining an expert witness on the contents of an exhibit, which the witness was unable to read through the videoconference system.[147] Furthermore, while videoconference provides some form of visual confrontation, even the highest-quality technology cannot present

137. See *supra* note 109 for a review of several commentators' positions on why videoconference testimony is superior to a Rule 15 deposition.

138. Tokson, *supra* note 109, at 1599–601.

139. *Id.*

140. Helland, *supra* note 108, at 721.

141. *Id.*; Tokson, *supra* note 109, at 1599–1600.

142. Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 892, 897 (2010).

143. *Id.* at 896–97.

144. Emmanuel, *supra* note 133.

145. Friedman, *supra* note 17, at 702.

146. *See, e.g.*, State v. Sewell, 595 N.W.2d 207, 212 (Minn. Ct. App. 1999) (noting that there was a delay between the questions and answers, which, in one instance, caused the witness to answer a question to which the trial judge sustained an objection).

147. Petition for Writ of Certiorari, *Junkin v. Florida*, *supra* note 1, at 5–9.

a continuous, clear image of the witness from the perspective of those in the courtroom, and vice versa.[148]

## III. DISCUSSION

Given the trajectory in modern society towards the use of technology in all facets of life, it is likely that more states will adopt legislation admitting videoconference testimony in criminal trials.[149] Certainly, this technology will appeal to governments looking to save money[150] or court systems seeking to move cases along more efficiently.[151] However, it must be remembered that for any governmental action, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table."[152] Therefore, the purpose of this Section is to identify when videoconference testimony may constitutionally serve as a substitute for in-person testimony and the policy choices that can be made within these bounds.[153]

This Comment concludes that limiting the use of videoconference testimony to cases where either the defendant consents or the prosecution meets *Craig*'s lofty legal standard is appropriate because virtual presence is simply not a meaningful substitute for physical presence.[154] However, for proponents of the technology, all is not lost. This Comment strongly recommends that legislatures or courts weighing videoconference-testimony statutes or court rules should consider procedural provisions, such as waiver or notice-and-demand clauses, because both pass constitutional muster and are sound approaches from a policy perspective.[155]

Absent one of these procedural avenues, a constitutionally permissible videoconference rule must condition admissibility upon the prosecution's ability to meet a legal standard that is at least as stringent as the *Craig* test.[156] Accordingly, rules

148. *See* Michael S. Quinn, Comment, Wrotten *but Not Dead: High Court of New York Signals Legislature to Review Televised Testimony at Criminal Trial*, 21 ALB. L.J. SCI. & TECH. 193, 201–02 (2011) (pointing out the shortcomings of videoconference technology, including clarity).

149. Indeed, three of the four states that have videoconference testimony rules or statutes (Alaska, Idaho, and Michigan) passed these measures within the past two years. MICH. COMP. LAWS ANN. § 600.2164a (enacted in 2012); ALASKA R. CRIM. P. 38.3 (adopted in 2012); IDAHO R. CRIM. P. 43.3 (adopted in 2011).

150. See *supra* notes 132–33 and accompanying text for examples of how videoconference technology in some criminal proceedings has yielded cost savings for local governments.

151. See *supra* note 49 and accompanying text for cases sanctioning the use of videoconference testimony for foreign witnesses located outside of the United States' subpoena power.

152. *See* District of Columbia v. Heller, 554 U.S. 570, 636 (2008) (explaining that, notwithstanding the problem of handgun violence in the United States, the Second Amendment prohibits a policy of banning the possession of all firearms); Giles v. California, 554 U.S. 353, 376 (2008) (commenting in a Confrontation Clause case that "abridging the constitutional rights of criminal defendants is not in the State's arsenal").

153. To take a rather straightforward example, the Fifth Amendment requires that the government pay "just compensation" to a landowner when taking property for public use. U.S. CONST. amend. V. The government would save money if it had no such obligation, but the text of the Constitution takes this policy choice off the table.

154. See *infra* Part III.B.1 for an explanation of the *Craig* case, including the articulation of the Supreme Court's most direct statement on the constitutionality of videoconference testimony.

155. See *infra* Part III.A for a discussion of waiver and notice-and-demand statutes, including how those statutes pass constitutional muster.

156. See *infra* Part III.B.1 for a discussion of videoconference-testimony rules applying a legal standard

that apply a lesser legal standard or permit the practice per se for certain types of witnesses or for certain types of crimes are unconstitutional.[157]

### *A. Procedural Options: Waiver and Notice-and-Demand Statutes*

Rulemakers crafting videoconference-testimony provisions should first consider procedural rules that enable prosecutors to entirely avoid litigating substantive Confrontation Clause issues. Waiver and notice-and-demand statutes can preclude many of these challenges because they provide an easy and successful defense to a procedurally deficient Sixth Amendment claim.[158] In fact, perhaps due to the lack of clarity on the constitutionality of videoconference testimony, one federal district court recently noted that it would be in the government's best interest to secure a waiver or similar procedural defense whenever it seeks to present this form of testimony.[159] Moreover, in contrast to testimony given via pretrial deposition—which many commentators feel does not adequately replicate live witness testimony—these statutes enable prosecution witnesses to testify in real time and in view of the factfinder.[160]

As a constitutional matter, it is well settled that a defendant may waive his rights under the Confrontation Clause, including the right to confront adverse witnesses in person.[161] In light of this constitutional freedom, legislatures have adopted statutes and rules requiring defendants' consent to waive their right to in-person confrontation when videoconference testimony is used.[162] For example, the Michigan statute conditions the admissibility of videoconference testimony upon the defendant's consent.[163] Similarly, the New Hampshire rule, at least to some extent, embraces this approach by authorizing the use of videoconference testimony in felony cases only upon consent.[164] Furthermore, while waiver is *expressly* authorized in these two jurisdictions, this

as stringent as the *Craig* test.

157. See *infra* Part III.B.2 for a discussion of the constitutionality of lower videoconference-testimony admission standards.

158. As the Court noted in *Melendez-Diaz*, the "defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so." Melendez-Diaz v. Massachusetts, 557 U.S. 305, 327 (2009). That is, if a defendant waived his Confrontation Clause rights or failed to object to the prosecution's notice that it intended to use videoconference testimony at trial in a timely manner, a court would rule against that defendant's subsequent Confrontation Clause challenge on procedural grounds. *Id.*

159. United States v. Ganadonegro, No. CR 09–0312 JB, 2012 WL 400727, at *16–17 (D.N.M. Jan. 23, 2012).

160. See *supra* note 109 for a list of several commentators' views on the inadequacy of Rule 15 depositions.

161. *See Melendez-Diaz*, 557 U.S. at 314 n.3 (stating plainly that "[t]he right to confrontation may, of course, be waived"); United States v. Yates, 438 F.3d 1307, 1318 (11th Cir. 2006) (en banc) (noting that absent "waiver or case-specific findings of exceptional circumstances creating the type of necessity *Craig* contemplates . . . witnesses and criminal defendants should meet face-to-face."); People v. Buie, 817 N.W.2d 33, 46–47 (Mich. 2012) (holding that defendant waived his right to confrontation upon consenting to the use of videoconference testimony).

162. *E.g.*, MICH. COMP. LAWS ANN. § 600.2164a(1) (2013); N.H. REV. STAT. ANN. § 516:37(I) (2013).

163. MICH. COMP. LAWS ANN. § 600.2164a(1).

164. N.H. REV. STAT. ANN. § 516:37(I).

procedural tool exists even in the absence of a waiver provision.[165]

Notice-and-demand provisions also pass constitutional muster. *Melendez-Diaz* specifically sanctioned the use of these rules because they compel defendants to exercise their Sixth Amendment rights at specific times provided for by statute.[166] Idaho has adopted this approach, enabling its prosecutors to use videoconference testimony if, after providing at least twenty-eight-days' notice before the proceeding date, the defendant consents or fails to object within fourteen days of the proceeding date.[167]

From a policy perspective, waiver and notice-and-demand statutes have cognizable benefits for both the prosecution and defendant. If a defendant decides that videoconference testimony would not adversely impact his case, the government should be able to enjoy the benefits of videoconference technology, such as cost savings and efficiency.[168] For example, because testimony offered by forensic analysts is now subject to the Confrontation Clause,[169] a defendant may choose to permit such a witness to appear via videoconference if the subject matter of the testimony is not seriously contested.[170]

Moreover, the practical and technological issues that often plague videoconference testimony may sometimes cut in the defendant's favor. For example, a defendant might eagerly consent to the use of videoconference testimony if that witness would offer highly moving or sympathetic evidence. As opposed to live testimony, where those in the courtroom can readily see, hear, and perceive the witness's emotional state, videoconference testimony is viewed through a screen, which may reduce the impact that the testimony has on the factfinder.[171] In addition, perhaps the

165. *See, e.g.*, *Buie*, 817 N.W.2d at 46–47 (holding that defendant waived his right to confrontation upon consenting to the use of videoconference testimony in a case that preceded Michigan's consent-based statute).

166. *Melendez-Diaz*, 557 U.S. at 327–28. In this case, the Court commented that jurisdictions may enact notice-and-demand statutes permitting the prosecution to use a laboratory report in lieu of witness testimony. *Id.* at 326–27. A statute that allows the substitution of videoconference testimony for live testimony is even more justifiable than the type of statute discussed in *Melendez-Diaz* because the former would only dictate the means of testifying, whereas the latter would excuse a witness from testifying at all. Or, to think about it another way, a defendant who stipulates that a laboratory report can come into evidence forfeits *all* four of the Confrontation Clause elements that the Court identified in *Craig*. Maryland v. Craig, 497 U.S. 836, 845–46 (1990). On the other hand, a defendant who permits an analyst to testify via videoconference enjoys at least two of the elements (testimony under oath and subject to cross-examination) and some semblance of a third (ability to view the demeanor of the witness). *Id.*

167. IDAHO R. CRIM. P. 43.3(2)–(3).

168. *Cf.* Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89, 95 (2002) (Scalia, J., statement) (commenting that defendants who believe videoconference testimony is "more efficient and more fair" may waive their right to confrontation).

169. *Melendez-Diaz*, 557 U.S. at 329.

170. Of course, that same defendant could also stipulate the contents of the report or allow the prosecution to admit the report in lieu of witness testimony.

171. Consider the Eighth Circuit's view on videoconference testimony in *United States v. Bordeaux*:

> The virtual "confrontations" offered by closed-circuit television systems fall short of the face-to-face standard because they do not provide the same truth-inducing effect. . . . Given the ubiquity of television, even children are keenly aware that a television image of a person (including a defendant in the case of a two-way system) is not the person[,] something is lost in the translation. Thus, a defendant watching a witness through a monitor will not have the same truth-inducing effect as an

defendant would prefer that the testimony be affected by technological issues associated with videoconference technology, such as lag time between an attorney's question and a witness's answer.[172] Once again, this may have the effect of distracting the factfinder (who ultimately determines the weight of the evidence) from the actual testimony being offered.[173]

### *B. Crafting a Videoconference-Testimony Provision that Comports with Current Supreme Court Jurisprudence.*

#### 1. Any Substantive Videoconference-Testimony Provision Must Condition Admissibility on a Standard that Is at Least as Stringent as the *Craig* Test

It is clear that any constitutional videoconference provision must condition its admissibility on the prosecution's ability to meet some type of legal standard. Indeed, no courts seriously suggest that virtual presence is the equivalent of physical presence—and, even if they did, reversal on appeal seems all but guaranteed.[174] Rather, most state and federal courts apply the *Craig* test, which allows videoconference testimony in lieu of live testimony if the prosecution is able to articulate a case-specific finding of necessity and demonstrate that the technology is reliable.[175]

Recent nonprecedential statements from the Supreme Court suggest that the legal standard for admitting videoconference testimony in contexts aside from child-sex-abuse cases must, at minimum, be as stringent as the *Craig* test. The Supreme Court's denial of proposed Federal Rule of Criminal Procedure 26(b), which conditioned admissibility upon a showing that the videoconference transmission was "[i]n the interest of justice" and justified by "exceptional circumstances," indicates that the standard can certainly not be lower.[176] Justice Scalia, in his statement supporting the denial of the proposed rule, found that this standard lacked the case-specific finding of necessity that the Court demanded in *Craig*.[177] While this statement, in itself, carries no precedential value, it has influenced the decisions of several state and federal lower courts.[178] Therefore, Justice Scalia's statement suggests that a statute or court rule with

unmediated gaze across the courtroom.

400 F.3d 548, 554 (8th Cir. 2005); *see also* Anthony Garofano, Comment, *Avoiding Virtual Justice: Video-Teleconference Testimony in Federal Criminal Trials*, 56 CATH. U. L. REV. 683, 700 (2007) (discussing the psychological differences between in-person and videoconference testimony).

172. See *supra* notes 145–48 and accompanying text for a discussion of how technological issues can affect the trial process.

173. Under the Federal Rules of Evidence, for example, the jury decides the weight of the evidence. FED. R. EVID. 104(e).

174. Even the Second Circuit in *Gigante*, which rejected the *Craig* approach when considering a challenge to the use of two-way videoconference technology, applied the legal standard that governs FED. R. CRIM. P. 15. United States v. Gigante, 166 F.3d 75, 81 (2d Cir. 1999).

175. Maryland v. Craig, 497 U.S. 836, 850 (1990). See *supra* Part II.C.2 for a discussion of federal and state court application of the *Craig* test.

176. Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89 app. at 99 (2002) (Breyer, J., dissenting statement).

177. *Id.* at 93 (Scalia, J., statement).

178. *See, e.g.*, El-Hadad v. United Arab Emirates, 496 F.3d 658, 669 (D.C. Cir. 2007) (citing rejection of

a standard that falls below the one established in *Craig* will likely be constitutionally deficient.

Additionally, another member of the current Supreme Court has implied that an even more stringent standard should be applied in cases that are factually distinct from *Craig*. In a 2010 statement respecting a denial of certiorari, Justice Sotomayor questioned whether *Craig*, which involved a juvenile witness in a sexual abuse case, should be applied in a case involving an infirm witness.[179] The implication of comparing the two cases seems to be that the legal standard for admissibility in *Craig*-like cases should be more accommodating to the witness and less so to the defendant.[180] For a state considering a videoconference-testimony statute that applies to non-sexual-abuse cases, it is possible that a legal standard more stringent than the *Craig* test is necessary to overcome a Sixth Amendment challenge.[181]

Alaska's newly adopted court rule provides an example of a videoconference rule that fully incorporates the *Craig* test.[182] In addition to weaving in the legal standard, Alaska's court rule explicitly provides that testimony must be given under oath and subject to cross-examination—two of the four Confrontation Clause elements that the Court identified in *Craig*.[183] These requirements are most likely unnecessary because the use of videoconference testimony is designed only to allow the witness to testify outside of the courtroom, not to displace any other substantive or procedural rules of evidence.[184] But they at least show the extent to which the Alaska rule strives to align itself with the holding and reasoning of *Craig*.

rule proposal for the proposition that the use of videoconference testimony is more restricted in criminal trials); United States v. Yates, 438 F.3d 1307, 1314–15 (11th Cir. 2006) (en banc) (rejecting government's argument that videoconference testimony protects defendants' right to confront witnesses better than a Rule 15 deposition on basis of Justice Scalia's statement accompanying rule proposal); Commonwealth v. Musser, 82 Va. Cir. 265, at *1 (2011) (citing rule proposal to help discern the Supreme Court's view on two-way videoconference testimony). *But see Yates*, 438 F.3d at 1325 n.8 (Tjoflat, J., dissenting) (noting that Justice Scalia's statement "represents nothing more than the legal musings of a Supreme Court Justice on an issue that has yet to be briefed and argued in a case or controversy before the Court").

179. Wrotten v. New York, 130 S. Ct. 2520, 2520 (2010) (Sotomayor, J., statement respecting denial of certiorari).

180. Justice Sotomayor's statement that the use of videoconference testimony in *Wrotten* "arose in a strikingly different context than in *Craig*" certainly leaves something open to interpretation. *Id.* Does this mean that a less stringent standard should be applied to *Wrotten*? Or exactly the opposite? However, when comparing *Craig* (child witness in sex abuse case) and *Wrotten* (infirm witness unable to travel to trial), the most logical interpretation is that a less stringent standard should govern the first set of facts.

181. *Cf.* Natalie D. Montell, Note, *A New Test for Two-Way Video Testimony: Bringing* Maryland v. Craig *into the Technological Era*, 50 U. LOUISVILLE L. REV. 361, 372 (2011) (indicating that Justice Sotomayor's statement signals the Court's willingness to adopt a new standard for two-way videoconference testimony).

182. ALASKA R. CRIM. P. 38.3(b)(1).

183. *Id.* 38.3(b)(3).

184. See *supra* note 19 and accompanying text for an explanation of how under the Alaska rule examinations of virtual witnesses are subject to the same procedures governing in-person testimony.

### 2. Rules that Admit Videoconference Testimony Per Se or Under a Lower Standard Violate the Confrontation Clause

Unlike the Alaska rule, the Idaho and New Hampshire videoconference provisions excuse the prosecution from meeting any legal standard depending on the type of witness testifying and the type of crime charged. Under the Idaho rule, a court may admit forensic testimony via videoconference without applying any legal standard.[185] Similarly, in New Hampshire, the state may offer expert testimony remotely in misdemeanor cases without meeting any legal standard.[186] Because these rules specifically relieve the prosecution from meeting the *Craig* test, however, they are constitutionally deficient and should not serve as models to prospective jurisdictions considering videoconference-testimony provisions.

#### *a. Courts and Legislatures Cannot Treat Forensic and Nonforensic Witnesses Differently for Purposes of the Confrontation Clause*

Many commentators have suggested that allowing witnesses to testify remotely is an appropriate response to the increased demands on prosecutors and forensic analysts after *Melendez-Diaz*,[187] which held that lab reports, such as DNA testing, ballistics reports, or toxicology tests, are "testimonial" evidence and therefore subject to the Confrontation Clause.[188] Proponents argue that if these witnesses can testify via videoconference from their offices, it reduces the amount of time they need to spend travelling, which results in more efficient trials and cost savings for the respective governmental units.[189]

Commentators have offered two arguments in support of this approach: first, allowing forensic analysts to testify via videoconference satisfies the *Craig* test, and second, a more relaxed *Craig* test applies to forensic analysts.[190] In addition, while not in the context of videoconference testimony, several parties in recent Supreme Court cases have argued that the Court should adopt a less demanding interpretation of the Confrontation Clause because of the perceived adverse consequences that would follow from a more restrictive interpretation.[191] A consideration of each of these arguments,

185. IDAHO R. CRIM. P. 43.3.

186. N.H. REV. STAT. ANN. § 516:37(I) (2013).

187. *See, e.g.*, Amy Ma, Note, *Mitigating the Prosecutors' Dilemma in Light of* Melendez-Diaz*: Live Two-Way Videoconferencing for Analyst Testimony Regarding Chemical Analysis*, 11 NEV. L.J. 793, 795 (2011) (proposing that this approach allows forensic laboratories to keep up with current caseloads without draining scarce public resources); Montell, *supra* note 181, at 363 (arguing that this approach complies with the Sixth Amendment and increases the efficiency of criminal proceedings); Sluss, *supra* note 52 (noting that the Virginia legislature may expand the use of videoconference technology to ensure the availability of its forensic analysts).

188. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311, 329 (2009).

189. Ma, *supra* note 187, at 795; Montell, *supra* note 181, at 363.

190. Ma, *supra* note 187, at 812–13; Montell, *supra* note 181, at 377–78.

191. See *infra* Part III.B.2.a.iii for a discussion of how the current Supreme Court has consistently refused to lessen the demands of the Confrontation Clause based on supposedly adverse implications that may follow a more restrictive interpretation of the clause.

however, reveals that none can withstand scrutiny under current Confrontation Clause jurisprudence.

i. Permitting Forensic Witnesses to Testify via Videoconference Does Not, in Itself, Satisfy the *Craig* Test

The argument that the *Craig* test is satisfied when forensic analysts testify via videoconference is simply unsustainable. While many courts assume the reliability prong is met, they scrutinize the public policy prong more closely.[192] Examples of important public policies include protecting child witnesses in sexual abuse cases and infirm witnesses whose health would be jeopardized if forced to travel to trial,[193] reaching witnesses who live beyond the subpoena power of the United States,[194] and obtaining testimony from foreign witnesses testifying against defendants who threaten the country's national security.[195] Notably absent are policies such as increasing courtroom efficiency, making the trial process more convenient for the prosecution, or preserving public resources.[196]

This is for good reason. In addition to handing down the substantive legal test for admitting videoconference testimony, *Craig* also involved the factual situation that perhaps most fittingly justifies departing from the Sixth Amendment's preference for live, in-person testimony—a child who had been the victim of sexual abuse and who would suffer emotional distress as a result of seeing the suspected perpetrator.[197]

While courts have stretched the test to cover less drastic situations, like infirm or foreign witnesses, it cannot be said that the Court in *Craig* contemplated policies like cost savings or efficiency.[198] Indeed, what governmental unit today does not have an interest in saving money? And in what criminal system is resolving cases efficiently not an important goal?

If these policies meet the public policy prong, *Craig* would effectively become a one-step test, under which videoconference testimony would be a permissible substitute

192. See *supra* Part II.C.2 for a discussion of how federal and state courts have applied the reliability prong of the *Craig* test.

193. Maryland v. Craig, 497 U.S. 836, 853 (1990); Horn v. Quarterman, 508 F.3d 306, 320 (5th Cir. 2007); United States v. Benson, 79 F. App'x 813, 820–21 (6th Cir. 2003); Harrell v. State, 709 So. 2d 1364, 1370 (Fla. 1998); People v. Wrotten, 923 N.E.2d 1099, 1103 (N.Y. 2009); Bush v. State, 193 P.3d 203, 215–16 (Wyo. 2008).

194. Harrell v. Butterworth, 251 F.3d 926, 931 (11th Cir. 2001) (per curiam); Rogers v. State, 40 So. 3d 888, 890 (Fla. Ct. App. 2010). *But see* United States v. Yates, 438 F.3d 1307, 1315–16 (11th Cir. 2006) (en banc) (rejecting the need to "expeditiously resolve" a case by admitting testimony from a foreign witness via videoconference technology because it did not meet the case-specific finding required by *Craig*).

195. United States v. Abu Ali, 528 F.3d 210, 240–41 (4th Cir. 2008).

196. *See* Commonwealth v. Atkinson, 987 A.2d 743, 750 (Pa. Super. Ct. 2009) (rejecting state's request to permit a witness who was a prisoner in state penitentiary to testify remotely because "[w]hile efficiency and security are important concerns, they are not sufficient reasons to circumvent [defendant's] constitutional right to confrontation"); Commonwealth v. Musser, 82 Va. Cir. 265, at *4–5 (2011) (holding that the government's interest in saving money does not satisfy the *Craig* test).

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

198. *Cf.* Wrotten v. New York, 130 S. Ct. 2520, 2520 (2010) (Sotomayor, J., statement respecting denial of certiorari) (commenting that the factual situation addressed in *Craig* was "strikingly different" than the current case, in which the videoconference witness was simply infirm and unable to travel to trial).

for in-person testimony so long as the prosecution meets the reliability prong, which is not a high bar.[199] This approach is not only inconsistent with *Craig*'s holding, which prescribed a meaningful two-step test, but also rests on the faulty premise that virtual presence is a viable substitute for physical presence.[200]

ii. The Text of the Constitution Forecloses upon Applying a Less Demanding Legal Standard to Forensic or Expert Witnesses

The argument that courts should apply a less demanding test to forensic witnesses is more reasonable in that it at least recognizes that the *Craig* test may not be satisfied with public policies that are present in every criminal prosecution.[201] It nonetheless fails because its underlying assumption is the same one that the Commonwealth of Massachusetts stressed, and the Supreme Court rejected, in *Melendez-Diaz*—that there is a constitutional difference between forensic and nonforensic witnesses.[202] Therefore, because both the Idaho and New Hampshire rules permit certain expert witnesses from testifying via videoconference without applying a *Craig*-like standard, they are unconstitutional and should not serve as model rules for other jurisdictions.

As noted in *Melendez-Diaz*, the Constitution recognizes only two types of witnesses in a criminal proceeding: those "against him [the defendant]" and those "in his favor."[203] Simply put then, forensic witnesses cannot be considered "a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation."[204] Because forensic witnesses are subject to the same Confrontation Clause requirements as any other prosecution witness, a constitutionally compliant videoconference rule must condition admissibility on the standard that applies to all other adverse witnesses—that is, the *Craig* test.[205]

iii. The Current Supreme Court Has Consistently Refused to Lessen the Demands of the Confrontation Clause Based on the Supposedly Adverse Implications that May Follow from a More Restrictive Interpretation of the Clause

The Supreme Court has had several opportunities in recent years to relax the requirements of the Confrontation Clause based on the practical implications of a given case. For example, in *Melendez-Diaz*, Massachusetts argued that the Court should exempt forensic witnesses from the demands of the Confrontation Clause based on

199. See *supra* Part II.C.2 for a discussion of how federal and state courts have applied the reliability prong of the *Craig* test.

200. See *infra* Part III.B.3 for a discussion of why virtual presence is not a meaningful substitute for physical presence.

201. See *supra* notes 198–200 and accompanying text for an explanation of why convenience, efficiency, and cost savings cannot meet the first prong of the *Craig* test.

202. See *supra* notes 67–81 and accompanying text for a detailed analysis of *Melendez-Diaz.*

203. U.S. CONST. amend. VI; Melendez-Diaz v. Massachusetts, 557 U.S. 305, 313 (2009).

204. *Melendez-Diaz*, 557 U.S. at 314.

205. See *supra* Part III.B.1 for a discussion of how any videoconference-testimony rule must supply a legal standard that is at least as stringent as the *Craig* test.

"necessities of trial and the adversary process."[206] Additionally, in *Giles v. California*,[207] which involved the scope of a common law exception to the hearsay rule, the dissent called for a more relaxed interpretation of the rule of forfeiture by wrongdoing based in part on the impact that a more rigid interpretation would have on domestic abuse cases.[208] Thus, in a similar vein, proponents of videoconference testimony could argue that the adverse consequences of limiting its use should compel the Court to relax its stance on the issue,[209] particularly in light of the additional demands that recent cases like *Crawford* and *Melendez-Diaz* have imposed on state and federal prosecutors.[210]

Once again, however, this does not appear to be a winning argument for the same reasons that the Court rejected these invitations in *Melendez-Diaz* and *Giles*. As Justice Scalia noted in *Melendez-Diaz*, many provisions in the Constitution make it difficult to prosecute criminal defendants, and, notwithstanding the inconvenience they impose, the Court may not simply disregard the clear directives of the text.[211] In *Giles*, Justice Scalia pointed out that the dissent's construction begged the question of whether there should be "a special, improvised, Confrontation Clause for those crimes that are frequently directed against women," but another "Confrontation Clause (the one the Framers adopted and *Crawford* described) for all other crimes."[212]

At bottom then, an invitation to relax the demands of the Confrontation Clause boils down to the same theme as the arguments attempting to draw distinctions among the type of witness testifying or, as discussed *infra* in Part III.B.2.b, among the type of crimes charged—that the Confrontation Clause should be interpreted differently based on the policy concerns of a given case. In the context of videoconference testimony, the only successful "public policy" argument would be one that satisfies the first prong of the *Craig* test.[213]

Perhaps in recognition of this theme, one commentator recently proposed a novel solution to avoiding the demands of the Confrontation Clause: reverse incorporation.[214] While the Confrontation Clause would still certainly apply to the federal government, reverse incorporation would free states from complying with the unincorporated portions of the Sixth Amendment, leaving them only to apply their own state constitutional confrontation clause provisions.[215] However, absent a structural change such as this, courts and legislatures are not at liberty to adopt videoconference

206. *Melendez-Diaz*, 557 U.S. at 325.

207. 554 U.S. 353 (2008).

208. *Giles*, 554 U.S. at 405–06 (Breyer, J., dissenting).

209. See *supra* notes 142–48 for a review of the adverse consequences that commentators mention.

210. See *supra* Part II.C.3 for a discussion of the impact that *Crawford* and *Melendez-Diaz* have had in this regard.

211. *Melendez-Diaz*, 557 U.S. at 325.

212. *Giles*, 554 U.S. at 376.

213. See *supra* Part III.B.1 for a discussion of how the *Craig* test remains the prevailing legal standard for the admissibility of videoconference testimony.

214. *See* Mark Egerman, *Avoiding Confrontation*, 84 TEMP. L. REV. 863, 897–902 (2012) (arguing that Congress should consider partial reverse incorporation of the Confrontation Clause for domestic abuse crimes in light of *Giles*).

215. *Id.* at 897–99.

provisions that are inconsistent with Supreme Court precedent.

*b. Videoconference-Testimony Provisions that Distinguish Between Felonies and Misdemeanors Are Similarly Unconstitutional*

No commentators have touched on the possibility of admitting videoconference testimony from forensic analysts in misdemeanor trials without imposing the *Craig* test, as New Hampshire's statute permits.[216] A policy argument in favor of this approach would largely mirror the one articulated in the context of distinguishing between forensic and lay witnesses—that the former need a less time-consuming way to testify because forensic laboratories are overburdened.[217] Once again, however, any policy choice must pass constitutional muster.

The Confrontation Clause does not distinguish between misdemeanor or felony trials. Rather, it applies to "all criminal prosecutions," which certainly include criminal trials.[218] Therefore, based on a textual reading of the Confrontation Clause, its protections extend equally to both felony and misdemeanor trials,[219] which include a defendant's right to confront adverse witnesses in person unless the prosecution can meet the *Craig* test.[220] Accordingly, the New Hampshire statute, which permits videoconference testimony from forensic witnesses in misdemeanor cases, violates the Sixth Amendment.

3. The Demands of the Confrontation Clause Should Not Be Relaxed Because Virtual Presence Is Not a Meaningful Substitute for Physical Presence

The conclusions arrived at in Parts III.A and III.B reflect the general view that the nonconsensual use of videoconference testimony by the prosecution in criminal proceedings should be limited. This position rests on the well-founded assumption that a witness's virtual presence is simply an inadequate substitute for his or her physical presence in the courtroom.

Courts have been highly skeptical of the proposition that videoconference testimony provides criminal defendants a form of confrontation that equals physical

216. N.H. REV. STAT. ANN. § 516:37(I) (2013).

217. Many commentators made this policy argument in light of *Melendez-Diaz*. *See, e.g.*, Ma, *supra* note 187, at 795 (proposing that allowing forensic witnesses to testify via videoconference would allow forensic laboratories to keep up with current caseloads without draining scarce public resources); Montell, *supra* note 181, at 363 (arguing that this approach complies with the Sixth Amendment and increases the efficiency of criminal proceedings); Sluss, *supra* note 52 (noting that the Virginia legislature may expand the use of videoconference technology to ensure the availability of its forensic analysts in response to *Melendez-Diaz*).

218. U.S. CONST. amend. VI. See Holst, *supra* note 25, at 1601–13, for a review of the criminal proceedings in which the Confrontation Clause applies.

219. *See, e.g.*, State v. Kramer, 278 P.3d 431, 435 (Idaho Ct. App. 2012) (applying Confrontation Clause to misdemeanor charges of driving under the influence and transporting open container of alcohol); Cranston v. State, 936 N.E.2d 342, 343–44 (Ind. Ct. App. 2010) (applying Confrontation Clause in misdemeanor case for driving while intoxicated); State v. Carter, 114 P.3d 1001, 1005 (Mont. 2005) (applying Confrontation Clause in misdemeanor case for driving under the influence).

220. See *supra* Part III.B.1 for the argument that, absent a defendant's consent, any videoconference-testimony provision must encapsulate the *Craig* test.

confrontation. Most notably, the Eighth Circuit in *United States v. Bordeaux*[221] questioned whether virtual confrontation between the defendant and witness has the same "truth-inducing" effect as face-to-face confrontation.[222] In the court's view, virtual confrontation does not have the same effect because:

> Given the ubiquity of television, [as] even children are keenly aware that a television image of a person . . . is not the person[,] something is lost in . . . translation. Thus, a defendant watching a witness through a monitor will not have the same truth-inducing effect as an unmediated gaze across the courtroom.[223]

Therefore, in the court's view, virtual presence creates the impression that those shown on video screens are not "real," and, in that connection, a witness testifying in view of the virtual defendant may not have as many qualms about lying in the defendant's virtual presence.[224]

Similarly, the Eleventh Circuit in *United States v. Yates*[225] observed that when testimony is offered via videoconference technology, all courts either implicitly or explicitly find that a defendant's right to confront adverse witnesses is "most certainly compromised."[226] Courts have done so implicitly by adopting the *Craig* standard, which is built upon the assumption that physical and virtual testimony are not constitutional equivalents.[227] The en banc court continued that even the Second Circuit, which rejected the *Craig* test in *Gigante*, has stated that "the use of remote, closed-circuit television testimony must be carefully circumscribed."[228] Therefore, the hesitation that many courts have in admitting videoconference testimony, whether it manifests itself in applying the *Craig* test or another legal standard, suggests that physical confrontation offers something to the defendant that is lost in virtual confrontation.

Of course, some might argue that judges are not psychologists and are therefore unequipped to determine whether videoconference proceedings adversely affect criminal defendants. However, a 2010 study of the impact that videoconference technology has had on bail proceedings in Cook County, Illinois, corroborates the

221. 400 F.3d 548 (8th Cir. 2005).

222. *Bordeaux*, 400 F.3d at 554.

223. *Id.*; *see also* Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89, 94 (2002) (Scalia, J., statement) (noting that the experience of a witness testifying in the defendant's physical presence at trial is quite distinct from a witness testifying "in a room that contains a television set beaming electrons that portray the defendant's image").

224. *See* Coy v. Iowa, 487 U.S. 1012, 1019 (1988) (holding that a defendant's Confrontation Clause rights were violated when the trial court placed a screen between the defendant and witness and reasoning that face-to-face confrontation lessens the likelihood that the witness would lie under oath, and, even if the witness did lie, it would be less convincing if offered while in view of the defendant).

225. 438 F.3d 1307 (11th Cir. 2006) (en banc).

226. *Yates*, 438 F.3d at 1315.

227. *Id.* at 1313–15. The court reasoned that because four other circuits have applied the *Craig* test, it is logical to assume that the two forms of testimony cannot simply be substituted for one another. *Id.* at 1313. See also *supra* notes 174–75 and accompanying text for a discussion about how courts do not consider in-person testimony and videoconference testimony to be constitutional equivalents.

228. *Id.* at 1315 (quoting United States v. Gigante, 166 F.3d 75, 80 (2d Cir. 1999)).

views that virtual presence has negative implications for criminal defendants.[229]

In response to increased case volume, Cook County, Illinois, which includes Chicago, instituted a policy in 1999 requiring that bail hearings for defendants charged with select felonies be conducted via videoconference technology.[230] Under the policy, defendants appeared before the court at their bail hearings remotely, while they were physically located in a jail.[231]

The authors evaluated all bail decisions from the eight-and-one-half years before and after Cook County initiated this program.[232] Their findings revealed that bond amounts levied in videoconference hearings increased by fifty-one percent since the inception of the program, while the amounts levied in live hearings over that same time period increased by only thirteen percent.[233] In light of this data, the authors concluded that defendants who participated in bail hearings remotely were "significantly disadvantaged" compared to those who had live bail hearings.[234] While bail hearings and witness testimony are separate criminal proceedings, this study nonetheless shows how virtual presence can prejudice the interests of criminal defendants.

## IV. CONCLUSION

This Comment has vetted many of the different approaches that legislators or courts may consider when crafting videoconference-testimony statutes or court rules. While debating substantive provisions is often the focus of most commentators, these rulemakers should not overlook the enactment of procedural provisions, such as waiver or notice-and-demand statutes, because they share the unique quality of preventing a defendant from raising a substantive Confrontation Clause challenge if he failed to follow the appropriate procedural steps.

With respect to provisions that admit videoconference testimony in nonconsensual situations, legislatures and courts should remember that the *Craig* test is the prevailing legal standard for admissibility and that this standard applies to testimony offered by any type of adverse witness, in any criminal trial. Thus, even though a forensic analyst in a misdemeanor driving under the influence case is readily distinguishable from an eyewitness who saw the defendant drinking at a bar, they are equal in the eyes of the Confrontation Clause. Each person is an adverse witness to the defendant—that is, one "against him"—who, under the Supreme Court's current jurisprudence, may only testify via videoconference if the prosecution can meet the *Craig* test. Therefore, any

229. Diamond et al., *supra* note 142, at 870.

230. *Id.* at 883.

231. *Id.* at 883–84. Bail hearings for those charged with serious felonies, such as homicides and sexual assaults, remained live and in person. *Id.* at 883.

232. *Id.* at 886. This yielded 645,117 case files. *Id.* at 887.

233. *Id.* at 896–97. The authors also analyzed how bail amounts changed for defendants charged with six specific felonies whose bail hearings took place via videoconference beginning in 1999. *Id.* at 893. The increase for armed robbery was 58%, for unarmed robbery 86%, for residential burglary 90%, for nonresidential burglary 64%, for possession of a stolen motor vehicle 78%, and for aggravated battery 70%. *Id.*

234. *Id.* at 898. These results were published in the Chicago Tribune on December 12, 2008, and only three days later, Cook County returned to conducting bail hearings in person. *Id.* at 870.

statute or court rule that admits such testimony per se or imposes a legal standard that is lower than the *Craig* test is unconstitutional.

Finally, rulemakers should avoid crafting legislation or court rules that represent reasonable policy responses to the Supreme Court's recent Confrontation Clause cases, but nevertheless cannot be squared with the text of the Constitution or the Court's precedent. The current Supreme Court has repeatedly displayed its unwillingness to relax the demands of the Confrontation Clause based on the argument that failure to do so would make prosecuting criminal defendants more difficult. This view should not be lamented, however, because it is rooted in the well-founded assumption that virtual presence does not adequately replicate physical presence.