COMMENT

Accusations from Abroad: Testimony of Unavailable Witnesses via Live Two-Way Videoconferencing Does Not Violate the Confrontation Clause of the Sixth Amendment

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INTRODUCTION

While striving to shield society from criminal activity, the U.S. criminal justice system also aims to protect the rights of criminal defendants.[1] The Confrontation Clause of the Sixth Amendment is one such form of protection.[2] The Clause affords criminal defendants the right to confront witnesses against them.[3] Courts have generally interpreted this to mean that defendants have the right to confront witnesses in person.[4] Case law has firmly established, however, that this is an ideal or a preference rather than a requirement.[5] An inflexible approach requiring in-person confrontation in all cases could block vital testimony in significant criminal cases.[6]

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[1] *See* United States v. Yates, 438 F.3d 1307, 1321 (11th Cir. 2006) (Tjoflat, J., dissenting) (citing United States v. Gigante, 971 F. Supp. 755, 756-57 (E.D.N.Y. 1997)) (noting that American criminal procedure is pragmatic and recognizing that courts must balance defendant's right to due process with public's right to protection against crime); *see also* Steve Holden, Izazaga v. Superior Court*: Affirming the Public's Cry to Unshackle the Criminal Prosecution System*, 23 PAC. L.J. 1721, 1722 (1992); Kelly Kszywienski, *Roadblock in the Search for Truth: What Are a Criminal Prosecutor's Constitutional and Ethical Obligations When the Evidence Supports Multiple, Inconsistent Theories of a Crime?*, 37 U. TOL. L. REV. 1111, 1140 (2006) (noting that although U.S. Constitution demands respect for rights of criminal defendants, general public safety also merits respect).

[2] *See* U.S. CONST. amend. VI (listing various rights of criminal defendants, including right to confront adverse witnesses).

[3] *Id.*

[4] Maryland v. Craig, 497 U.S. 836, 849 (1990) (noting that Confrontation Clause reflects preference for face-to-face confrontation at trial); Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (citing Kentucky v. Stincer, 482 U.S. 730, 748-50 (1987) (Marshall, J., dissenting)); *see also* Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) (plurality opinion); Snyder v. Massachusetts, 291 U.S. 97, 106 (1934); Dowdell v. United States, 221 U.S. 325, 330 (1911); Mattox v. United States, 156 U.S. 237, 243-44 (1895). Courts have looked to both the text and history of the Confrontation Clause. *See Coy*, 487 U.S. at 1015-16; California v. Green, 399 U.S. 149, 156 (1970); *Mattox*, 156 U.S. at 242 (noting that Confrontation Clause prevents conviction by ex parte affidavit); *see also Ritchie*, 480 U.S. at 51; *Snyder*, 291 U.S. at 106; *Dowdell*, 221 U.S. at 330; Kirby v. United States, 174 U.S. 47, 55 (1899).

[5] *Cf. Craig*, 497 U.S. at 849 (citing Ohio v. Roberts, 448 U.S. 56, 63 (1980); *Mattox*, 156 U.S. at 243) (noting that courts may dispense with in-person confrontation requirement in some cases); Ariana J. Torchin, *A Multidimensional Framework for the Analysis of Testimonial Hearsay Under* Crawford v. Washington, 94 GEO. L.J. 581, 583-84 (2006) (noting that in-person confrontation is preference and not absolute requirement).

[6] *See Craig*, 497 U.S. at 837 (noting that if courts always required in-person confrontation, then Confrontation Clause would eliminate almost every hearsay exception). For example, a statement that a person makes under the belief that he is

Imagine, for example, that a terrorist committed an atrocious act in the United States, similar to the attacks on September 11, 2001.[7] A French national, Pierre, is the only person who can identify the terrorist.[8] Pierre lives in France and refuses to come to the United States to testify at trial.[9] He is willing, however, to testify via live two-way videoconferencing from France.[10] This would allow both Pierre and those in the courtroom to see and hear each other live via video monitor.[11]

If the U.S. Supreme Court demanded in-person confrontation in this situation, Pierre would never testify before the jury.[12] As a French national living in France, he would be outside the U.S. subpoena power.[13] The prosecution might introduce Pierre's written deposition at trial under Rule 15 of the Federal Rules of Criminal Procedure ("Rule 15").[14] Without observing his demeanor while testifying, however, the judge or jury would have more difficulty assessing Pierre's credibility.[15] Thus, prohibiting live video testimony could

dying is admissible evidence if that person is unavailable to testify. FED. R. EVID. 804(b)(2) (stating that this exception is available in prosecution for homicide or in civil action or proceeding). This is a long-held and undisputed exception to the in-person confrontation requirement. Crawford v. Washington, 541 U.S. 36, 56 n.6 (2004); *Mattox*, 156 U.S. at 243-44.

[7] This hypothetical is loosely based on *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006) (holding that witnesses could not testify from Australia via live two-way videoconferencing even if testimony was essential to conviction).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*; *see also* Aaron Harmon, *Child Testimony via Two-Way Closed Circuit Television: A New Perspective on* Maryland v. Craig *in* United States v. Turning Bear *and* United States v. Bordeaux, 7 N.C. J.L. & TECH. 157, 161 (2005) (noting that with two-way videoconferencing, witness can see and hear courtroom proceedings).

[12] *See supra* note 7.

[13] *See Yates*, 438 F.3d at 1310 (noting that witness was beyond U.S. subpoena power because witness testified from Australia).

[14] *See* FED. R. CRIM. P. 15 (providing that party may depose witness to preserve testimony for trial if there are exceptional circumstances and deposition is in interest of justice). A prosecutor could also videotape a deposition under Rule 15 and present the videotape to the jury later at trial. Nancy Gertner, *Videoconferencing: Learning Through Screens*, 12 WM. & MARY BILL RTS. J. 769, 776 (2004) (noting that Rule 15 permits use of videotaped depositions in federal criminal trials). However, prosecutors are not required to videotape Rule 15 depositions and often introduce only a written deposition at trial. *See, e.g.*, United States v. Salim, 855 F.2d 944, 947 (2d Cir. 1988) (noting that French court denied government's request to record deposition on video or audio tape because such recording was contrary to French law).

[15] *See* United States v. Milian-Rodriguez, 828 F.2d 679, 686 (11th Cir. 1987) (noting that courts do not favor using Rule 15 depositions in criminal cases because

severely impair or block essential evidence.[16] The terrorist may be more likely to go free simply because the witness could not or would not travel to the United States to testify.[17]

With these effects in mind, many courts have allowed witnesses to testify via one-way or two-way videoconferencing.[18] In *Yates v. United States*, however, the Eleventh Circuit Court of Appeals held that the two-way video testimony of a foreign witness abroad violates the Confrontation Clause.[19] This holding conflicts with the Second Circuit Court of Appeals' holding in *United States v. Gigante* that two-way video testimony preserves, rather than infringes upon, the right to face-to-face confrontation.[20] The Supreme Court has never ruled on

trier of fact does not have chance to observe witness's demeanor); *see also* California v. Green, 399 U.S. 149, 157-58 (1970); FED. R. EVID. art. VIII advisory committee's note (noting that general rule against admitting out-of-court statements is based on importance of demeanor evidence); Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 1-3 (2000) (noting that courts consider demeanor evidence essential to jury's assessment of witness's credibility); *supra* note 7.

[16] *See, e.g.*, *Yates*, 438 F.3d at 1316 (holding that although two-way video testimony was essential to prosecution's case, testimony was inadmissible); *see also* United States v. Scheffer, 523 U.S. 303, 312-13 (1998) (quoting United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973)) (upholding per se exclusion of polygraph evidence in military trials on ground that basic principle of our criminal system is that jury determines witness's credibility); *supra* note 7.

[17] *See Yates*, 438 F.3d at 1309 (setting aside criminal conviction and remanding case for new trial on grounds that two-way video testimony was not admissible); *supra* note 7.

[18] *See, e.g.*, Harrell v. State, 709 So. 2d 1364 (Fla. Dist. Ct. App. 1998) (holding that allowing foreign tourists to testify from Argentina via satellite transmission did not violate defendant's right of confrontation); Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986) (holding that one-way video testimony was proper and that there is no constitutional right to in-person confrontation); State v. Sewell, 595 N.W.2d 207 (Minn. Ct. App. 1999) (holding that live video testimony was proper because witness could not travel due to serious health problems); Kansas City v. McCoy, 525 S.W.2d 336 (Mo. 1975) (holding that expert testimony regarding marijuana via two-way videoconferencing did not violate Confrontation Clause); State v. Sheppard, 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984) (holding that live video testimony was proper exception to Confrontation Clause in child sexual abuse cases); People v. Algarin, 498 N.Y.S.2d 977 (App. Div. 1986) (holding that two-way video testimony of child sexual abuse victim was proper method of balancing child's interests and defendant's rights); People v. Henderson, 503 N.Y.S.2d 238 (Sup. Ct. 1986) (finding that people's interest in protecting child sexual abuse victims outweighed minor intrusion on defendant's right of confrontation).

[19] *Yates*, 438 F.3d at 1309 (holding that witness's testimony from Australia was inadmissible because defendant did not have chance to confront witness in person).

[20] United States v. Gigante, 166 F.3d 75, 80-81 (2d Cir. 1999) (distinguishing two-way videoconferencing from one-way videoconferencing in that with one-way videoconferencing, witness cannot see or hear defendant).

the constitutionality of two-way video testimony.[21] In *Maryland v. Craig*, however, the Court held that one-way video testimony is proper in some child abuse cases.[22] Recently, the Court also set forth a two-pronged test for assessing potential Confrontation Clause violations in *Crawford v. Washington*.[23]

This Comment argues that the Supreme Court should find that the Confrontation Clause does not bar the testimony of unavailable witnesses via two-way videoconferencing. Part I examines the historical and legal background of the Clause and how it relates to live video testimony. Part II explores the conflict between the Eleventh Circuit's holding in *Yates* and the Second Circuit's holding in *Gigante*. Part III proposes how the Supreme Court should resolve the split. First, the Court should find that two-way video testimony is a new form of testimony that does not fall neatly under *Crawford* or *Craig*. Such testimony does not violate the Clause, however, because it is superior to testimony that would satisfy the *Crawford* test. Second, the Court should hold that even if *Crawford* applies, the testimony satisfies both prongs of the *Crawford* standard and should therefore be admissible. Third, the Court should find that even if *Craig* applies, such testimony would also satisfy the *Craig* standard.

I. BACKGROUND: THE HISTORY OF THE CONFRONTATION CLAUSE AND ITS RELATIONSHIP TO LIVE VIDEO TESTIMONY

An analysis of the Confrontation Clause's application to live video testimony first requires an explanation of the history, purpose, and scope of the Clause.[24] The Clause affords a criminal defendant the right to confront witnesses against him.[25] Courts have found that this generally requires in-person confrontation.[26] Over time, however, the Supreme Court and Congress have carved out many exceptions to this

[21] *See Yates*, 438 F.3d at 1307 (implying that *Craig* is only Supreme Court case addressing live video testimony because court relied wholly on *Craig* to analyze issue).

[22] 497 U.S. 836, 857 (1990) (noting that one-way video testimony is only admissible if evidence shows forcing child to testify before defendant would traumatize child).

[23] 541 U.S. 36, 68 (1990) (holding that Confrontation Clause bars out-of-court testimonial statements unless witness is unavailable to testify and defendant had opportunity to cross-examine).

[24] *See Crawford*, 541 U.S. at 43 (noting that courts must base interpretation of Confrontation Clause on its history).

[25] U.S. CONST. amend. VI.

[26] *Craig*, 497 U.S. at 849 (citing Ohio v. Roberts, 448 U.S. 56, 63 (1980); Mattox v. United States, 156 U.S. 237, 243 (1895)).

requirement, including the hearsay exceptions and Rule 15 depositions.[27] The Court has also delineated several tests for evaluating the scope of the Clause.[28]

A. The Confrontation Clause

The Sixth Amendment states that the accused in a criminal prosecution has the right to confront witnesses against him.[29] The history of the Clause is instructive as to its meaning and purpose.[30] Before its adoption in 1791, justices of the peace or other officials often examined witnesses before trial.[31] Judges occasionally read these examinations, known as ex parte examinations, in court in the place of live testimony.[32]

Defendants frequently demanded to have their accusers brought before them.[33] They argued that it is particularly difficult for a witness to lie to a defendant's face in the formal and imposing setting of a courtroom.[34] They also contended that ex parte examinations

[27] *See* FED. R. CRIM. P. 15 (stating that depositions are admissible at trial if both parties have notice and it is in interest of justice due to exceptional circumstances); FED. R. EVID. 803-804; *Craig*, 497 U.S. at 849 (noting that various hearsay exceptions admit out-of-court statements where defendant does not confront witness in person); Mattox v. United States, 156 U.S. 237, 244 (1895) (holding that former testimony is admissible in court even though it is out-of-court statement); United States v. Yates, 438 F.3d 1307, 1316 (11th Cir. 2006).

[28] *See Crawford*, 541 U.S. at 68 (creating two-part test to determine if Confrontation Clause bars out-of-court testimonial statements); *Craig*, 497 U.S. at 837 (creating two-part test to determine if Confrontation Clause bars one-way video testimony of child).

[29] U.S. CONST. amend. VI (affording criminal defendants right to confront adverse witnesses).

[30] *See Crawford*, 541 U.S. at 43.

[31] *See id.* at 43-44 (citing Lilburn's Case, (1637) 3 How. St. Tr. 1315, 1318-22, 1329 (Star Chamber); Raleigh's Case, (1603) 2 How. St. Tr. 1, 15-16, 24 (H.L.); Throckmorton's Case, (1554) 1 How. St. Tr. 869, 875-76 (H.L.); 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 326 (London, MacMillan 1883)); *Craig*, 497 U.S. at 845 (quoting *Mattox*, 156 U.S. at 242-43).

[32] *See Crawford*, 541 U.S. at 43 (citing 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 326 (London, MacMillan 1883)). These examinations were common under two statutes in effect during the reign of Queen Mary in the sixteenth century. *Id.*

[33] *Id.* One of the most notorious uses of ex parte examinations was in the 1630 trial of Sir Walter Raleigh for treason. *Id.* at 44. In that case, the court denied the defendant's request to have his accuser brought before him and subsequently sentenced the defendant to death. *Id.* One of the defendant's judges later stated that this conviction was a grave mistake. *Id.*

[34] *See id.* (showing that Raleigh believed his accuser would recant if court forced

prevented the defendant from testing the witness's credibility or accuracy before the trier of fact through cross-examination.[35]

The Framers of the Constitution drafted the Confrontation Clause in order to eliminate the problems with these examinations.[36] Since the adoption of the Clause, courts have consistently recognized the importance of live testimony, subject to cross-examination before the trier of fact.[37] Such testimony helps the judge or jury to assess the witness's credibility, which ultimately aids the truth-seeking process.[38]

B. Hearsay and Hearsay Exceptions

Over time, however, courts have created various exceptions to the requirement of in-person, in-court confrontation.[39] For example,

accuser to testify at trial). Many courts have found that it is more difficult for a witness to lie about a person to his face rather than behind his back. *See Craig*, 497 U.S. at 846 (recognizing that in-person confrontation decreases probability that witness will implicate wrong person); Coy v. Iowa, 487 U.S. 1012, 1019 (1988); Ohio v. Roberts, 448 U.S. 56, 64 (1980) (quoting Mattox v. United States, 156 U.S. 237, 242-43(1895)). Moreover, the Court has stated that something deep in the human psyche regards in-person confrontation as being necessary to a fair trial. *Craig*, 497 U.S. at 847 (quoting *Coy*, 487 U.S. at 1017).

[35] *Crawford*, 541 U.S. at 45 (citing Fenwick's Case, (1696) 13 How. St. Tr. 537, 591-92 (H.C.)). Many courts have firmly held that cross-examination before the trier of fact is essential to help the jury assess the witness's credibility. *Craig*, 497 U.S. at 846 (quoting California v. Green, 399 U.S. 149, 158 (1970)); Delaware v. Fensterer, 474 U.S. 15, 21-22 (1985) (noting that cross-examination allows opposing counsel to probe witness and expose forgetfulness, confusion, or evasion).

[36] *See Crawford*, 541 U.S. at 50 (stating that original purpose of Confrontation Clause was to eliminate use of ex parte examinations); *Craig*, 497 U.S. at 845-46 (noting that witnesses should testify under oath, before trier of fact, and subject to cross-examination); Mattox v. United States, 156 U.S. 237, 242-43 (1895); Ann Hetherwick Pumphrey, *Admissibility of Hearsay Statements to Police:* Davis v. Washington *and* Hammon v. Indiana, 50 BOSTON B.J. 17, 17 (2006).

[37] *See Craig*, 497 U.S. at 846; *Coy*, 487 U.S. at 1016 (citing Kentucky v. Stincer, 482 U.S. 730, 748, 749-50 (1987) (Marshall, J., dissenting)); *see also* California v. Green, 399 U.S. 149, 158 (1970); Dowdell v. United States, 221 U.S. 325, 330 (1911); Kirby v. United States, 174 U.S. 47, 55 (1899).

[38] *See* United States v. Milian-Rodriguez, 828 F.2d 679, 686 (11th Cir. 1987); *see also* FED. R. EVID. art. VIII advisory committee's note (noting that general rule against admitting out-of-court statements is based on importance of demeanor evidence); Rand, *supra* note 15, at 1-3 (noting that courts consider demeanor evidence essential to jury's assessment of witness's credibility).

[39] *See, e.g.*, *Crawford*, 541 U.S. at 56 n.6 (noting dying declarations exception to hearsay rule); *Craig*, 497 U.S. at 851 (holding that live video testimony is admissible in some cases); *Mattox*, 156 U.S. at 242-44 (noting that in-person confrontation is not always required).

there are numerous exceptions to the hearsay rule.[40] The Federal Rules of Evidence define hearsay as an out-of-court statement that the proponent offers to prove the truth of that statement.[41] Although hearsay is generally inadmissible, a variety of exceptions allow a trial judge to admit certain types of out-of-court statements.[42] For example, the former testimony exception provides that testimony of an unavailable witness in a former proceeding or deposition is admissible if the defendant had an opportunity and similar motive to cross-examine the witness during the former proceeding or deposition.[43] Courts often admit such evidence in the form of a written transcript.[44] Thus, the witness is allowed to testify against a defendant in a criminal proceeding even though the defendant cannot confront the witness at trial and the jury cannot observe the witness's demeanor.[45]

C. Rule 15 Depositions

Courts may also admit out-of-court statements through Rule 15 depositions.[46] Rule 15 allows the prosecution or defense to introduce a deposition during trial.[47] Attorneys may use Rule 15 depositions only if, due to exceptional circumstances, it is in the interest of justice to do so.[48] Prosecutors often use such depositions to take and

[40] *See* FED. R. EVID. 801, 803-804, 807. Some exceptions to the hearsay rule require that the witness be unavailable. *See id.* 804. The majority of the hearsay exceptions, however, do not require that the witness be unavailable. *See id.* 803. The Federal Rules also provide a general exception allowing courts to fashion new exceptions to the hearsay rule as needed. *See id.* 807. Such evidence must have certain guarantees of trustworthiness. *Id.* The statement must be evidence of a material fact and it must be more probative on the issue than any other evidence. *Id.* The admission of the statement must also serve the interests of justice. *Id.*

[41] *Id.* 801.

[42] *See id.* 803-804.

[43] *Id.* 804(b)(1).

[44] *See, e.g.*, Mancusi v. Stubbs, 408 U.S. 204, 213-16 (1972) (holding that reading transcript of former trial to jury was permissible); *Mattox*, 156 U.S. at 259-61 (admitting reporter's notes of testimony from former trial of two witnesses who had died).

[45] *See Mattox*, 156 U.S. at 259-61.

[46] *See* FED. R. CRIM. P. 15.

[47] *Id.*

[48] *Id.*; *see* United States v. Yates, 438 F.3d 1307, 1316-17 (11th Cir. 2006) (suggesting that Rule 15 deposition is appropriate in situations where witness is living abroad); Bryan A. Carey, *Should American Courts Listen to What Foreign Courts Hear?: The Confrontation and Hearsay Problems of Prior Testimony Taken Abroad in Criminal Proceedings*, 29 AM. J. CRIM. L. 29, 32 (2001) (noting that Rule 15 depositions are primary method for obtaining testimony from witnesses abroad); Gertner, *supra* note

preserve the testimony of foreign witnesses abroad who refuse or are unable to testify at trial.[49]

Rule 15 also guarantees the defendant the right to be present at the deposition.[50] In many cases, however, courts have admitted Rule 15 depositions conducted abroad even though the defendant could not attend the deposition.[51] For example, in *United States v. Salim*, the defendant could not travel to France to attend the deposition of an adverse witness.[52] The U.S. government lacked the authority to keep the defendant in custody on foreign soil.[53] Nevertheless, the district court admitted the deposition transcript at trial, and the Second Circuit found no error.[54] The First, Third, and Eleventh Circuit Courts of Appeals have reached the same conclusion in similar cases.[55] Therefore, although Rule 15 guarantees defendants the right to attend depositions of adverse witnesses, courts do not always protect this right.[56]

14, at 774 (explaining that Confrontation Clause requires that courts allow Rule 15 depositions only if exceptional circumstances are present).

[49] *See Yates*, 438 F.3d at 1316-17 (suggesting that Rule 15 deposition is viable option for cases in which witnesses are out of country); United States v. McKeeve, 131 F.3d 1, 7-10 (1st Cir. 1997) (noting that government deposed witness in United Kingdom); United States v. Mueller, 74 F.3d 1152, 1156-57 (11th Cir. 1996) (noting that prosecution deposed witness in England); United States v. Kelly, 892 F.2d 255, 260-63 (3d Cir. 1989) (noting that deposition took place in Belgium); United States v. Salim, 855 F.2d 944, 947 (2d Cir. 1988) (noting that defendant was unable to attend Rule 15 deposition in France); Carey, *supra* note 48, at 32.

[50] FED. R. CRIM. P. 15(d) (stating that government must pay expenses of attending deposition if defendant cannot afford to pay); *see also* Don v. Nix, 886 F.2d 203, 206-07 (8th Cir. 1989) (holding that criminal defendant has right to attend deposition of adverse witnesses); United States v. Benfield, 593 F.2d 815, 821 (8th Cir. 1979); *In re* Letters of Request from Supreme Court of H.K., 821 F. Supp. 204, 209 (S.D.N.Y. 1993) (finding that Rule 15 guarantees defendant right to attend deposition in order to satisfy Confrontation Clause).

[51] *See McKeeve*, 131 F.3d at 7-10 (noting that United States lacked jurisdiction to retain custody of federal detainees on foreign soil and United Kingdom would not agree to assume temporary custody); *Mueller*, 74 F.3d at 1156-57 (holding that deposition of witness in England was admissible at trial even though defendant could only speak to lawyer by phone during deposition); *Kelly*, 892 F.2d at 260-63 (holding that admission into evidence of videotaped depositions taken in Belgium in defendant's absence did not violate defendant's right of confrontation); *Salim*, 855 F.2d at 948.

[52] *See Salim*, 855 F.2d at 947.

[53] *Id.*

[54] *Id.* at 948-55.

[55] *See McKeeve*, 131 F.3d at 5; *Mueller*, 74 F.3d at 1156-57; *Kelly*, 892 F.2d at 260-63.

[56] *See* United States v. Yates, 438 F.3d 1307, 1326 n.11 (11th Cir. 2006) (Tjoflat, J., dissenting) (noting several cases in which defendant was unable to be present at

Moreover, foreign courts often conduct Rule 15 depositions in accordance with their own procedural rules.[57] In *Salim*, for example, the prosecution deposed the witness in France, following French procedure, which only allows the judge to question witnesses.[58] The attorneys on both sides had to submit their questions in writing, and the judge barred them from the room during questioning.[59] Thus, defense counsel could not fully cross-examine the witness, which illustrates that Rule 15 depositions often do not give defendants the same protection they would receive under U.S. procedure.[60]

D. Crawford*'s Two-Pronged Test for Determining Whether the Confrontation Clause Bars Out-of-Court Testimonial Statements*

The Supreme Court has identified other situations in which courts need not afford criminal defendants the right to confront witnesses in person.[61] For example, in *Crawford*, the Court created a two-pronged test to determine whether the Confrontation Clause bars out-of-court testimonial statements.[62] The Court ruled that such statements are inadmissible unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.[63] A witness is unavailable if the witness is unable or refuses to testify at trial and the court cannot compel the witness to testify.[64] In its opinion, the Court heavily emphasized the importance of cross-examination, suggesting that adequate cross-examination is the critical factor in Confrontation Clause analysis.[65] In addition, the Court noted that the *Crawford* test

Rule 15 deposition); Carey, *supra* note 48, at 52-54.

[57] Carey, *supra* note 48, at 30 (noting that foreign court may not meet American evidentiary standards during Rule 15 depositions).

[58] *See Salim*, 855 F.2d at 947-48.

[59] *Id.*

[60] *See id.*; Carey, *supra* note 48, at 49-50.

[61] *See* Crawford v. Washington, 541 U.S. 36, 68 (2004) (finding that out-of-court testimonial statements are admissible if witness is unavailable and defendant had prior opportunity for cross-examination); United States v. Mattox, 156 U.S. 237, 238-40 (1895) (holding that statements made at former trial or hearing may be admissible as evidence against defendant).

[62] *Crawford,* 541 U.S. at 51, 71 (defining testimonial statement as formal declaration or affirmation to establish or prove some fact).

[63] *Id.* at 68.

[64] FED. R. EVID. 804(a). A witness is also unavailable if the witness asserts a privilege not to testify. *Id.* 804(a)(1).

[65] *See Crawford*, 541 U.S. at 43-51.

applies to all out-of-court testimonial statements, including statements that fall under an exception to the hearsay rule.[66]

At issue in *Crawford* was the admissibility of a recorded statement that the defendant's wife gave during a police interrogation.[67] On trial for murder, the defendant argued self-defense, but his wife's recorded statement seemingly undermined his story.[68] She could not testify at trial because of a state statute prohibiting spouses from testifying against each other.[69] The prosecution thus sought to admit the recording in lieu of live testimony.[70] The trial court admitted the recording, and on appeal, the defendant argued that this violated his right to confront the witnesses against him.[71]

The Court found that the admission of the recording violated the defendant's right to confront the witness.[72] The witness was unavailable to testify at trial, satisfying the first prong of the newly created test.[73] The recording did not pass the second prong, however, because the defendant never had an opportunity to cross-examine his wife.[74] Thus, the Court reversed the defendant's conviction and remanded the case for new trial.[75]

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[66] *Id.* at 56 (overturning Ohio v. Roberts, 448 U.S. 56 (1980)); *see* Andrew King-Ries, State v. Mizenko*: The Montana Supreme Court Wades into the Post-*Crawford *Waters*, 67 MONT. L. REV. 275, 277-78 (2006) (noting that hearsay statements must satisfy *Crawford*'s two-pronged test). Under *Roberts*, the Confrontation Clause did not bar evidence that fell within a long-standing exception to the hearsay rule. Ohio v. Roberts, 448 U.S. 56, 66 (1980). *But see Crawford*, 541 U.S. at 56 n.6 (noting that dying declarations exception to hearsay rule is one deviation which is justified because it existed at time of drafting Sixth Amendment).

[67] *Crawford*, 541 U.S. at 38-40 (recounting wife's statement that victim did not have weapon in his hands when defendant stabbed him, indicating defendant did not act in self-defense).

[68] *Id.*

[69] *See* WASH. REV. CODE ANN. § 5.60.060(1) (1994). In Washington, this privilege does not cover a spouse's out-of-court statements, which are admissible under a hearsay exception. *Crawford*, 541 U.S. at 40 (citing State v. Burden, 841 P.2d 758, 761 (Wash. 1992)). The State invoked the hearsay exception for statements against penal interest because the defendant's wife admitted that she helped facilitate the assault. *Id.*; *see* WASH. R. EVID. 804(b)(3) (2003). Therefore, the prosecution had the right to introduce the recording at trial as long as the Confrontation Clause did not bar it. *Crawford*, 541 U.S. at 42.

[70] *Crawford*, 541 U.S. at 40.

[71] *Id.* at 40-41.

[72] *Id.* at 68.

[73] *See id.* at 40.

[74] *Id.*

[75] *Id.* at 69.

E. The Admissibility of Live Video Testimony and Craig*'s Two-Pronged Test for Dispensing with the Requirement of In-Person Confrontation*

In *Craig*, the Supreme Court created another two-pronged test for identifying situations in which in-person confrontation is not necessary.[76] The first prong of the *Craig* test requires that denial of in-person confrontation be necessary to further an important public policy.[77] The second prong requires that the testimony have certain indicia of reliability.[78]

At issue in *Craig* was whether a child sexual abuse victim could testify via one-way videoconferencing in the alleged abuser's criminal trial.[79] One-way videoconferencing allows those in the courtroom to see and hear the witness, but the witness cannot see or hear into the courtroom.[80] Normally, an out-of-court testimonial statement is only admissible if a witness is unavailable.[81] Even though the child was

[76] *See* Maryland v. Craig, 497 U.S. 836, 837 (1990).

[77] *Id.*

[78] *Id.* (noting that indicia of reliability include testimony under oath, subject to cross-examination, and before trier of fact).

[79] *Id.* at 852. Numerous courts have found that a child witness may testify via one-way or two-way videoconferencing when facing the defendant would traumatize the child. *See, e.g.*, United States v. Etimani, 328 F.3d 493 (9th Cir. 2003) (finding that six-year-old sexual abuse victim could testify via two-way videoconferencing to protect child); United States v. Weekley, 130 F.3d 747 (6th Cir. 1997) (permitting child kidnapping victim to testify via two-way videoconferencing); United States v. Rouse, 111 F.3d 561 (8th Cir. 1997) (finding that three victims of child sexual abuse could testify via videoconferencing); LaBayre v. Iowa, 97 F.3d 1061 (8th Cir. 1996) (finding that eight-year-old victim of sexual abuse could testify via videoconferencing); Jelinek v. Costello, 247 F. Supp. 2d 212 (E.D.N.Y. 2003) (holding that live video testimony was in best interests of child); Reutter v. State, 886 P.2d 1298 (Alaska Ct. App. 1994) (finding that live video testimony was proper because victim had already suffered and would likely suffer further if forced to testify before defendant); Ahmed v. United States, 856 A.2d 560 (D.C. 2004) (allowing child victim to testify outside presence of defendant because victim ran away and slept on street to avoid testifying in court); Hopkins v. State, 632 So. 2d 1372 (Fla. 1994) (holding that child's live video testimony was proper but finding that courts must make case-specific determinations regarding need for such testimony); State v. Sheppard, 484 A.2d 1330 (N.J. Super. Ct. Law Div. 1984) (holding that one-way video testimony was proper in criminal trial for sexual assault of minor because it was only modest erosion of Confrontation Clause); People v. Algarin, 498 N.Y.S.2d 977 (Sup. Ct. 1986) (reasoning that live video testimony was proper method of balancing interests of children and rights of defendant).

[80] *See Craig*, 497 U.S. at 836. With one-way videoconferencing, the witness, prosecutor, and defense counsel are in one room. *See id.* The defendant can communicate with her attorney via an electronic device. *See id.* Counsel can make objections during the witness's testimony as if the testimony were in court. *See id.*

[81] *See id.* at 865 (Scalia, J., dissenting) (noting that prosecution must normally

available to testify in this case, the district court allowed testimony via one-way videoconferencing to protect the child from emotional trauma.[82]

The Supreme Court held that the use of the one-way video testimony satisfied both prongs of the test.[83] First, the child's testimony satisfied the public policy prong because protecting child witnesses in child abuse cases is an important public policy.[84] Second, the child testified under oath, subject to cross-examination, and the jury was able to observe the child's demeanor, thus satisfying the reliability prong.[85] Therefore, the child's testimony was admissible even though the defendant never confronted the child in person.[86]

Craig is the only case in which the Supreme Court has addressed both live video testimony and the Confrontation Clause.[87] In *Craig*,

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either produce or demonstrate witness's unavailability in order to use declarant's statement against defendant).

[82] *See id.* at 860 (majority opinion). The Court found that one-way video testimony is proper only if the trial court reviews each individual case. *Id.* Courts must determine that testifying in the defendant's presence would traumatize the particular child in each case. *See id.*; United States v. Yates, 438 F.3d 1307, 1328 (11th Cir. 2006) (Tjoflat, J., dissenting) (noting that court could have compelled child witnesses to testify); Adam Sleeter, *Injecting Fairness into the Doctrine of Forfeiture by Wrongdoing*, 83 WASH. U. L.Q. 1367, 1374 (2005) (noting that refusal to testify due to potential trauma is generally insufficient to constitute unavailability of witness).

[83] *Craig*, 497 U.S. at 857. In contrast, many lower court decisions have held that a child sexual abuse victim may not testify via videoconferencing. *See, e.g.*, United States v. Bordeaux, 400 F.3d 548 (8th Cir. 2005) (holding that child had to testify in courtroom because trial court could not determine whether child had fear of defendant or of courtroom in general); United States v. Turning Bear, 357 F.3d 730 (8th Cir. 2004) (holding that child's fear of participants and large courtroom in general, rather than fear of defendant, was not sufficient to allow testimony via videoconferencing); United States v. Moses, 137 F.3d 894 (6th Cir. 1998) (finding that child sexual abuse victim's testimony via videoconferencing violated Confrontation Clause because child's testimony was critical to case); Cumbie v. Singletary, 991 F.2d 715 (11th Cir. 1993) (ruling that trial court did not make sufficient individualized findings about potential harm to child sexual abuse victim caused by testifying in defendant's presence); State v. Warford, 389 N.W.2d 575 (Neb. 1986) (holding that child sexual abuse victim could not testify via videoconferencing because defendant could not communicate privately with his attorney during testimony).

[84] *Craig*, 497 U.S. at 837 (holding that protecting children from trauma of testifying before accused is important public policy). Some argue that the actual policy underlying the *Craig* decision was the importance of convicting guilty defendants. *See id.* at 867 (Scalia, J., dissenting).

[85] *Id.* at 851-52 (majority opinion) (noting that these assurances are superior to those required for admission of many hearsay statements).

[86] *Id.* at 857.

[87] *See id.* at 836-37 (holding that one-way video testimony in certain child abuse

however, the Court only addressed the use of one-way video testimony.[88] The Court has never addressed the admissibility of two-way video testimony.[89]

With two-way video testimony, the parties on both ends of the circuit can hear and see each other.[90] The television monitors instantaneously transmit the images and sounds.[91] Many state courts have held that the use of such testimony satisfies the Clause.[92] However, the federal circuit courts of appeals are in disagreement on this point.[93]

II. THE STATE OF THE LAW

Without guidance from the Supreme Court or federal rules, several circuits have developed their own positions on two-way video testimony.[94] The Second Circuit held that two-way video testimony

cases does not violate Confrontation Clause).

[88] *See id.* at 836.

[89] *See* United States v. Yates, 438 F.3d 1307, 1313 (11th Cir. 2006) (relying on *Craig* to analyze two-way video testimony case even though *Craig* involved one-way video testimony).

[90] *See* Harmon, *supra* note 11, at 161.

[91] *Id.*

[92] *See, e.g.*, State v. Alterisi, 702 A.2d 651 (Conn. App. Ct. 1997) (finding child victim's fear of testifying before defendant sufficient to justify child's live video testimony); State v. Ells, 667 A.2d 556 (Conn. App. Ct. 1995) (ruling that it was proper to allow child to testify via videoconferencing even though trial court did not state that there was compelling need); Williams v. United States, 859 A.2d 130 (D.C. 2004) (finding that testimony of child sexual abuse victim was proper because trial court first tried unsuccessfully to have child testify before defendant at trial); *In re* C.W.D., 501 S.E.2d 232 (Ga. Ct. App. 1998) (finding it was proper for child to testify via videoconferencing because psychologist testified that child's post traumatic stress syndrome could worsen); People v. Ely, 618 N.E.2d 1221 (Ill. App. Ct. 1993) (noting that child's live video testimony was admissible because defendant had opportunity to fully cross-examine); State v. Spurlock, 52 P.3d 371 (Kan. Ct. App. 2002) (finding that child's live video testimony did not violate Confrontation Clause); Danner v. Commonwealth, 963 S.W.2d 632 (Ky. 1998) (finding that 15-year-old sodomy victim could testify via videoconferencing because requiring testimony at trial would inhibit truth-seeking process).

[93] *Compare Yates*, 438 F.3d at 1307 (finding that testimony of unavailable witness via two-way videoconferencing violates Confrontation Clause), *with* United States v. Gigante, 166 F.3d 75, 78 (2d Cir. 1999) (holding that testimony of unavailable witness via two-way videoconferencing does not violate Confrontation Clause).

[94] *See Yates*, 438 F.3d at 1307 (finding that two-way video testimony of unavailable witness violates Confrontation Clause); United States v. Bordeaux, 400 F.3d 548, 554-55 (8th Cir. 2005) (declining to follow *Gigante*, 166 F.3d at 75). The *Bordeaux* court found that confrontation via two-way videoconferencing is not constitutionally equivalent to in-person confrontation. *Bordeaux*, 400 F.3d at 554-55;

preserves, rather than infringes on, the right to face-to-face confrontation.[95] In contrast, the Eleventh Circuit held that the two-way video testimony of foreign witnesses violates the Confrontation Clause.[96]

A. The Second Circuit Found that the Two-Way Video Testimony of Unavailable Witnesses Preserves the Right of Confrontation

In *Gigante*, the Second Circuit held that admitting an unavailable witness's two-way video testimony does not violate the Confrontation Clause.[97] The district court admitted the two-way video testimony of a witness from a remote, undisclosed location.[98] The witness was a former associate of the Mafia and a participant in the Federal Witness Protection Program.[99] He was also in the final stages of cancer and was unable to travel to attend the trial.[100] Thus, the district court allowed the use of two-way video testimony to protect the witness's health and safety.[101]

Affirming the district court's holding, the Second Circuit held that the two-way video testimony was admissible due to the exceptional circumstances and the interests of justice.[102] This is the same standard used for determining the admissibility of Rule 15 depositions.[103] The court explained that two-way video testimony is more protective of a defendant's confrontation rights than testimony via Rule 15 depositions.[104] Unlike two-way video testimony, depositions do not allow the trier of fact to observe the witness's testimony subject to live cross-examination.[105] Therefore, the court declined to apply a stricter standard for the admission of two-way video testimony than that used for Rule 15 depositions.[106]

Gigante, 166 F.3d at 78 (holding that testimony of unavailable witness via two-way videoconferencing does not violate Confrontation Clause).

95 *Gigante*, 166 F.3d at 80.

96 *Yates*, 438 F.3d at 1307.

97 *Gigante*, 166 F.3d at 78.

98 *Id.*

99 *Id.* at 79.

100 *Id.*

101 *Id.* at 79-80.

102 *Id.* at 81.

103 *See* FED. R. CRIM. P. 15; *Gigante*, 166 F.3d at 81.

104 *Gigante*, 166 F.3d at 81.

105 *Id.*

106 *Id.*

The court also held that *Craig*'s requirement of an important public policy did not apply in this case.[107] The court distinguished *Craig* because it involved one-way video testimony.[108] In contrast, *Gigante* involved two-way video testimony.[109] The court reasoned that two-way video testimony allows the defendant to confront the witness because the defendant and the witness can see and hear each other live at trial.[110] The court concluded that two-way video testimony is admissible at trial and does not need to satisfy the *Craig* test.[111]

B. The Eleventh Circuit Found that the Two-Way Video Testimony of Unavailable Witnesses Violates the Confrontation Clause

In contrast, the Eleventh Circuit recently held in *Yates* that the two-way video testimony of unavailable witnesses does violate the Confrontation Clause.[112] In *Yates*, the prosecutors charged defendants with various offenses arising from their involvement with an Internet pharmacy.[113] The district court allowed witnesses for the prosecution to testify from Australia via live, two-way videoconferencing.[114] The Eleventh Circuit reversed, finding that such testimony was inadmissible.[115]

The Eleventh Circuit held that the *Craig* test applies to the two-way video testimony of unavailable witnesses.[116] The court noted that the Sixth, Eighth, Ninth, and Tenth Circuit Courts of Appeals had all found that *Craig* applies.[117] In addition, concluding that two-way

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[107] *Id.* at 80-81.

[108] *Id.* at 81.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] United States v. Yates, 438 F.3d 1307, 1309 (11th Cir. 2006).

[113] *Id.* at 1309-10 (noting that court convicted defendants of mail fraud, conspiracy to defraud, conspiracy to commit money laundering, and various prescription-drug-related offenses).

[114] *Id.* at 1310.

[115] *Id.* at 1309.

[116] *Id.* at 1312.

[117] *Id.* at 1313 (citing United States v. Moses, 137 F.3d 894, 897-98 (6th Cir. 1998)); *see* United States v. Weekley, 130 F.3d 747, 753 (6th Cir. 1997); United States v. Rouse, 111 F.3d 561, 568 (8th Cir. 1997); United States v. Quintero, 21 F.3d 885, 892 (9th Cir. 1994); United States v. Carrier, 9 F.3d 867, 868 (10th Cir. 1993); United States v. Garcia, 7 F.3d 885, 887-88 (9th Cir. 1993); United States v. Farley, 992 F.2d 1122, 1125 (10th Cir. 1993). Notably, the Eleventh Circuit held that *Craig* applies to two-way video testimony in *Harrell v. Butterworth*, 251 F.3d 926, 930 (11th Cir. 2001). Contrary to its holding in *Yates*, however, the Eleventh Circuit concluded in

video testimony is presented "at trial," the court deduced that *Crawford* does not apply because *Crawford* only deals with statements made prior to trial.[118]

Applying *Craig*, the Eleventh Circuit then found that the testimony at issue failed the first prong of the *Craig* test.[119] The first prong requires that denial of confrontation be necessary to further an important public policy.[120] The court conceded that providing the trier of fact with essential evidence is an important public policy.[121] The court found, however, that live video testimony is not necessary because Rule 15 depositions provide a superior method of introducing testimony from abroad.[122] The court reasoned that depositions are superior because the defendant has the right to attend the deposition and face the witness in person.[123] The court noted that defendants are rarely unable to attend Rule 15 depositions.[124] Thus, because Rule 15 provides a superior alternative, live video testimony is not strictly necessary.[125] Having found that two-way video testimony did not satisfy the first prong of the *Craig* test, the court did not address the indicia of reliability in the second prong.[126]

In summary, the Eleventh Circuit's holding in *Yates* that two-way video testimony violates the Confrontation Clause directly conflicts with the Second Circuit's holding in *Gigante*.[127] The Second Circuit, finding that *Craig* does not apply, held that such testimony is admissible under the same standard used for Rule 15 depositions.[128] In contrast, the Eleventh Circuit, applying *Craig*, found that such testimony is inadmissible because it fails the first prong of *Craig*.[129]

Harrell that such testimony satisfied the *Craig* test. *Harrell*, 251 F.3d at 930.

[118] *Yates*, 438 F.3d at 1314 n.4.

[119] *Id.* at 1316.

[120] *Id.*

[121] *Id.*

[122] *Id.* at 1314.

[123] *Id.*

[124] *Id.* at 1317.

[125] *Id.* at 1314.

[126] *See id.* at 1315-18 (omitting discussion of whether live video testimony satisfied second prong of *Craig* test because court decided issues based on first prong).

[127] *See id.* at 1309 (holding that two-way video testimony of unavailable witnesses violates Confrontation Clause); United States v. Gigante, 166 F.3d 75, 80-81 (2d Cir. 1999) (holding that two-way video testimony satisfies Confrontation Clause because such testimony preserves confrontation).

[128] *Gigante*, 166 F.3d at 81.

[129] *Yates*, 438 F.3d at 1316.

III. THE TWO-WAY VIDEO TESTIMONY OF UNAVAILABLE WITNESSES DOES NOT VIOLATE THE CONFRONTATION CLAUSE

The Supreme Court should resolve the circuit split by holding that admitting the two-way video testimony of unavailable witnesses does not violate the Confrontation Clause. Such testimony is a new form of testimony that the Court has yet to consider. It does not fall neatly under the *Crawford* or *Craig* standard. The two-way video testimony of an unavailable witness is, however, superior to testimony that would satisfy the *Crawford* standard. Therefore, the testimony of an unavailable witness via two-way videoconferencing should be admissible. Moreover, even if one were to insist upon applying an existing Supreme Court standard, such testimony would satisfy the two-pronged test of *Crawford* or *Craig*.[130]

A. The Two-Way Video Testimony of Unavailable Witnesses Is a New Form of Testimony that Is Superior to Testimony that Would Satisfy Crawford

The ideal of the Confrontation Clause is live, in-person testimony, subject to cross-examination before the trier of fact.[131] Although it does not fit within an existing Supreme Court standard, the two-way video testimony of unavailable witnesses comes closer to this ideal than testimony that would be deemed constitutional under *Crawford*. It provides for contemporaneous cross-examination before the trier of fact, which is not necessarily present in testimony that would satisfy *Crawford*.[132] Because two-way video testimony is superior to constitutionally permissible forms of testimony, it does not violate the Clause.

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[130] *Id.* at 1320-24 (Tjoflat, J., dissenting) (arguing that two-way video testimony satisfies *Craig* standard); *id.* at 1326-27 (Tjoflat, J., dissenting) (arguing that two-way video testimony satisfies *Crawford* standard).

[131] *See* Maryland v. Craig, 497 U.S. 836, 849 (1990) (noting that Confrontation Clause reflects preference for face-to-face confrontation at trial); *Gigante*, 166 F.3d at 80.

[132] *See Yates*, 438 F.3d at 1310 (describing how witness was questioned before jury via two-way videoconferencing); *see, e.g.*, FED. R. EVID. 804(b)(1) (describing former testimony exception to hearsay rule).

1. The Two-Way Video Testimony of Unavailable Witnesses Is a New Form of Testimony that Does Not Fall Squarely Under *Crawford* or *Craig*

The two-way video testimony of an unavailable witness does not fall neatly within the *Crawford* or *Craig* framework. First, the Court in *Crawford* assessed the constitutionality of testimony given prior to trial, which is fundamentally different from two-way video testimony which is given during trial and before the trier of fact. [133] Specifically, the issue in *Crawford* was the admissibility of a recorded statement that the defendant's wife gave prior to rather than during trial.[134] Throughout *Crawford*, the Court discussed various cases involving testimony given prior to trial.[135] For example, the Court described the evils of ex parte examinations, in which an officer examines a witness before trial.[136]

Moreover, the second prong of the *Crawford* standard itself reinforces the fact that the test was meant to apply to testimony given prior to trial and therefore does not apply to live video testimony.[137] The second prong states that the defendant must have had a prior opportunity to cross-examine the witness.[138] The fact that the test refers only to a prior opportunity to cross-examine the witness strongly suggests that the Court failed to consider the possibility of contemporaneous cross-examination, which is available through videoconferencing.[139]

Pretrial testimony is distinct from two-way video testimony, where a witness testifies live before the trier of fact and is subject to contemporaneous cross-examination.[140] Unlike the testimony at issue

[133] *See* Ohio v. Roberts, 448 U.S. 56, 65 (1980) (noting that prosecution may not substitute prior testimony for live testimony unless government first shows that witness is unavailable to appear at trial); *Yates*, 438 F.3d at 1314 n.4 (noting that *Crawford* applies only to testimony given prior to trial and therefore does not apply to two-way videoconferencing, which is presented at trial).

[134] Crawford v. Washington, 541 U.S. 36, 39-40 (2004) (recounting wife's testimony that victim did not have weapon in his hands when defendant shot him, indicating defendant did not act in self-defense).

[135] *See generally id.* (discussing trial of Sir Walter Raleigh where testimony was given prior to trial).

[136] *Id.* at 50.

[137] *See id.* at 68.

[138] *Id.*

[139] *See* Harmon, *supra* note 11, at 161 (noting that two-way videoconferencing allows for real time interaction between witness and defense counsel).

[140] *See* Ohio v. Roberts, 448 U.S. 56, 65 (1980) (noting that prosecution may not substitute prior testimony for live testimony unless government first shows that

in *Crawford*, videoconferencing allows the trier of fact to assess the witness's credibility by observing his or her demeanor during live cross-examination.[141] Given the significant difference between pretrial testimony and contemporaneous testimony before the trier of fact, it would be inappropriate to apply the *Crawford* test to live video testimony.[142]

Furthermore, the *Crawford* Court strongly suggested that its two-pronged test applies only to out-of-court statements because it used the term "out-of-court" numerous times throughout its analysis.[143] Two-way video testimony, however, is neither wholly "in" nor "out" of court in any traditional sense. The term "in court" has historically referred to situations in which the witness physically appears in court.[144] The term "out of court" has traditionally referred to situations in which the defendant testifies while physically out of the courtroom and not before the trier of fact.[145] In contrast, with two-way video testimony, the witness testifies while physically outside of the courtroom but before the trier of fact during trial.[146] Those in the courtroom can watch the live cross-examination of the witness and assess the witness's credibility.[147] This "quasi in-court" testimony made possible by new technology is a form of testimony that the Supreme Court has never addressed.

Similarly, the *Craig* framework is inapplicable to assessing the admissibility of the two-way video testimony of unavailable witnesses.[148] First, *Craig* involved one-way rather than two-way video testimony.[149]

witness is unavailable to appear at trial).

[141] *See* Harmon, *supra* note 11, at 158.

[142] *See Roberts*, 448 U.S. at 65 (noting that prosecution may not substitute prior testimony for live testimony unless government first shows that witness is unavailable to appear at trial); *see also* Maryland v. Craig, 497 U.S. 836, 849 (1990) (noting that live testimony before trier of fact is ideal of Confrontation Clause).

[143] *See Crawford*, 541 U.S. at 51 (stating "[t]he constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement").

[144] *See* United States v. Inadi, 475 U.S. 387, 395 (1986) (referring to declarant testifying from stand as in-court testimony); United States v. Yates, 438 F.3d 1307, 1329-30 (11th Cir. 2006) (Tjoflat, J., dissenting) (using term "in court" to refer to witness who physically appears in court).

[145] *See Crawford*, 541 U.S. at 59 n.9 (quoting *Inadi*, 475 U.S. at 395) (noting that "reliability of some out-of-court statements 'cannot be replicated, even if the declarant testifies to the same matters in court'").

[146] *See Yates*, 438 F.3d at 1310.

[147] *See id.*

[148] United States v. Gigante, 166 F.3d 75, 80-81 (2d Cir. 1999).

[149] *Id.*

In one-way video testimony, the witness, the prosecutor, and the defense counsel withdraw to another room where they cannot see or hear into the courtroom.[150] Those in the courtroom, however, can see and hear into the witness room.[151] Thus, the defendant can see and hear the witness but the witness cannot see or hear the defendant.[152] In contrast, with two-way video testimony, the witness and the defendant can see and hear each other.[153] This is more in line with traditional notions of confrontation because it comes closer to the experience of testifying in person, in the courtroom. Relative to two-way video testimony, the one-way testimony that the Court permitted in *Craig* provided for a much more limited confrontation between the witness and the defendant.[154] Thus, the Court should not hold the more complete confrontation that occurs with two-way videoconferencing to the same standard as the confrontation permitted in *Craig*.[155]

Second, the *Craig* framework addresses situations in which the witness is available to testify in court and therefore does not apply to the two-way video testimony of unavailable witnesses.[156] The child witnesses in *Craig* were available because the court could have compelled them to testify.[157] As Justice Antonin Scalia pointed out in *Crawford* and in his dissent in *Craig*, unavailability has historically been a critical issue with regard to the Confrontation Clause.[158] Justice Scalia stated, "[C]onditions for the admission of hearsay have long included a 'general requirement of unavailability' of the declarant."[159] Courts have generally been much more lenient in admitting the testimony of a witness who does not physically confront the defendant if that witness is unavailable to appear at trial.[160] The live video testimony of unavailable witnesses should not have to satisfy the high standard of the *Craig* test, which was crafted in

[150] *See* Maryland v. Craig, 497 U.S. 836, 836 (1990).

[151] *See id.*

[152] *See id.*

[153] Harmon, *supra* note 11, at 161.

[154] *See Gigante*, 166 F.3d at 80-81.

[155] *See id.*

[156] United States v. Yates, 438 F.3d 1307, 1326 (11th Cir. 2006) (Tjoflat, J., dissenting).

[157] *Id.*

[158] Crawford v. Washington, 541 U.S. 36, 53-54 (2004); Maryland v. Craig, 497 U.S. 836, 865-66 (1990) (Scalia, J., dissenting).

[159] *Craig*, 497 U.S. at 865 (Scalia, J., dissenting) (citing Idaho v. Wright, 497 U.S. 805, 815 (1990)).

[160] *See id.*

response to a situation involving available witnesses.[161] Thus, the two-way video testimony of unavailable witnesses does not fall within the *Craig* framework.[162]

2. The Two-Way Video Testimony of Unavailable Witnesses Is Constitutional Because It Is Superior to Testimony that Would Satisfy *Crawford*

The two-way video testimony of an unavailable witness is constitutional because it is superior to testimony that would satisfy the recent Supreme Court *Crawford* test.[163] Two-way video testimony provides for superior cross-examination, which the *Crawford* Court suggested is the primary concern of the Confrontation Clause.[164] The Court pointed out that the ultimate purpose of the Clause is to ensure the reliability of testimony.[165] The Court explained, however, that the Clause commands that reliability be tested in a constitutionally prescribed manner, "by testing in the crucible of cross-examination."[166] The Court also focused heavily on the historical importance of adequate cross-examination throughout its opinion.[167] Thus, the majority indicated that the defendant's right to fully and adequately cross-examine accusatory witnesses is at the heart of the Clause.[168] Testimony via two-way videoconferencing more fully protects the right to cross-examination than testimony that would meet the *Crawford* standard. This is because unlike testimony that would satisfy the *Crawford* test, two-way video testimony allows for contemporaneous cross-examination before the trier of fact.[169]

For example, former testimony, a long-standing exception to the hearsay rule, would satisfy the *Crawford* test, yet it is constitutionally

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[161] *See Yates*, 438 F.3d at 1326 (Tjoflat, J., dissenting).

[162] United States v. Gigante, 166 F.3d 75, 81 (2d Cir. 1999).

[163] *See generally Crawford*, 541 U.S. 36 (2004) (setting forth two-pronged test applicable to out-of-court testimonial statements).

[164] *See id.* at 61-62; Matthew J. Tokson, *Virtual Confrontation: Is Videoconference Testimony by an Unavailable Witness Constitutional?*, 74 U. CHI. L. REV. 1581, 1587 (2007) (noting that *Crawford* Court suggests that cross-examination is main concern of Confrontation Clause).

[165] *Crawford*, 541 U.S. at 61.

[166] *Id.*

[167] *See id.* at 43-51.

[168] *See id.* at 61-62.

[169] *See* United States v. Yates, 438 F.3d 1307, 1314 n.4 (11th Cir. 2006); Harmon, *supra* note 11, at 161.

inferior to testimony via two-way videoconferencing.[170] Under the former testimony exception, a witness's testimony from a former proceeding or deposition is admissible if the defendant had an opportunity and similar motive to cross-examine the witness during the prior proceeding or deposition.[171] The witness must also be unavailable.[172] Courts often admit such evidence in the form of a written transcript from a former proceeding.[173] Such testimony satisfies the *Crawford* test because the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness at the former proceeding or deposition.[174]

Although it satisfies the *Crawford* test, former testimony is inferior to testimony via live two-way videoconferencing because it does not allow for contemporaneous cross-examination of the witness.[175] Instead, the trier of fact is generally presented with the written transcript from a prior proceeding.[176] Thus, the current trier of fact has no opportunity to view the witness's demeanor during live cross-examination.[177] This is a major limitation on the cross-examination.[178]

Courts have historically held that live cross-examination before the trier of fact is critical because demeanor evidence is vital to the truth-seeking process.[179] According to the *Crawford* Court: "Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of fact in question . . . [w]ritten evidence . . .

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[170] *See* FED. R. EVID. 804(b)(1); *Crawford*, 541 U.S. at 57 (citing Mattox v. United States, 156 U.S. 237 (1895)).

[171] FED. R. EVID. 804(b)(1).

[172] *Id.*

[173] *See, e.g.,* Mancusi v. Stubbs, 408 U.S. 204, 213-16 (1972) (holding that reading transcript of former trial to jury was permissible); Mattox v. United States, 156 U.S. 237, 244 (1895) (admitting reporter's notes of testimony from former trial of two witnesses who had died).

[174] *See Crawford*, 541 U.S. at 68.

[175] *See, e.g.*, *Mattox*, 156 U.S. at 238 (indicating that reporter's notes from former trial were admitted into evidence).

[176] *See, e.g.*, *Mancusi*, 408 U.S. at 213-16; *Mattox*, 156 U.S. at 244.

[177] *See supra* note 175.

[178] *See Crawford*, 541 U.S. at 49 (noting importance of cross-examination before trier of fact).

[179] *See* United States v. Milian-Rodriguez, 828 F.2d 679, 686 (11th Cir. 1987) (noting that courts do not favor using Rule 15 depositions in criminal cases because trier of fact does not have chance to observe witness's demeanor); *see also* California v. Green, 399 U.S. 149, 157-58 (1970); FED. R. EVID. art. VIII advisory committee's note (noting that general rule against admitting out-of-court statements is based on importance of demeanor evidence); Rand, *supra* note 15, at 1-3 (noting that courts consider demeanor evidence essential to jury's assessment of witness's credibility).

[is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth."[180] Thus, the *Crawford* Court acknowledged the importance of cross-examination before the trier of fact.[181] Therefore, former testimony given prior to trial is constitutionally inferior to testimony given live at trial via two-way videoconferencing.

Furthermore, the *Craig* Court indicated that cross-examination before the trier of fact is at the heart of the Clause.[182] The Court stated: "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."[183] Given that testimony via live two-way videoconferencing allows for contemporaneous cross-examination before the trier of fact, it better comports with the central purpose of the Confrontation Clause than former testimony. Because former testimony satisfies the Confrontation Clause, two-way video testimony should satisfy the Confrontation Clause as well.

Some may argue that despite the fact that two-way video testimony allows for contemporaneous cross-examination before the trier of fact, it is inferior to former testimony because with former testimony, the defendant had a prior opportunity to stand physically face to face with his accuser.[184] They may argue that the *Crawford* Court assumed that the requirement of cross-examination would ensure the defendant had a chance to confront the witness in person.[185] This is a broad assumption, however, because the *Crawford* Court never stated that the prior opportunity for cross-examination had to involve a physical, face-to-face confrontation.[186]

Similarly, some may argue that something deep in human nature makes a prior physical, in-person confrontation superior to a contemporaneous confrontation via video monitor.[187] They might say

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[180] *Crawford*, 541 U.S. at 49 (citation omitted).

[181] *See id.* at 49-50.

[182] *See* Maryland v. Craig, 497 U.S. 836, 845 (1990).

[183] *Id.*

[184] *See* United States v. Yates, 438 F.3d 1307, 1326-27 (11th Cir. 2006) (Tjoflat, J., dissenting) (arguing that physical presence is not required under *Crawford*).

[185] *See id.* (anticipating argument that cross-examination is inadequate because defendant does not have opportunity to confront witness in person).

[186] *See id.*

[187] *See Craig*, 497 U.S. at 846-47 (noting that it may be more difficult for witnesses to lie when face to face with defendant and that something in human nature makes face-to-face confrontation important).

that because of this intangible factor, it is preferable to admit former testimony if the defendant had a prior opportunity to come face to face with the defendant.[188] Perhaps, as the *Craig* Court suggested, witnesses are less likely to lie if they are physically in the courtroom.[189] Maybe the trier of fact would have a substantially different perception of the witness over video monitor. This issue goes to the heart of the controversy surrounding two-way video testimony. The primary difference between traditional, in-court testimony and two-way video testimony is that for the latter, the witness is not physically in the courtroom but testifies in two-dimensional form.[190]

Indeed, courts have long held that physical, in-person confrontation is the ideal of the Confrontation Clause.[191] In both *Crawford* and *Craig*, however, the Court set forth standards that allows for the admission of testimony that falls short of this ideal.[192] Specifically, in *Craig*, the Court held that testimony via one-way videoconferencing provides for a full and adequate cross-examination even if there is no in-person confrontation.[193] If cross-examination via one-way videoconferencing is adequate, then cross-examination via two-way video must be all the more so. Thus, the Court has shown a willingness to forgo the ideal of physical, in-person confrontation under certain circumstances.[194]

Of course, the videoconferencing technology must be adequate for two-dimensional testimony to be acceptable.[195] The trier of fact must be able to observe properly the live cross-examination of the accusatory witness at trial. The video equipment must allow for clear observation and communication. In other words, the witness must be able to see and hear into the courtroom and participants in the courtroom must be able to see and hear the witness clearly. Judges should bear the responsibility of determining whether the technology is adequate. The Supreme Court should put forth a uniform standard for judges to follow when assessing adequacy. As new technological

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[188] *See id.*

[189] *Id.* at 845-46 (noting that "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back'").

[190] *See* Harmon, *supra* note 11, at 157-58.

[191] *See Craig*, 497 U.S. at 849.

[192] *See* Crawford v. Washington, 541 U.S. 36, 68 (2004); *Craig*, 497 U.S. at 860.

[193] *Craig*, 497 U.S. at 857.

[194] *See id.* at 849.

[195] *Cf.* United States v. Yates, 438 F.3d 1307, 1323 (11th Cir. 2006) (Tjoflat, J., dissenting) (noting that quality of videoconferencing technology must be considered).

innovations such as high definition television continue to improve, the adequacy of the two-dimensional picture will become less of an issue.

B. Even if Crawford *Applies to the Two-Way Video Testimony of Unavailable Witnesses, Such Testimony Satisfies Both Prongs of the* Crawford *Test*

Even if the Court were to find that *Crawford* applies to the two-way video testimony of unavailable witnesses, such testimony would nevertheless satisfy the two-pronged *Crawford* test.[196] As this Comment addresses only the issue of an unavailable witness testifying via two-way videoconferencing, the first prong of the *Crawford* test, unavailability, is met.[197] Two-way video testimony would also satisfy the second prong of the *Crawford* test, which requires that the defendant have a prior opportunity to cross-examine the witness.[198] With two-way video testimony, the defendant's attorney can cross-examine the witness during the actual trial via television monitor.[199] Live cross-examination at trial surpasses the minimum requirement of the opportunity to cross-examine prior to trial because it occurs live before the trier of fact.[200] Live cross-examination is preferable to testimony given prior to trial because it allows the trier of fact to observe the witness's demeanor, which helps the trier of fact to assess the witness's credibility and ultimately aids the truth-seeking process.[201]

As discussed above, some may argue that a prior opportunity to cross-examine a witness is superior because it allows the defendant the opportunity to confront the witness in person.[202] However, the

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[196] *See id.* at 1326-27 (noting that two-way video testimony of unavailable witness satisfies two-pronged *Crawford* test).

[197] *See Crawford*, 541 U.S. at 68 (noting unavailability requirement).

[198] *Yates*, 438 F.3d at 1323.

[199] *See Yates*, 438 F.3d at 1310.

[200] *See* Crawford v. Washington, 541 U.S. 36, 59 (2004); *see also* Maryland v. Craig, 497 U.S. 836, 849 (1990) (noting that ideal of Confrontation Clause is to have witnesses testifying live at trial). Testifying live at trial allows the jury to observe the witness's demeanor. *Craig*, 497 U.S. at 845. This is important in helping the jury to determine the witness's credibility and thus to find the truth. *Id.*

[201] *See* United States v. Milian-Rodriguez, 828 F.2d 679, 686 (11th Cir. 1987); *see also* FED. R. CRIM. P. 15; FED. R. EVID. art. VIII advisory committee's note (noting that general rule against admitting out-of-court statements is based on importance of demeanor evidence); Rand, *supra* note 15, at 2-3 (noting that courts consider demeanor evidence essential to jury's assessment of witness's credibility).

[202] *See Yates*, 438 F.3d at 1326-27 (Tjoflat, J., dissenting); *see also supra* Part III.A.2.

Crawford Court did not specify that the prior cross-examination had to be in person.[203] Moreover, the *Craig* Court found that cross-examination via one-way videoconferencing was adequate.[204] Thus, two-way videoconferencing, which provides the opportunity for a more complete cross-examination must be adequate as well. In short, two-way video testimony would satisfy both prongs of the *Crawford* test and should therefore be admissible at trial.[205]

C. Even if Craig *Applies to the Two-Way Video Testimony of Unavailable Witnesses, Such Testimony Satisfies Both Prongs of the* Craig *Test*

Even if the Court were to find that *Craig* applies, the two-way video testimony of unavailable witnesses would satisfy both prongs of the *Craig* test.[206] Such testimony would satisfy the first prong because it is necessary to further the important public policy of providing the fact-finder with truthful testimony.[207] The testimony is necessary because there are no viable alternatives to further this goal.[208] Such testimony also satisfies the second prong because the testimony bears adequate indicia of reliability.[209] Two-way video testimony is reliable because witnesses testify under oath and are subject to cross-examination before the trier of fact.[210] Therefore, the two-way video testimony of unavailable witnesses does not violate the Confrontation Clause.[211]

1. Two-Way Video Testimony Is Necessary to Further an Important Public Policy Because Rule 15 Depositions Are Inferior

Two-way video testimony satisfies the first prong of the *Craig* test because it is necessary to further an important public policy.[212] In *Yates*, the Eleventh Circuit found that providing the judge or jury with essential evidence is an important public policy.[213] The *Yates* court

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[203] *Yates*, 438 F.3d at 1326-27.

[204] *Craig*, 497 U.S. at 860.

[205] *Yates*, 438 F.3d at 1326-27 (Tjoflat, J., dissenting).

[206] *Id.* at 1320-23.

[207] *Id.* at 1320.

[208] *See id.* at 1324.

[209] *See Craig*, 497 U.S. at 851 (noting that even one-way video testimony bears adequate indicia of reliability including oath, cross-examination before trier of fact, and demeanor evidence).

[210] *See id.*

[211] *Yates*, 438 F.3d at 1320 (Tjoflat, J., dissenting).

[212] *Id.*

[213] *Id.* at 1316 (majority opinion).

held that two-way video testimony is not necessary to further this policy because Rule 15 depositions provide a superior alternative.[214] Contrary to the Eleventh Circuit's reasoning, however, Rule 15 depositions are inferior to two-way video testimony for several reasons.[215]

First, in a deposition, the judge or jury cannot observe the witness testifying live.[216] In contrast, with two-way video testimony, the judge or jury observes the testimony live over video monitor.[217] The trier of fact can thereby assess the demeanor of the witness during direct and cross-examination.[218] This demeanor evidence helps the trier of fact evaluate the witness's credibility, aiding the truth-seeking process.[219]

Second, defendants are often unable to attend Rule 15 depositions because the government lacks authority to keep detainees in custody overseas.[220] In *Salim*, for example, the criminal defendant could not attend the deposition of an adverse witness conducted in France.[221]

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[214] *Id.*

[215] *See id.* at 1334 (Tjoflat, J., dissenting).

[216] *See id.*; *see also* California v. Green, 399 U.S. 149, 158 (1970); United States v. Milian-Rodriguez, 828 F.2d 679, 686 (11th Cir. 1987) (noting that courts do not favor using Rule 15 depositions in criminal cases because trier of fact does not have chance to observe witness's demeanor); FED. R. EVID. art. VIII advisory committee's note (noting that general rule against admitting out-of-court statements is based on importance of demeanor evidence). A prosecutor may videotape a deposition under Rule 15 and present the videotape to the jury later at trial. Gertner, *supra* note 14, at 776 (noting that Rule 15 permits use of videotaped depositions in federal criminal trials). However, prosecutors are not required to videotape Rule 15 depositions and often introduce only a written deposition at trial. *See, e.g.*, United States v. Salim, 855 F.2d 944, 947 (2d Cir. 1988) (noting that French court denied government's request to record deposition on video or audio tape because such recording was contrary to French law).

[217] Harmon, *supra* note 11, at 161.

[218] *See Yates*, 438 F.3d at 1334 (Tjoflat, J., dissenting); Harmon, *supra* note 11, at 161.

[219] *See* Maryland v. Craig, 497 U.S. 836, 845 (1990) (quoting Mattox v. United States, 156 U.S. 237, 242-43 (1895)); *Yates*, 438 F.3d at 1334.

[220] *See* United States v. McKeeve, 131 F.3d 1, 7 (1st Cir. 1997) (noting that defendant was unable to be present at deposition); United States v. Mueller, 74 F.3d 1152, 1156-57 (11th Cir. 1996) (same); United States v. Walker, 1 F.3d 423, 428 (6th Cir. 1993) (finding that defendant refused to attend deposition in Japan because defendant feared Japanese government would prosecute him); United States v. Kelly, 892 F.2d 255, 260 (3d Cir. 1989) (noting that Belgian authorities refused to allow incarcerated defendant to attend deposition in Belgium despite request); *Salim*, 855 F.2d at 947 (noting that defendant was unable to attend Rule 15 deposition in France because U.S. Marshals lacked authority to keep him in custody in France).

[221] *Salim*, 855 F.2d at 947. The jury convicted Mohamed Salim of narcotics conspiracy and offering to bribe a federal agent. *Id.* at 946. The authorities arrested

Despite the Eleventh Circuit's claim in *Yates* that *Salim* is a rare, exceptional case, there is evidence to the contrary.[222] In *United States v. McKeeve*, for example, the First Circuit admitted a deposition taken abroad where the defendant was not present.[223] The Eleventh and Third Circuits did the same in *United States v. Mueller* and *United States v. Kelly*, respectively.[224] Thus, with Rule 15 depositions, the defendant may have no opportunity to confront the witness at all.[225] Two-way videoconferencing is superior in that it guarantees the defendant the opportunity to confront the witness via television monitor.

Third, Rule 15 depositions are inferior to two-way video testimony because, even if the defendant is able to attend, foreign countries often follow different procedures that inhibit adequate confrontation and cross-examination.[226] For instance, in *Salim*, the defendant's attorney could not cross-examine the prosecution's witness because French law only permits judges to question witnesses.[227] The *Crawford* Court emphasized that traditional cross-examination is essential to the U.S. criminal justice system.[228] With two-way video testimony, the defense can fully cross-examine adverse witnesses before the trier of fact via television monitor.[229] Therefore, because there may be no adequate

Bebe Soraia Rouhani, Salim's accomplice, in a Paris airport and discovered that she was carrying heroin intended for Salim. *Id.* at 947. Shortly after officers apprehended Salim, he offered a customs agent $20,000 to allow him to escape. *Id.* The court found that the prosecution could depose Rouhani in France because French police were holding her in custody in France. *Id.*

[222] *See Yates*, 438 F.3d at 1327 (Tjoflat, J., dissenting).

[223] *McKeeve*, 131 F.3d at 5-10.

[224] *Mueller*, 74 F.3d at 1156-57. The *Mueller* court held that the deposition of a witness living in England was admissible at trial even though the defendant could not attend the deposition. *Id.* The court reasoned that defense counsel was present during the deposition and that the defendant was able to listen via telephone. *Id.*; *see also Kelly*, 892 F.2d at 260-63 (holding that admission into evidence of videotaped depositions taken in Belgium in defendant's absence did not violate defendant's right of confrontation).

[225] *See, e.g.*, *McKeeve*, 131 F.3d at 8 (noting that defendant was unable to attend deposition); *Mueller*, 74 F.3d at 1156-57 (same); *Walker*, 1 F.3d at 428 (same); *Kelly*, 892 F.2d at 261 (same); *Salim*, 855 F.2d at 947 (same).

[226] *See, e.g.*, *Salim*, 855 F.2d at 952 (noting that in France courts may not ask accused to take oath); *see* Carey, *supra* note 48, at 30 (noting that foreign courts often do not follow U.S. procedures during Rule 15 depositions).

[227] *Salim*, 855 F.2d at 947.

[228] *See* Crawford v. Washington, 541 U.S. 36, 48-50 (2004) (emphasizing importance of traditional cross-examination).

[229] *See* Maryland v. Craig, 497 U.S. 836, 851 (1990) (finding that cross-examination via one-way videoconferencing is sufficient cross-examination). It is true that it would be possible for a foreign country to impose its own procedures for

alternatives, two-way video testimony is necessary to further the important public policy of admitting critical evidence in criminal cases.[230]

2. Two-Way Video Testimony Is Reliable Because the Witness Testifies Under Oath, Before the Trier of Fact, and Subject to Cross-Examination

Two-way video testimony also satisfies the second prong of the *Craig* test, which requires reliable testimony.[231] In *Craig*, the Court held that testimony is reliable if the witness testifies under oath, before the trier of fact, and subject to cross-examination.[232] The Court found that one-way video testimony satisfied each of these reliability factors.[233] Likewise, two-way video testimony also satisfies these requirements.[234] The witness testifies under oath, the judge or jury observes live testimony, and the witness is subject to cross-examination.[235]

Some might argue, however, that the oath of foreign witnesses abroad may not be meaningful.[236] They might assert that the witness is not subject to a plausible threat of prosecution for perjury because the witness is outside the United States.[237] But this argument applies equally to a foreign witness's oath during a Rule 15 deposition, given

testimony via videoconferencing given on foreign soil. It is more likely, however, that U.S. procedures would be followed if a U.S. judge were observing and participating via videoconferencing from the United States.

[230] *See* United States v. Yates, 438 F.3d 1307, 1320-21 (11th Cir. 2006).

[231] *See Craig*, 497 U.S. at 851 (holding that one-way video testimony bears indicia of reliability).

[232] *Id.*

[233] *Id.* at 857; *see also* Harmon, *supra* note 11, at 177 (noting that because witness in *Craig* testified under oath, subject to cross-examination, and before trier of fact, one-way video testimony was reliable).

[234] *See* United States v. Gigante, 166 F.3d 75, 80 (2d Cir. 1999) (noting that witness swore oath via videoconferencing, testified before trier of fact, and was subject to cross-examination).

[235] *See id.* at 80 (finding that two-way video testimony is more protective of right of confrontation than one-way video).

[236] *See* United States v. Yates, 438 F.3d 1307, 1318 (11th Cir. 2006) (noting that defendants argued that oath of Australian witnesses was not meaningful). The defendants in *Yates* argued that the oath was invalid because federal law did not authorize someone to administer an oath outside of the United States. *Id.* The defendants also argued that the witness's oath did not subject the witnesses to a plausible threat of prosecution for perjury. *Id.* The *Yates* court did not address this claim because the court found it moot. *Id.*

[237] *See id.*

that the witness is also testifying from abroad.[238] Rule 15 depositions are nevertheless a well-established practice.[239] In addition, there is generally no prohibition on the testimony of witnesses who are likely to leave the United States following trial. A witness who testifies in the courtroom may similarly not fear perjuring himself if he knows that he is leaving the country soon. Thus, the danger that a witness will perjure himself and escape prosecution by being in a foreign country is always present and is not unique to testimony from abroad. Moreover, the opposing attorney is free to point this issue out to the jury and ask it to give weight to this factor when assessing the witness's credibility. Thus, the possibility that the witness might not take the oath seriously should not preclude testimony from abroad via videoconferencing.[240]

In short, two-way video testimony satisfies the second prong of the *Craig* test because it is sufficiently reliable.[241] Two-way video testimony allows witnesses to testify under oath, before the trier of fact, and subject to cross-examination.[242] The two-way video testimony of unavailable witnesses also satisfies the first prong of the *Craig* test.[243] Introducing evidence in court is an important public policy and there may be no adequate alternatives if the witness is unavailable to testify at trial.[244] Thus, two-way video testimony of unavailable witnesses satisfies both prongs of the *Craig* test and therefore does not violate the Confrontation Clause.

CONCLUSION

Although contemporaneous, in-person testimony before the trier of fact is the ideal of the Confrontation Clause, courts have consistently made exceptions to this general requirement.[245] The two-way video testimony of unavailable witnesses comes closer to reaching this ideal

[238] *See, e.g.*, United States v. Salim, 855 F.2d 944, 946 (2d Cir. 1988) (noting that witness was deposed via Rule 15 deposition while abroad).

[239] *See, e.g.*, Christian v. Rhode, 41 F.3d 461, 465 (9th Cir. 1994) (noting that witness was deposed via Rule 15 deposition); United States v. Kelly, 892 F.2d 255, 260 (3d Cir. 1989) (same); *Salim*, 855 F.2d at 946 (same).

[240] *See Yates*, 438 F.3d at 1327-36 (implying that oath issue should not preclude two-way video testimony from abroad).

[241] United States v. Gigante, 166 F.3d 75, 80-81 (2d Cir. 1999).

[242] *Id.* at 80.

[243] *Yates*, 438 F.3d at 1332-35.

[244] *See id.* at 1333.

[245] *See* Maryland v. Craig, 497 U.S. 836, 849 (1990) (citing Ohio v. Roberts, 448 U.S. 56, 63 (1980)); Mattox v. United States, 156 U.S. 237, 243 (1895).

than testimony that would be held constitutional under *Crawford*. Two-way video testimony provides for contemporaneous cross-examination before the trier of fact, which is not available in certain forms of testimony that would satisfy the *Crawford* standard.[246] Moreover, although two-way video testimony does not fit within an existing Supreme Court framework, it would satisfy both prongs of the *Crawford* or *Craig* standard if applied.[247] In sum, the two-way video testimony of unavailable witnesses is constitutional and may provide judges and juries with critical evidence in important cases.[248] Given the growing need for this new form of testimony in light of the increasing transnational nature of crime, the Supreme Court should embrace it as the next best thing to live, in-person testimony.

[246] *See Yates*, 438 F.3d at 1310 (describing how witness was questioned before jury via two-way videoconferencing); *see, e.g.*, FED. R. EVID. 804(b)(1) (describing former testimony exception to hearsay rule).

[247] *See Yates*, 438 F.3d at 1320-24, 1326-27 (Tjoflat, J., dissenting).

[248] *See id.*