COMMENTS

Telephonic Testimony: Talking with the Experts

INTRODUCTION

Suppose that Dave, the owner of Used Cars for Less, is accused of receiving stolen cars.[1] The San Francisco police find fingerprints on the cars and submit them to the nearest government crime laboratory for analysis.[2] By the time the case comes to trial, the laboratory expert who analyzed the fingerprints has moved to Seattle, a two-hour plane ride away.[3] The expert will testify that the fingerprints on the cars match Dave's fingerprints.[4] Dave does not deny that he touched the cars, but

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[1] This Comment focuses on criminal trials because criminal defendants receive greater protection than do civil defendants. *See* U.S. CONST. amend. VI (granting rights specifically to criminally accused).

[2] This Comment focuses on the admissibility of forensic testimony by telephone. *See infra* text accompanying notes 17-22. Forensic evidence is a product of forensic science. Forensic science refers to "the application of the natural sciences to matters of the law." Henry C. Lee, *Forensic Science and the Law*, 25 CONN. L. REV. 1117, 1117 (1993). Besides the traditional sciences of physics, chemistry, biology and mathematics, forensic science draws on other areas including medicine, odontology, anthropology, psychiatry, toxicology, radiology, entomology, climatology, and engineering. *Id.* Forensic evidence includes fingerprints, blood, semen, drugs, hair, and fibers. Joseph L. Peterson, *Use of Forensic Evidence by the Police and Courts* 2 (National Institute of Justice, Research in Brief NCJ 107206, 1987). Forensic evidence establishes crime elements, such as illicit drugs, implicates or exonerates suspects, and helps reconstruct the crime or crime scene. *Id.*

[3] *Cf.* Topping v. People, 793 P.2d 1168, 1169 (Colo. 1990) (involving forensic expert witness who moved from Colorado to Kentucky).

[4] 12 Cf. *id.* at 1170 (confirming crime element with forensic expert testimony).

claims not to have known that they were stolen.[5] The prosecution wants to save the cost of bringing the laboratory expert down from Seattle to give undisputed testimony.[6] Thus, the prosecution requests that the court permit the expert to testify by telephone.[7] The defense objects, arguing that admitting the testimony by telephone will violate the defendant's Sixth Amendment right to confront an adverse witness.[8]

Under current law, the court does not have a clear standard to guide its ruling on the objection.[9] Two state supreme courts have addressed the question of whether telephonic testimony violated a defendant's confrontation right.[10] The Iowa Supreme Court held that it did not,[11] whereas, the Colorado Supreme Court held that it did.[12]

In-court appearances are the predominant procedure for presenting witness testimony.[13] At times, however, in-court testi-

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[5] *Cf. id.* at 1172 n.11 (involving defendant who denied satisfying one crime element).

[6] *See infra* text accompanying notes 46-57 (explaining why prosecutor would request telephonic testimony to save money); *cf.* State v. Aldape 307 N.W.2d 32, 43 (Iowa 1981) (noting that prosecutor wanted to save expenses of bringing witness to court).

[7] *Cf. Topping*, 793 P.2d at 1169 (involving prosecution request that forensic expert witness testify by telephone from another state).

[8] *See* U.S. CONST. amend. VI. The Sixth Amendment states that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . [and] to be confronted with the witnesses against him . . . ." *Id.* In addition to confrontation, the Sixth Amendment assures criminal defendants the right to a speedy and public trial. *Id.* Telephonic testimony does not unduly interfere with a defendant's right to a public trial just because the public may not be able to hear the testimony. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 379 (1979) (holding that right to public trial belongs to accused, not to public). Further, a judge may admit telephonic testimony under the same discretion it uses to close the courtroom to the public. Town of Geneva v. Tills, 384 N.W.2d 701, 703 n.3 (Wis. 1986).

[9] *E.g.*, Coy v. Iowa, 487 U.S. 1012, 1021 (1988). In *Coy*, the Supreme Court did not clearly define exceptions to the Confrontation Clause. *See id.* (suggesting only that exceptions to Confrontation Clause may exist). The Confrontation Clause assures a criminal defendant the right to meet adverse witnesses face-to-face. *Id.* at 1016. Important public interests may, however, outweigh this right. *Id.* at 1020. The Supreme Court has not decided whether telephonic testimony violates the Confrontation Clause. Eric Croft, Note, *Telephonic Testimony in Criminal and Civil Trials*, 14 HASTINGS COMM. & ENT. L.J. 107, 112 (1991).

[10] *Compare Topping*, 793 P.2d at 1172 (holding that admission of telephonic testimony violated confrontation right in sexual assault trial) *with* State v. Aldape, 307 N.W.2d 32, 43 (Iowa 1981) (admitting telephonic testimony in murder trial suppression hearing).

[11] *Aldape*, 307 N.W.2d at 43.

[12] *Topping*, 793 P.2d at 1172.

[13] Michael J. Weber, *Permissibility of Testimony by Telephone in State Trial*, 85 A.L.R.4th

mony is impractical or even impossible.[14] Some courts, taking advantage of technologies unknown to the founding fathers, use alternatives to in-court appearances when appropriate.[15] The telephone is one readily available and inexpensive technology that some courts have already used to receive testimony.[16]

This Comment examines the admissibility of telephonic testimony from expert witnesses about forensic evidence.[17] Forensic evidence plays a crucial role in the criminal justice system,[18] and its use is growing.[19] Limited resources in criminal justice systems nationwide already cause delays in processing forensic evidence.[20] When the prosecution presents forensic expert testi-

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476, 481 (1991). In-court testimony helps juries evaluate witness credibility by providing an opportunity to observe demeanor. *Id.* In-court testimony also ensures that the witness does not refer to any outside sources such as documents or other people. *Id.*

[14] *See* Gregg v. Gregg, 776 P.2d 1041, 1043 (Alaska 1989) (administering oath and receiving testimony by telephone during divorce trial because of harsh weather and great travel distances); Ferrante v. Ferrante, 485 N.Y.S.2d 960, 962 (N.Y. Sup. Ct. 1985) (admitting telephonic testimony of 92-year-old plaintiff confined to nursing home).

[15] *See* Weber, *supra* note 13, at 480 (including closed-circuit television, audio recording, and videotape among matters related to telephonic testimony); *see also* Mark Curriden, *Courtroom of the Future Is Here*, A.B.A. J., Jan. 1995, at 22, 23 (describing experimental courtroom for testing advanced technologies that will be adding long-distance video connections to receive testimony).

[16] *See* ALASKA R. CRIM. P. 38.1 (defining court procedures for admitting telephonic testimony in criminal cases); *Gregg*, 776 P.2d at 1044 (admitting telephonic testimony in divorce proceeding despite objection); *Ferrante*, 485 N.Y.S.2d at 962 (admitting telephonic testimony in accounting action); Russell G. Donaldson, *Propriety of Telephone Testimony or Hearings in Prison Proceedings*, 9 A.L.R.5th 451 (1993) (analyzing cases discussing whether and when prison officials can review disciplinary or prisoners' rights issues by telephone); Russell G. Donaldson, *Propriety of Telephone Testimony or Hearings in Unemployment Compensation Proceedings*, 90 A.L.R.4th 532 (1991) (reviewing cases in which administrative agencies used telephone in unemployment compensation proceedings); Russell G. Donaldson, *Propriety of Telephone Testimony or Hearings in Public Welfare Proceedings*, 88 A.L.R.4th 1094 (1991) (examining cases addressing whether telephonic testimony is admissible in public welfare and assistance proceedings).

Some jurisdictions address the admissibility of telephonic testimony in statutes. *See* Weber, *supra* note 13, at 482 (observing generally that some jurisdictions address telephonic testimony in statutes and rules); *infra* notes 144-45 (citing statutory sources of procedures for admitting telephonic testimony). Other jurisdictions rely on general rules of evidence. Weber, *supra* note 13, at 482-83.

[17] *See* Peterson, *supra* note 2, at 2 (explaining that forensic evidence is typically presented via laboratory analysis and interpretative expert testimony).

[18] *See* Lee, *supra* note 2, at 1125 (describing forensic science as crucial to "high quality of justice"); *infra* text accompanying notes 41-44 (discussing importance of forensic evidence and why prosecutors present it).

[19] *See infra* note 46 and accompanying text (noting increasing use of forensic evidence by prosecutors).

[20] *See* Tomas Guillen & Eric Nalder, *Crime Labs Overburdened Nationwide*, SEATTLE TIMES,

mony, the expense of bringing the expert into court depletes these limited resources.[21] If forensic experts can testify by telephone without violating a defendant's confrontation right, the saved resources can be applied to other criminal justice system needs.[22]

This Comment contends that, in appropriate cases, courts should admit forensic expert testimony by telephone.[23] Part I provides background information about the Sixth Amendment Confrontation Clause and the importance of forensic evidence. Part II reviews two conflicting state supreme court opinions that address the admissibility of telephonic testimony in light of the Confrontation Clause. Finally, Part III proposes an analysis for identifying cases in which forensic expert telephonic testimony comports with the Confrontation Clause. Part III also proposes procedures that a court should use, in those cases, to admit testimony by telephone.

I. BACKGROUND

The right to confront one's accuser may predate the earliest Anglo-American legal systems.[24] The primary goal of confronta-

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June 19, 1994, at A15 [hereinafter *Crime Labs*] (documenting nationwide crisis in government crime laboratories); *see also* Tomas Guillen & Eric Nalder, *Overwhelming Evidence — Crime Labs in Crisis — Staggering Backlog of Cases Hinders Investigations of Murder, Rape, Arson and Other Major Crimes*, SEATTLE TIMES, June 19, 1994, at A14 [hereinafter *Staggering Backlog*] (reporting that Washington state laboratories' budgets reduced by more than 11% in 1994); Gary Hendricks, *Southside Lawmakers Take Aim at Crime Issue*, ATLANTA CONST., Jan. 27, 1994, at I5 (reporting serious delays in analyzing prosecution evidence at understaffed state crime laboratory); Stephen Hudak, *Crime Lab Chief Finds Fund Raising a Tough Case*, PLAIN DEALER, Nov. 26, 1994, at 1B (reporting resignation of county crime lab director because funding was not increased in 17 years while caseload almost tripled); James Rainey & Jeff Brazil, *Case Sparks Post-Mortem on Troubled Crime Lab*, L.A. TIMES, Oct. 5, 1995, at A1 (describing Los Angeles Police Department crime laboratory as "understaffed, overburdened and financially hobbled").

[21] *See* W.J.C. v. County of Vilas, 369 N.W.2d 162, 164 (Wis. Ct. App. 1985) (taking judicial notice of significant costs of using experts, particularly those from other locales); State v. Aldape, 307 N.W.2d 32, 43 (Iowa 1981) (allowing telephonic testimony in order to save travel and accommodation expenses); Weber, *supra* note 13, at 481 (noting considerable travel expenses incurred by distant witnesses).

[22] *See infra* text accompanying notes 118-21 (discussing uses for resources within criminal justice system).

[23] *See infra* text accompanying notes 123-35 (proposing analysis that courts may use to evaluate admitting telephonic testimony).

[24] *See* Coy v. Iowa, 487 U.S. 1012, 1015 (1988) (suggesting that confrontation right may

tion is to discover the truth by giving a criminal defendant the opportunity to cross examine an adverse witness face-to-face.[25] Telephonic testimony precludes face-to-face confrontation.[26] Thus, a court may only admit forensic expert witness testimony by telephone if it satisfies an exception to the face-to-face confrontation right.

A. The Sixth Amendment Confrontation Clause

The Confrontation Clause of the Sixth Amendment guarantees criminal defendants the right to confront and cross examine adverse witnesses.[27] Cross examination of an adverse witness is crucial to the fact finder in evaluating the witness's credibility.[28] One hundred years ago, however, the Supreme Court rejected a literal interpretation of face-to-face confrontation that would render any statement made outside the defendant's presence inadmissible at trial.[29] The Court has repeatedly affirmed

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have existed under Roman law).

[25] *See* Maryland v. Craig, 497 U.S. 836, 857 (1990) (describing goal of Confrontation Clause as "truth-seeking"); *Coy*, 487 U.S. at 1017 (citing holding in Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) that Confrontation Clause gives criminal defendant right to physically face and cross examine adverse witnesses); People v. Williams, 333 N.E.2d 577, 581 (Mich. Ct. App. 1983) (quoting Mattox v. United States, 156 U.S. 237, 242-43 (1895) to explain that Confrontation Clause ensures that courts do not admit ex parte affidavits in lieu of personal questioning of witness).

[26] *See* Topping v. People, 793 P.2d 1168, 1172 (Colo. 1990) (rejecting telephonic testimony because defendant could not confront witness in person); State v. Aldape, 307 N.W.2d 32, 43 (Iowa 1981) (admitting telephonic testimony despite absence of face-to-face confrontation).

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

[28] *See* Delaware v. Fensterer, 474 U.S. 15, 22 (1985) (per curiam) (noting that cross examination exposes flaws in testimony); *see also* Davis v. Alaska, 415 U.S. 308, 316 (1974) (identifying cross examination as "principal means" for determining credibility); Douglas v. Alabama, 380 U.S. 415, 418 (1965) (depicting cross examination as "primary interest" of confrontation clause); State v. Aldape 307 N.W.2d 32, 43 (Iowa 1981) (characterizing cross examination as "principal interest" of Sixth Amendment); 5 JOHN H. WIGMORE, EVIDENCE §1395, at 123 (3d ed. 1940) (identifying cross examination as "main and essential purpose" of confrontation).

[29] Mattox v. United States, 156 U.S. 237, 242-43 (1895). At his first trial, Mattox was convicted of murder and he appealed. *See* Mattox v. United States, 146 U. S. 140, 141 (1892) (reporting Chief Justice's statement of facts in syllabus because it was omitted from opinion). The Supreme Court reversed the conviction and remanded the case. *Id.* at 153. At the second trial, the court admitted into evidence a transcribed copy of testimony given at the first trial by two witnesses who had since died. *Mattox*, 156 U.S. at 240. Mattox was

that face-to-face confrontation is not an absolute right.[30] In the 1988 case of *Coy v. Iowa*, the Court suggested a standard for exceptions to face-to-face confrontation.[31]

In *Coy*, a sexual assault case, the trial court approved the placement of a screen between the child witnesses and the defendant.[32] The defendant was convicted, and he appealed.[33] The Iowa Supreme Court rejected the defendant's argument that the screen violated his Sixth Amendment confrontation right.[34] The United States Supreme Court reversed, holding that the screen abridged the defendant's right to face-to-face confrontation.[35] The Court reasoned that a witness finds it more difficult to lie about a defendant "to his face" than "behind his back."[36] It held that the need to protect sexual abuse victims from emotional trauma does not outweigh the defendant's confrontation right.[37] The Court acknowledged, in dictum, that exceptions to the defendant's right to face-to-face confrontation may exist.[38] It cautioned that any exception must rise to the standard of "further[ing] an important public policy."[39] In light of *Coy*, the admissibility of forensic expert testimony by telephone, which precludes face-to-face

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convicted again. *See id.* at 237 (reporting Justice's statement of facts in syllabus because not included in opinion). Mattox appealed his second conviction in part because he claimed that by admitting the transcribed testimony, the court denied him his constitutional right to confront adverse witnesses. *Id.* at 240. The Supreme Court held that the Confrontation Clause did not prevent the trial court from admitting the testimony because despite the absence of confrontation, the evidence was competent. *Id.* at 244. The Court declared that, on occasion, public policy considerations may prevail over the rights of the accused. *Id.* at 242-43.

[30] *See* Maryland v. Craig, 497 U.S. 836, 848 (1990) (stating that absolute requirement of confrontation would nullify essentially all cases finding hearsay admissible).

[31] Coy v. Iowa, 487 U.S. 1012 (1988); *see infra* text accompanying note 39 (specifying Supreme Court's statement of standard for Confrontation Clause exceptions).

[32] *Coy*, 478 U.S. at 1014.

[33] *Id.* at 1015.

[34] *Id.*

[35] *Id.* at 1022.

[36] *Id.* at 1019.

[37] *Id.* at 1020-21.

[38] *See id.* at 1021 ("We leave for another day, however, the question whether any exceptions exist.").

[39] *Id.* The Court referred to *Coy* two years later to explain when it might allow exceptions to face-to-face confrontation. Maryland v. Craig, 497 U.S. 836, 850 (1990).

confrontation, depends on whether admitting telephonic testimony furthers an important public policy.[40]

B. Forensic Evidence

To evaluate whether telephonic forensic expert testimony can satisfy the *Coy* standard, one must consider why prosecutors use forensic evidence and how they present it. Sometimes prosecutors use forensic evidence simply because they think judges or juries expect it.[41] More importantly, prosecutors use forensic evidence to directly prove a crime element or to conclusively link the defendant to the crime.[42] Certain criminal cases require forensic evidence.[43] Furthermore, the use of forensic evidence affects charging decisions, plea negotiations, convictions, and sentences.[44] The Supreme Court fully supports the use of forensic evidence in criminal cases.[45]

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[40] *Coy*, 487 U.S. at 1021.

[41] Joseph L. Peterson et al., *The Uses and Effects of Forensic Science in the Adjudication of Felony Cases*, 32 J. FORENSIC SCI. 1730, 1748 (1987) [hereinafter *Forensic Science*]. Some prosecutors are reluctant to try cases without forensic evidence when they believe the jury expects it. *Id.* In fact, prosecutors will go out of their way to explain the absence of forensic evidence. *Id.* Forensic evidence impresses jurors in criminal cases who find scientific experts "most persuasive." *Id.* The National Institute of Justice, however, urges prosecutors to use forensic evidence because it contributes to determining guilt or innocence. Peterson, *supra* note 2, at 6.

[42] Peterson, *supra* note 2, at 2.

[43] *See* MICHAEL J. SAKS & RICHARD VAN DUIZEND, NAT'L CENTER FOR STATE COURTS, THE USE OF SCIENTIFIC EVIDENCE IN LITIGATION 8 (1983) (explaining that homicide cases require testimony about cause of death; arson cases need testimony from fire marshals and forensic chemists; and forgery cases rely on questioned document experts); Peterson, *supra* note 2, at 2 (noting that drug cases require scientific evidence to establish crime was committed).

[44] Peterson, *supra* note 2, at 2-5. Forensic evidence plays several roles in the process of criminal justice. *Id.* James K. Stewart, Director of the National Institute of Justice, noted that forensic evidence can play an important part in arresting and convicting suspects. *Id.* at 1. One study found that about 25% of jurors thought that they would have acquitted, rather than have convicted, the defendant if the prosecution had not presented forensic evidence. *Forensic Science*, *supra* note 41, at 1748. Forensic evidence, such as matching fingerprints, can be inculpatory. Peterson, *supra* note 2, at 2. Conversely, forensic evidence, such as a non-matching blood type, can be exculpatory. *Id.* Admissions, incriminating statements, and other tangible evidence have a greater impact on a decision to convict than forensic evidence does, but the absence of forensic evidence may lead to dismissal or acquittal if no strong evidence of guilt exists. *Id.* at 4. One study found that forensic evidence is the only evidentiary factor affecting sentence length. *Id.* at 5. Defendants receive longer sentences when laboratory reports are available. *Id.*

[45] *See* Escobedo v. Illinois, 378 U.S. 478, 489 (1964) (approving use of forensic

Prosecutors' use of forensic evidence is growing.[46] This growth is due in part to new scientific methods.[47] The number of crime laboratories has increased threefold in the last 20 years to accommodate the demand for the scientific analysis of evidence.[48] Unfortunately, the demand still exceeds the processing capacity of the laboratories.[49]

Federal, state, and local governments, which are responsible for investigating crimes, pay for prosecutors' laboratory tests and reports.[50] In addition, governments bear the cost of presenting the evidence at trial.[51] When the prosecution presents forensic evidence, it typically uses expert witnesses to interpret the laboratory reports.[52] Whenever the prosecution brings a forensic expert witness into court, it pays for the transportation costs

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evidence obtained through independent investigations); Breithaupt v. Abram, 352 U.S. 432, 439 (1957) (describing scientific methods as important for detecting crime); *see also* Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 OHIO. ST. L.J. 671, 700 (1988) (citing *Escobedo* and *Breithaupt* as examples of Supreme Court encouraging use of forensic evidence).

[46] *See* SAKS & VAN DUIZEND, supra note 43, at 8 (noting steady increase in use of forensic experts); Giannelli, *supra* note 45, at 700 (forecasting that increased use of scientific evidence will continue); *Staggering Backlog*, *supra* note 20, at A14 (reporting that in Washington state, number of crime laboratory employees increased 66% while caseload increased 164% from 1983 to 1993).

[47] *See* Giannelli, *supra* note 45, at 671-72 (identifying neutron activation analysis, atomic absorption, scanning electron microscopy, and trace metal detection as examples of new forensic techniques).

[48] *Id.* at 671.

[49] *See* John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1218 (1994) (describing criminal justice system as underfunded); Peterson, *supra* note 2, at 5 (noting that crime laboratories are generally understaffed and budgets in some jurisdictions are severely constrained); Rainey & Brazil, *supra* note 20, at A1 (reporting that Los Angeles Police Department Firearms Analysis Unit has constant backlog of 300 cases because staff size over last four and a half years has not increased while caseload had tripled); *supra* note 20 (citing examples of underfunded laboratories).

[50] *See Crime Labs*, *supra* note 20, at A15 (noting that taxpayers finance crime laboratories).

[51] Telephone interview with Jerry Chisum, Crime Scene Program Manager, California Criminalistic Institute of the Department of Justice (Nov. 8, 1994) [hereinafter Chisum Interview].

[52] Peterson, *supra* note 2, at 2. Prosecutors typically present forensic evidence via laboratory analysis and interpretative expert testimony. *Id.* Some jurisdictions admit forensic reports without accompanying expert testimony. Giannelli, *supra* note 45, at 673. But even in those jurisdictions, a defendant has a constitutional right to cross examine a prosecution witness. *Id.* at 701. For example, notice and demand statutes allow laboratory reports to be admitted without expert testimony if the defendant is served with a copy and does not request the testimony. *Id.*

with limited government funds.[53] In addition, if the expert works in a government crime laboratory, the travel time is at the expense of work on other cases.[54]

California statistics exemplify the time involved in presenting forensic expert testimony. Forensic experts from the laboratories within the California Bureau of Forensic Services make more than 1600 court appearances each year.[55] In addition to the time spent testifying, an expert witness spends considerable time traveling and waiting to testify.[56] The cost of the total time that the experts must be away from their laboratories for court appearances is equivalent to the salaries of eight or nine mid-level experts.[57]

II. STATE OF THE LAW

In an effort to use limited resources efficiently, prosecutors have already offered telephonic testimony when the state would have incurred considerable costs to bring the witnesses into court.[58] The Supreme Court has not yet decided whether the use of telephonic testimony ever comports with the Confronta-

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[53] *See* State v. Aldape, 307 N.W.2d 32, 43 (Iowa 1981) (allowing telephonic testimony in order to save prosecution witness travel and accommodation expenses); W.J.C. v. County of Vilas, 369 N.W.2d 162, 164 (Wis. Ct. App. 1985) (taking judicial notice of significant costs of using experts, particularly those from other locales); Weber, *supra* note 13, at 481 (noting considerable travel expenses incurred by distant witnesses).

[54] *See infra* text accompanying note 56 (describing time required by in-court appearances).

[55] Telephone interview with Cecil Hider, Bureau Chief, Bureau of Forensic Services (Nov. 11, 1994) [hereinafter Hider Interview].

[56] *Id.* For example, because the Redding crime laboratory covers most of northern California, travel time can be six hours. *Id.* The time the expert spends waiting to testify can add several more. *Id.* Thus, an expert may be away from the laboratory for a full day to appear in court to testify. Chisum Interview, *supra* note 51.

[57] Hider Interview, *supra* note 55. The California Bureau of Forensic Services employs about 100 mid- and upper-level forensic scientists to analyze evidence. Telephone interview with Janet Crocker, Associate Analyst, Bureau of Forensic Services (Apr. 7, 1995). Approximately 90 employees are criminalists that process crime scene evidence. *Id.* Eight employees are toxicologists that test blood and urine samples. *Id.*

[58] Topping v. People, 793 P.2d 1168, 1170 (Colo. 1990) (offering telephonic testimony of Kentucky physician in Colorado sexual assault case); State v. Aldape 307 N.W.2d 32, 43 (Iowa 1981) (admitting telephonic testimony from Texas witnesses in Iowa murder trial suppression hearing); Chisum Interview, *supra* note 51 (recounting his experience in 1990 homicide case when he testified as forensic expert by telephone from Sacramento, California to court in Imperial County, California).

tion Clause.[59] When the trial courts in *State v. Aldape* and *Topping v. People* admitted telephonic testimony, the state supreme courts of Iowa and Colorado, respectively, reached conflicting results.[60]

A. State v. Aldape

The Iowa Supreme Court upheld the admission of telephonic testimony in *State v. Aldape*.[61] The defendant in *Aldape* was charged with first-degree murder.[62] During a suppression hearing, a magistrate and a police officer testified by telephone from Texas.[63] At that time, the defendant agreed to the use of telephonic testimony.[64] The trial court convicted the defendant.[65]

On appeal to the Iowa Supreme Court, the defendant contended that the trial court violated his confrontation right by admitting the testimony by telephone.[66] Because *Aldape* antedated *Coy*, the state supreme court fashioned its own approach for determining whether the Confrontation Clause barred the admission of the testimony. The court considered why the prosecution requested telephonic testimony, what interests the confrontation right protects, and whether the telephonic testimony interfered significantly with the defendant's interests.[67]

First, the *Aldape* court noted that the prosecution used telephonic testimony to avoid the travel and accommodation costs for two witnesses.[68] Second, the court noted that the primary purpose of the Confrontation Clause is to ensure cross examination for the purpose of evaluating witness credibility.[69] Third,

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[59] Croft, *supra* note 9, at 112.

[60] *Compare Topping*, 793 P.2d at 1172 (holding that admission of telephonic testimony violated confrontation right in sexual assault trial) *with Aldape*, 307 N.W.2d at 43 (admitting telephonic testimony in murder trial suppression hearing).

[61] 307 N.W.2d 32, 43 (Iowa 1981).

[62] *Id.* at 34.

[63] *Id.* at 43.

[64] *Id.*

[65] *Id.* at 34.

[66] *Id.* at 43. The court also rejected the defendant's four other contentions. *Id.* at 45.

[67] *Id.* at 43. Although the witnesses testified in a suppression hearing, the court's analysis is applicable to trial testimony. *See id.* (analyzing Confrontation Clause without referring to suppression hearing context).

[68] *Id.*

[69] *Id.*

while acknowledging that witness demeanor may reflect credibility, the court found it dispensable in this case because the witnesses were under oath and thoroughly cross examined.[70] Thus, the court held that the telephonic testimony did not compromise the defendant's confrontation right.

The Iowa Supreme Court's analysis in *Aldape* was too brief and conclusory to be persuasive authority for other courts that consider admitting telephonic testimony.[71] The *Aldape* court simply acknowledged that the prosecution offered telephonic testimony to save the expense of in-court testimony.[72] Had the court evaluated this motive, it might have concluded that the efficient use of limited government resources furthers an important public policy.[73] Therefore, the court could have admitted the telephonic testimony even under the *Coy* standard for exceptions to face-to-face confrontation.[74]

B. Topping v. People

Contrary to the *Aldape* court, the Colorado Supreme Court in *Topping v. People*[75] held that the admission of telephonic testimony had violated the defendant's confrontation right.[76] The defendant in *Topping* was charged with first-degree sexual assault.[77] At the time of the trial, the physician who had examined the victim resided in Kentucky.[78] The prosecution filed a motion to admit the physician's testimony by telephone because a personal appearance would have been "highly

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[70] *Id.*

[71] *Id.* at 43. The court's analysis of the admissibility of the telephonic testimony consisted of three paragraphs. *Id.* The Iowa court did not discuss the nature of the testimony nor explain why demeanor was unimportant in this case. *Id.* The only explanation the court gave for admitting telephonic testimony was that the defense cross examined the witnesses, who testified under oath. *Id.*

[72] *Id.*

[73] *See infra* text accompanying notes 105-22 (arguing that use of telephonic testimony can further important public policy).

[74] *See supra* text accompanying note 39 (stating *Coy* standard for exceptions to Confrontation Clause).

[75] 793 P.2d 1168 (Colo. 1990).

[76] *Id.* at 1169, 1172.

[77] *Id.* The defendant was also charged with first degree burglary and felony menacing. *Id.*

[78] *Id.*

inconvenient."[79] Over defense opposition, the trial court granted the motion and admitted the testimony by telephone.[80]

After the trial court convicted the defendant, he appealed to the Colorado Court of Appeals.[81] The defendant argued that the trial court violated his confrontation right by permitting the physician to testify by telephone.[82] The court of appeals considered the defendant's confrontation right in the context of the facts. First, the court pointed out that telephonic testimony only interfered with confrontation by preventing the defendant and the jury from observing the physician's demeanor.[83] Telephonic testimony did not prevent the defense attorney from cross examining the physician in the presence of both the defendant and the jury.[84] Second, the court rejected a literal interpretation of face-to-face confrontation when, as in this case, the witness's credibility is not in question.[85] The court explained that the physician had no vested interest in the verdict, the defense had thoroughly cross examined her, and the defense had not disputed the testimony.[86] Finally, the court stated that modern technology affects the balance between the defendant's and the public's rights.[87] Thus, the court of appeals upheld the admission of the telephonic testimony and affirmed the defendant's conviction.[88]

The Colorado Supreme Court granted the defendant's petition for review to consider the trial court's admission of telephonic testimony in light of the Confrontation Clause.[89] The

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[79] *Id.*

[80] *Id.*

[81] People v. Topping, 764 P.2d 369, 370 (Colo. Ct. App. 1988).

[82] *Id.* The defendant also appealed on two other grounds. *Id.*

[83] *Id.* at 371.

[84] *Id.*

[85] *See id.* (agreeing with trial court's conclusion that face-to-face confrontation is "a figure of speech" and unnecessary when credibility is not at issue).

[86] *Id.* The physician testified that she had examined the victim and concluded that the victim had been sexually assaulted. Topping v. People, 793 P.2d 1168, 1170 (Colo. 1990). The defendant did not dispute this conclusion; rather, he claimed that he was not the perpetrator. *Id.* at 1172 n.11.

[87] *See Topping*, 764 P.2d at 371 (accepting trial court's view that courts should take modern technology into account when balancing rights of defendant and public).

[88] *Id.* The court rejected the defendant's other arguments. *Id.*

[89] *See Topping*, 793 P.2d at 1169 (granting review only on issue of confrontation right violation).

People argued that the facts of the case justified an exception to face-to-face confrontation under *Coy v. Iowa*.[90] Although the court agreed that *Coy* was relevant to determining whether the telephonic testimony was admissible, it only analyzed whether the telephonic testimony was admissible under a hearsay exception.[91] After finding that the testimony did not satisfy the exception, the court abruptly concluded that the telephonic testimony abridged the defendant's confrontation right.[92] It simply announced that neither witness convenience nor the use of modern communications technology sufficed to warrant an exception to face-to-face confrontation.[93] The state supreme court concluded that the lower courts erred in admitting the telephonic testimony.[94]

Nonetheless, the Colorado Supreme Court found the error harmless and upheld the conviction.[95] When the court analyzed the possible prejudicial effect of the error, it considered the testimony's context.[96] The court noted that the defense did not

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[90] *Id.* at 1171. The People also argued that the court should admit the testimony under a hearsay exception allowing reliable testimony from an unavailable witness. *See id.* (referring to Supreme Court's two-part test for admitting hearsay defined in Ohio v. Roberts, 448 U.S. 56, 65 (1980)). The court held that inconvenience does not amount to unavailability and thus rejected this argument. *Id.* (citing People v. Diefenderfer, 784 P.2d 741, 750 (Colo. 1989)).

[91] *Id.*

[92] *Id.* at 1172. The court had previously hinted at dissatisfaction with the testimony, but never explained how this interfered with the defendant's confrontation right. For example, the court noted that on cross examination the defense asked the witness "*only* four questions." *Id.* at 1170 n.5 (emphasis added). The defendant, however, had not disputed the content of the testimony. *Id.* at 1172 n.11. The court also commented that the "testimony *pointedly* included the witness' *ultimate opinion* that the victim had been sexually assaulted." *Id.* at 1172 (emphasis added). By characterizing this testimony as the ultimate opinion, the court disregarded that the witness's testimony was only that the victim had been sexually assaulted, not that the defendant was the perpetrator. *Id.* at 1172 n.11. Furthermore, the rules of evidence that restrict opinion testimony by other witnesses do not apply to expert witnesses. *See* Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1155 (1991) (describing several Federal Rules of Evidence pertaining to non-expert witnesses as meaningless in context of expert testimony). In fact, opinion evidence is the most common type of expert witness testimony. *Id.*

[93] *Topping*, 793 P.2d at 1172.

[94] *Id.*

[95] *Id.* A constitutional error is harmless if, beyond a reasonable doubt, it does not affect the trial's outcome. Chapman v. California, 386 U.S. 18, 24 (1967).

[96] *Topping*, 793 P.2d at 1172. The court looked at the content of the physician's testimony and its relationship to the other testimony. *Id.* The court noted that the physician's testimony was only that some unspecified person had sexually assaulted the

dispute the testimony's content and that the testimony was not critical to establishing the crime.[97] Thus, by concluding that the admission of telephonic testimony was harmless error, the court indicated that face-to-face confrontation was not essential to safeguard this defendant's confrontation right.[98]

The United States Supreme Court has stated that the cost of an additional safeguard may sometimes outweigh an individual's right.[99] Regarding the right to face-to-face confrontation, the Court suggested in *Coy* that it would make exceptions to further important public policies.[100] Although the *Topping* court referred to *Coy*, it failed to examine public policy arguments for admitting telephonic testimony.[101]

III. PROPOSAL

This Comment argues that, in appropriate cases, admitting telephonic testimony furthers the public policy goal of efficient resource allocation within the criminal justice system.[102] This view underlies the proposed analysis that courts should use when deciding whether to admit telephonic testimony by forensic experts in criminal cases.[103] This Comment also proposes procedures for admitting telephonic testimony that ensure the defendant's right to a fair trial.[104]

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victim. *Id.* Then, the court pointed out that the victim's testimony had independently established this fact and that the defendant did not contest the point. *Id.* The defense attorney told the jurors during voir dire, and again during closing arguments, that the evidence would show that the victim had been sexually assaulted. *Id.* at 1172 n.11. Given these facts, the court held that the admission of the testimony by telephone did not alter the outcome of the trial. *Id.* at 1172.

[97] *Id.* at 1172.

[98] *See id.* (determining that telephonic testimony did not affect outcome of case).

[99] *See* Mattox v. United States, 156 U.S. 237, 242-43 (1895) (declaring that "incidental" benefits for defendants do not justify sacrificing rights of public); Mathews v. Eldridge, 424 U.S. 319, 348 (1976) (stating that due process analysis of procedural safeguards should consider limited government resources).

[100] Coy v. Iowa, 487 U.S. 1012, 1021 (1988).

[101] *See Topping*, 793 P.2d at 1170-72 (rejecting public policy arguments without even examining them); *supra* text accompanying note 93 (summarizing extent of court's public policy examination).

[102] *See* discussion *infra* part III.A (arguing that telephonic testimony satisfies *Coy* standard for exceptions to face-to-face confrontation by furthering important public policy).

[103] *See* discussion *infra* part III.B (proposing balancing test and explaining how courts should apply to case).

[104] *See* discussion *infra* part III.C (defining procedures court should use to admit tele-

A. Telephonic Testimony Furthers Efficient Resource Allocation Within the Criminal Justice System

To satisfy the *Coy* standard for exceptions to face-to-face confrontation, the admission of forensic expert testimony by telephone must further an important public policy.[105] Society accords rights to criminal defendants to ensure their fair treatment.[106] Efficient resource allocation within the criminal justice system is an important public policy goal because it maintains the balance between a defendant's rights and competing criminal justice system concerns.[107] Public policy decision-makers should consider the costs and benefits of protecting a defendant's rights, not only in the narrow context of a specific case, but in the broader context of the criminal justice system.[108]

Government crime laboratories are part of this broader context.[109] Many laboratories are ill-equipped and understaffed.[110] When laboratories are backlogged, prosecutors sometimes forego scientific analyses or ask for continuances.[111] When laboratories do not have the resources to identify false leads, police may waste already scarce resources pursuing these leads.[112]

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phonic testimony).

[105] Coy v. Iowa, 487 U.S. 1012, 1021 (1988).

[106] Stuart S. Nagel, *Policy Evaluation and Criminal Justice*, 50 BROOK. L. REV. 53, 53 (1983).

[107] Mattox v. United States, 156 U.S. 237, 243 (1895). Public policy considerations are sometimes more important than constitutional provisions that protect rights of defendants. *Id.* Society balances the rights of suspects with its desire to protect itself. Nagel, *supra* note 106, at 53. One can view the criminal justice system in various ways. *Id.* Society has broad interests in reducing crime and allocating resources optimally. *Id.* Looking at the criminal justice system functionally, the system includes the police, the courts, and corrections. *Id.* Decision-makers develop public policies addressing all these views of the system. *Id.*

[108] *See* Maryland v. Craig, 497 U.S. 836, 850 (1990) (noting that courts should interpret confrontation right in context of trial and adversary system).

[109] *See* SAKS & VAN DUIZEND, *supra* note 43, at 53 (noting that forensic science laboratories are generally part of police departments or FBI).

[110] *See supra* note 20 (citing examples of understaffed and ill-equipped laboratories).

[111] *Crime Labs*, *supra* note 20, at A15. Backlogs can be reduced if experts are not taken away from laboratories to testify in court. *See infra* note 56 (giving example of time involved in personal appearances). Delays can make it more difficult to convict guilty parties because of the resulting loss of physical evidence, witnesses, and memories of events. Flanagan v. United States, 465 U.S. 259, 264 (1984). Also, delays in justified acquittals further delay the prosecution's pursuit of the guilty party. *Id.* at 265.

[112] *Crime Labs*, *supra* note 20, at A15. For seven months, the Louisiana police

Two recent cases illustrate the effects of inadequate crime laboratory resources.[113] In one case, sixteen months after a bomb was left outside a grammar school, the police abandoned the case because the state crime laboratory had not yet run any analytical tests.[114] In the other case, a man spent two months in jail when police falsely accused him of rape.[115] The judge released him to wait, yet another month, until the short-staffed crime laboratory could run the test necessary to clear his name.[116] But for inadequate forensic resources, the government could have avoided these injustices and many others.[117]

When telephonic testimony comports with a defendant's confrontation right, the government should not squander time and money to bring a forensic expert witness to court.[118] The expert could better use the time to process evidence from other cases.[119] The government could use the cost savings from transportation and accommodations to hire additional staff or buy needed equipment.[120] The cost of in-court testimony from one

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investigated the wrong suspect in a series of rapes before the backlogged FBI laboratory sent a report clearing him. *Id.* The Louisiana government crime laboratories cannot afford advanced equipment and must pay thousands of dollars to private laboratories or wait for the overburdened FBI laboratory to perform certain tests. *Id.*

[113] *See* Peterson, *supra* note 2, at 5 (finding crime laboratories generally understaffed and overworked); *infra* text accompanying notes 113-16 (giving examples of disturbing consequences of inadequate resources).

[114] *Staggering Backlog, supra* note 20, at A14.

[115] Tomas Guillen & Eric Nalder, *Overwhelming Evidence — Crime Labs in Crisis — Waiting Months for the Crime Lab to Clear Him, a Laborer Accused of Rape Lost About All He Owned: His Good Name*, SEATTLE TIMES, June 20, 1994, at A1.

[116] *Id.*

[117] *See Staggering Backlog, supra* note 20, at A14 (reporting numerous unsolved cases due to inadequate forensic resources and summarizing situation as "take a number — and wait").

[118] *See* State v. Aldape, 307 N.W.2d 32, 43 (Iowa 1981) (admitting telephonic testimony when prosecution wanted to save expenses of in-court appearance and defendant's confrontation right not violated).

[119] *See* Guillen & Nalder, *supra* note 115, at A1 (reporting that under staffing causes long delays in processing forensic evidence); *supra* note 56 and accompanying text (giving example of staff time involved in in-court appearances).

[120] *See* W.J.C. v. County of Vilas, 369 N.W.2d 162, 164 (Wis. Ct. App. 1985) (judicially noticing considerable costs of using experts, particularly those from other locales); Ken White, *Inside the Crime Lab*, THE LAS VEGAS REV.-J., Aug. 3, 1995 at 1D (reporting that Las Vegas Metropolitan Police Department's Criminalistics Bureau is so understaffed that mandatory overtime is common); Guillen & Nalder, *supra* note 115, at A1 (listing equipment that Washington state crime laboratory officials lack to work effectively); *Crime Labs, supra* note 20, at A15 (reporting that Louisiana government crime laboratories cannot

witness may be insignificant in relation to a crime laboratory's total budget, but the use of forensic evidence is growing and the cumulative costs are substantial.[121] Thus, admitting telephonic testimony in appropriate cases furthers efficient resource allocation within the criminal justice system.[122] In these cases, telephonic testimony furthers an important public policy and, therefore, satisfies the *Coy* standard for exceptions to face-to-face confrontation.

B. Analysis for Evaluating Admissibility of Telephonic Testimony

Because constitutional issues do not lend themselves to bright line rules,[123] this Comment proposes a balancing test. Courts should balance two factors to determine whether telephonic testimony promotes efficient resource allocation in a given case. The factors are: (1) the cost of bringing the witness into court, and (2) the value of observing the witness's demeanor.[124] The following discussion examines these factors and how a court should evaluate them.

When a court determines the cost of bringing the witness into court, it must consider all the resources required, including

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afford advanced equipment and must pay thousands of dollars to private laboratories or wait for overburdened FBI laboratory to perform certain tests).

[121] *See supra* text accompanying notes 46-48 (describing prosecution's increasing use of forensic evidence); *supra* text accompanying note 56 (giving example of staff time involved in in-court appearances).

[122] *See supra* text accompanying notes 119-20 (describing other uses for resources saved by admitting telephonic testimony).

[123] Professor Erwin Chermerinsky, Commentator at the *U.C. Davis Law Review* International Shoe Symposium (Feb. 10, 1995). Bright lines rules are not appropriate for questions in which the surrounding circumstances vary. *See* Local 761, International Union of Elec. v. NLRB, 366 U.S. 667, 674 (noting that definitive formulas are inappropriate for evaluating variable situations). Sixth Amendment questions require a balance of competing interests. *See* John Stocker, *Sixth Amendment: Preclusion of Defense Witnesses and the Sixth Amendment's Compulsory Process Clause to Present a Defense*, 79 J. CRIM. L. & CRIMINOLOGY 835, 851 (1988) (discussing Taylor v. Illinois, 484 U.S. 400 (1988), in which Court found that Sixth Amendment compulsory process right did not necessarily override public interests).

[124] *See* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (noting that government has interest in conserving its resources); Mattox v. United States, 156 U.S. 237, 242-43 (1895) (stating that witness demeanor helps jury determine if testimony is "worthy of belief"); State v. Aldape, 307 N.W.2d 32, 43 (Iowa 1981) (allowing telephonic testimony in order to save costs of in-court appearance); Michael J. Weber, *Permissibility of Testimony by Telephone in State Trial*, 85 A.L.R.4th 476, 481 (1991) (explaining that in-court testimony aids juries in evaluating witness credibility by allowing them to observe witness's demeanor).

transportation and accommodation costs, and travel time.[125] The greater the total cost, the more the corresponding savings contribute to efficient resource allocation.[126] Thus, the greater the cost of bringing a witness into court, the more it favors admitting telephonic testimony.[127] Cost savings alone, however, are never dispositive.[128]

When a court evaluates the value of observing the witness's demeanor, it should consider that the purpose of face-to-face confrontation is to assist the fact finder in assessing credibility.[129] When a witness's credibility is not an issue, it reduces the value of observing her demeanor.[130] For example, a witness's credibility is greater when a defendant does not dispute the testimony, when other evidence corroborates the testimony, or when the court appoints the witness.[131] Thus, these circumstances favor admitting telephonic testimony.[132]

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[125] *See supra* notes 53, 56 (describing time and money required to bring prosecution witnesses into court).

[126] *See Mathews*, 424 U.S. at 348 (stating that need to conserve limited government resources at some point justifies dispensing with marginal safeguards for individuals).

[127] *See* State *ex rel.* Juvenile Dept. of Lane County v. Stevens, 786 P.2d 1296, 1299 (Or. Ct. App. 1990) (determining that state's financial interest weighed in favor of telephonic testimony); Babcock v. Employment Div., 696 P.2d 19, 21 (Or. Ct. App. 1985) (allowing telephonic testimony in interest of saving limited agency resources); *supra* note 56 (describing substantial time required for in-court appearances, particularly when court is in another city).

[128] *Mathews*, 424 U.S. at 334. Cost alone does not control outcome when evaluating procedural safeguards. *See id.* (explaining three-factor due process balancing test). The savings must be considered with other factors to maintain a balance between the rights of the accused and the cost to society. *Id.*

[129] *See* Mattox v. United States, 156 U.S. 237, 242-43 (1895) (stating that witness demeanor helps jury determine if testimony is "worthy of belief"); State v. Aldape, 307 N.W.2d 32, 43 (Iowa 1981) (determining that Confrontation Clause assures effective cross examination to provide basis for evaluating witness's testimony).

[130] *See* Maryland v. Craig, 497 U.S. 836, 850 (1990) (explaining that courts should interpret confrontation right in "context of the necessities of trial"); *see also* Weber, *supra* note 13, at 486 (noting that facts of case may justify telephonic testimony).

[131] *See* Topping v. People, 793 P.2d 1168, 1172 (Colo. 1990) (holding admission of telephonic testimony harmless error because defendant did not dispute testimony and victim corroborated it); Giannelli, *supra* note 45, at 701 (stating that defendants often do not dispute prosecution's scientific evidence at trial); Gross, *supra* note 92, at 1188-89 (remarking that many commentators, concerned that experts selected by parties are dangerously partisan, have long proposed use of court-appointed experts).

[132] *See* State v. Aldape, 307 N.W.2d 32, 43 (Iowa 1981) (admitting telephonic testimony despite absence of confrontation because trial court had adequate basis for assessing witness's credibility); W.J.C. v. County of Vilas, 369 N.W.2d 162, 163-64 (Wis. Ct. App.

A court has an easy decision when both factors favor the same result. If the cost of bringing the witness into court is high and the value of observing her demeanor is low, a court should admit telephonic testimony.[133] Conversely, if cost is low and the value of observing demeanor is high, the witness should testify in court.[134] When the factors conflict, a court must exercise judicial discretion.[135]

Using the proposed balancing test, a court presented with the introductory hypothetical should analyze it as follows.[136] First, the cost of bringing the expert into court includes round-trip airfare between Seattle and San Francisco and the associated travel time.[137] Since airfare is substantially more than the cost of a phone call, and considerable travel time is involved, the cost factor favors admitting telephonic testimony.[138] Second, the value of observing the expert's demeanor is low because the defendant does not dispute the testimony.[139] In this hypothetical, in which cost is high and the value of observing demeanor is low, a court should admit the forensic expert testimony by telephone.[140]

1985) (permitting telephonic testimony because only slight risk of error when jury could not observe demeanor of court-appointed experts).

[133] *See* Mathews v. Eldridge, 424 U.S. 319, 348 (1976) (indicating need to balance cost of procedural safeguard and benefit to society).

[134] *Id.*

[135] *See* Burgdorf v. Funder, 54 Cal. Rptr. 805, 809 (Ct. App. 1966) (defining discretion as equitable decision making based on what is "just and proper under the circumstances"); Elder v. Anderson, 23 Cal. Rptr. 48, 51 (Ct. App. 1962) (describing discretionary acts as those in which no "hard and fast rule" dictates conduct); Manekas v. Allied Discount Co., 166 N.Y.S.2d 366, 369 (Sup. Ct. 1957) (characterizing discretion as privilege to decide considering what is "fair and equitable" under circumstances).

[136] *See supra* text accompanying notes 1-8 (posing hypothetical).

[137] *See supra* text accompanying note 51 (noting that government bears expense of presenting prosecution witnesses).

[138] *See supra* text accompanying note 125 (explaining how to apply cost factor).

[139] *See supra* notes 130-32 and accompanying text (discussing effect of undisputed testimony on admissibility of telephonic testimony).

[140] *See supra* text accompanying note 133 (explaining that court should admit telephonic testimony when cost of in-court appearance is high and value of observing witness's demeanor is low).

C. Procedures for Receiving Telephonic Testimony

When a court admits telephonic testimony, it should follow the procedures defined below. These procedures preserve a defendant's right to a fair trial without requiring significant time or expense.[141] Neither the *Aldape* nor the *Topping* opinions revealed much detail about the procedures the trial courts used to admit the telephonic testimony.[142] The proposed procedures draw from statutes, cases, books, and articles that have addressed the subject.[143]

When a court admits telephonic testimony, it must give the parties adequate notice of when and how the testimony will be received.[144] The court should exercise its discretion in determining what notice is reasonable.[145] Notice allows the parties to exchange documents and prepare adequately for questioning the witness.[146] This preserves a key component of the defendant's confrontation right by ensuring the opportunity to cross examine the witness.[147]

The witness, jury, judge, defendant, attorneys, and court reporter should have simultaneous access to the telephone

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[141] *See infra* text accompanying notes 162-70 (explaining how procedures, coupled with balancing test, ensure reliability of testimony).

[142] *See Topping*, 764 P.2d at 371 (noting that jury and defendant heard cross examination, but not specifying means used); State v. Aldape, 307 N.W.2d 32, 43 (Iowa 1981) (noting that witnesses were sworn before testifying, but not specifying procedure used).

[143] *See infra* notes 144-46, 148-49, 153-55 (citing sources of procedures).

[144] *In re* Amendment of Rules of Civil, Criminal, and Appellate Procedure: Proceedings by Tel. and Audiovisual Means, 141 Wis. 2d, at xiii, xxv (1987).

[145] *See* ALASKA R. CRIM. P. 38.1 (omitting any notice requirement where telephonic testimony is admitted in criminal cases in court's discretion); 141 Wis. 2d, at xxv (requiring prior notice without specific requirements); Town of Geneva v. Tills, 384 N.W.2d 701, 704 (Wis. 1985) (reversing decision allowing telephonic testimony because court abused its discretion by not allowing defense adequate time to review documents referred to by witness).

[146] *See* Elson v. State, 633 P.2d 292 (Alaska Ct. App. 1981), *aff'd*, 659 P.2d 1195 (Alaska 1983) (admitting telephonic testimony at sentencing hearing in which defense counsel had laboratory report prior to testimony), *and cert. denied*, 498 U.S. 1119 (1991); *Tills*, 384 N.W.2d at 704-05 (finding trial court abused its discretion because defense had no opportunity prior to cross examination to see documents to which witness referred); W.J.C. v. County of Vilas, 369 N.W.2d 162, 164 (Wis. Ct. App. 1985) (allowing telephonic testimony in civil commitment hearing because court-appointed experts had previously filed complete reports).

[147] *See supra* notes 25, 28 and accompanying text (finding cross examination essential to confrontation right).

call.[148] Speakerphones, loudspeakers, telephone conference calls, or any combination can be used.[149] Access to the live testimony allows everyone to hear intonations, hesitations, and other subtle forms of expression.[150] Consequently, simultaneous access minimizes the impact of telephonic testimony on the defendant's confrontation right because only the visual component of the testimony is absent.[151]

A notary should be present at the site of testimony to identify the witness.[152] The witness must promise by oath or affirmation to testify truthfully.[153] The notary at the site, or the judge via telephone, can administer the oath or affirmation.[154] The notary would also attest that the witness did not refer to extraneous documents or receive coaching by another person.[155] These procedures increase the likelihood that a witness will testify truthfully, thereby serving the truth-seeking goal of the Confrontation Clause.[156]

In summary, the procedures require notice and exchange of documents, simultaneous access for all participants, and a notary at the site of testimony. These practical and effective procedures

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[148] *See* 141 Wis. 2d, at xxv (requiring simultaneous voice communication between court reporter and all parties to call).

[149] *See id.* (requiring simultaneous access by loudspeaker or by making person party to call); Ferrante v. Ferrante, 485 N.Y.S.2d 960, 962 (N.Y. Sup. Ct. 1985) (involving testimony broadcast over speakerphone in chambers); *Tills*, 384 N.W.2d at 703 (using speakerphone in chambers).

[150] *See* People v. Topping, 764 P.2d 369, 371 (Colo. Ct. App. 1988) (specifying loss of demeanor as only limitation on confrontation when using telephonic testimony).

[151] *Id.*

[152] *See* Croft, *supra* note 9, at 107 (suggesting that notary verify witness's identity); *see also* Weber, *supra* note 13, at 480 (noting that establishing identity of witness is one advantage of in-court testimony).

[153] RONALD L. CARLSON ET AL., EVIDENCE IN THE NINETIES 152 (3d ed. 1991). Not only does an oath or affirmation remind the witness of the importance of truthful testimony, it also exposes the witness to charges of perjury. *Id.* For example, Alaska Rule of Evidence 603 requires a witness to give an oath or affirmation to tell the truth. Gregg v. Gregg, 776 P.2d 1041, 1043 n.8 (Alaska 1989).

[154] *See Gregg*, 776 P.2d at 1043 (judge); Ferrante v. Ferrante, 485 N.Y.S.2d 960, 962 (N.Y. Sup. Ct. 1985) (notary); Town of Geneva v. Tills, 384 N.W.2d 701, 703 (Wis. 1985) (judge); *In re* Amendment of Rules of Civil, Criminal, and Appellate Procedure: Proceedings by Telephone and Audiovisual Means, 141 Wis. 2d, at xiii, xxxiii (1987) (state authorized officer).

[155] *See* Weber, *supra* note 13, at 481 (noting that if witness receives outside coaching or improperly refers to documents it can hamper task of fact finding).

[156] Maryland v. Craig, 497 U.S. 836, 857 (1990).

maintain a defendant's right to a fair trial. Nonetheless, not everyone may agree that courts should admit telephonic testimony.

D. Potential Objection to Admitting Telephonic Testimony and Rebuttal

Some might argue that courts should analyze telephonic testimony as hearsay.[157] In fact, the State in *Topping* suggested that the Colorado Supreme Court should admit the physician's telephonic testimony under a hearsay exception.[158] Without determining whether the physician's testimony was, in fact, hearsay, the court rejected it for failing to satisfy the exception.[159]

Telephonic testimony, however, is not hearsay.[160] Even so, concerns about the reliability of hearsay are equally relevant to the reliability of telephonic testimony.[161] Courts generally consider four elements to determine if hearsay is reliable.[162] One element is the absence of an oath or affirmation.[163] The proposed procedures for telephonic testimony require that the witness testifies under oath or affirmation.[164] A second element is the possibility of error when information is orally transmitted along a chain of people.[165] Telephonic testimony is as direct as in-court testimony.[166] A third element is the jury's inability to

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[157] *See* Topping v. People, 793 P.2d 1168, 1171 (Colo. 1990) (analyzing telephonic testimony under two-prong hearsay exception defined in Ohio v. Roberts, 448 U.S. 56, 65 (1980)); Croft, *supra* note 9, at 107 (treating telephonic testimony as hearsay).

[158] *Topping*, 793 P.2d at 1171.

[159] *Id.*

[160] CARLSON, *supra* note 153, at 566. The hearsay rule only applies to an out-of-court declarant. *Id.* An out-of-court declarant is one who cannot be cross examined *at the time the testimony is given. Id.* at 581. Because the defense may cross examine the witness while she testifies, she is not an out-of-court declarant, and the testimony is not hearsay. *See Topping*, 793 P.2d at 1170 (noting that defense cross examined witness by telephone); State v. Aldape, 307 N.W.2d 32, 43 (Iowa 1981) (accepting telephonic testimony in part because defense cross examined witnesses by telephone).

[161] *See* CARLSON, *supra* note 153, at 565 (explaining that hearsay rule is based on assumptions about unreliability of certain types of evidence).

[162] *Id.* at 566.

[163] *Id.*

[164] *See supra* text accompanying note 153 (proposing oath or affirmation requirement).

[165] CARLSON, *supra* note 153, at 567.

[166] *See* People v. Topping, 764 P.2d 369, 371 (Colo. Ct. App. 1988) (noting that jury

observe the declarant's demeanor.[167] The analytical factor of the value of observing the witness's demeanor addresses this concern.[168] The final, predominant element is the defendant's opportunity to cross examine the declarant.[169] The proposed procedural requirements of notice and access to documents enable effective cross examination of the witness.[170] Thus, the proposal's balancing test, coupled with the procedures, ensure that any telephonic testimony a court admits will be reliable.[171]

CONCLUSION

The Sixth Amendment Confrontation Clause guarantees criminal defendants the right to confront and cross examine adverse witnesses. Increasingly, prosecutors are using expert witnesses to present forensic evidence against criminal defendants. In an effort to conserve limited resources, prosecutors look to use cost saving technologies, such as the telephone, to present this expert testimony. No clear standard exists to guide a court when it determines whether telephonic testimony by a former expert witness is compatible with a defendant's confrontation right in a given case.

Telephonic testimony by forensic experts in criminal trials can be compatible with the Confrontation Clause. This Comment proposes a case-specific analysis for deciding when a witness may testify by telephone and suggests procedures for admitting the testimony in those cases. Telephonic testimony conserves limited government resources by eliminating unnecessary travel time and

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and defendant heard cross examination).

[167] CARLSON, *supra* note 153, at 567.

[168] *See supra* text accompanying notes 129-32 (discussing relevance of demeanor to analysis of telephonic testimony).

[169] CARLSON, *supra* note 153, at 567.

[170] *See supra* text accompanying notes 144-46 (suggesting requirements of notice and access to documents).

[171] *See* discussion *supra* parts III.B-C (proposing test to identify cases in which court may admit telephonic testimony and specifying procedures for receiving it).

costs. The government can use these resources more efficiently elsewhere in the criminal justice system to help fulfill the promise of justice for all.

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