STUDENT WORKS

GOING TOO FAR IN *UNITED STATES v. YATES*: THE ELEVENTH CIRCUIT'S APPLICATION OF *MARYLAND v. CRAIG* TO TWO-WAY VIDEOCONFERENCING

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I. INTRODUCTION

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[1]

Satisfying the Confrontation Clause has been described as the act of placing a witness face-to-face with the defendant, so that the defendant may cross-examine the witness in the presence of both the judge and jury.[2] However, what happens if the witness is unavailable to testify in court?

 Notes & Comments Editor, *Stetson Law Review*. B.S. Finance, University of Florida, 2003; J.D., Stetson University College of Law, 2006. This Article is dedicated to my parents Rick and Karen Rocha, my sister Kristin, and my brother Jake for their continuous love and support during law school and throughout my life. I would like to thank Professor Jerome C. Latimer, as well as the members and advisors of the *Stetson Law Review*, particularly Editor-in-Chief Paula Bentley, Executive Editor Traci McKee, and Notes and Comments Editors Suzanne Boy and Amy Rigdon, for their assistance and guidance on the publication of this Article.

1. U.S. Const. amend. VI (emphasis added).
2. 21A Am. Jur. 2d *Criminal Law* § 1168 (2006).

Picture this scenario:[3] The State of Florida charges a defendant with a heinous crime. The prosecution structures its case around the testimony of the only eyewitness. However, this witness resides in England and was only visiting Florida when she observed the crime. The witness refuses to come back to Florida to testify against the defendant at trial. Because she is not a citizen of the United States, the Florida court does not have the power to subpoena the witness to appear in court.[4] The prosecution recognizes that the Confrontation Clause grants the defendant a right to confront the witnesses against him but questions just what kind of confrontation to which the defendant is entitled. The prosecutor moves the court to allow the key eyewitness to testify via two-way videoconference. Should the court allow an exception to the face-to-face confrontation requirement when the witness is truly unavailable, or should the court strictly construe the Confrontation Clause and deny the witness' testimony?

A. *United States v. Yates*

In *United States v. Yates*,[5] the Eleventh Circuit Court of Appeals dealt with the issue of whether the introduction of two-way video testimony violates a defendant's Sixth Amendment rights.[6] In *Yates*, the defendants were accused of several offenses and were prosecuted in the Middle District of Alabama.[7] Before trial, the prosecution moved the court to permit two Australian witnesses to testify at trial via two-way videoconferencing.[8] As the basis for its motion, the prosecution claimed that both witnesses were unwilling to travel to the United States but would agree to testify at trial by means of a video teleconference.[9] Since these

3. The hypothetical is derived from *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006).

4. For a discussion of why foreign nationals are not subject to a United States district court's subpoena power, consult *infra* notes 171–174 and the accompanying text.

5. 438 F.3d 1307 (11th Cir. 2006).

6. *Id.* at 1311.

7. *Id.* at 1310. The defendants were charged with various crimes, including "mail fraud, conspiracy to defraud the United States, conspiracy to commit money laundering, and various prescription-drug-related offenses arising out of their involvement in . . . an Internet pharmacy based in Clanton, Alabama." *Id.* at 1309–1310.

8. *Id.*

9. *Id.* Furthermore, the Government claimed that both witnesses were "essential . . . to the [G]overnment's case-in-chief." *Id.*

witnesses were not citizens of the United States, they could not be subpoenaed to appear in court.[10]

The district court granted the prosecution's motion and allowed the witnesses to testify at trial.[11] The court found the defendants guilty of all the charges.[12] They appealed these convictions, arguing that the admission of videoconferenced testimony violated their Sixth Amendment rights to confrontation by denying them "face-to-face encounters with the witnesses against them."[13] On appeal, the Eleventh Circuit vacated the convictions and remanded the case for a new trial on the merits.[14] The court applied the test established in *Maryland v. Craig*[15] and held that the admission of the two-way video testimony had violated the defendants' confrontation rights.[16]

B. The Significance of *Yates*

The Eleventh Circuit's decision in *Yates* is indicative of the confusion over which test courts should use to determine whether two-way video testimony violates a defendant's Sixth Amendment right to confront the witnesses against him.[17] The majority of federal circuit courts, including the Eleventh, have applied the rule established in *Craig*.[18] However, the Second Circuit has specifi-

10. *Id*.

11. *Id*. The district court granted the prosecution's motion for the following reasons: (1) two-way video conferencing would not violate the defendants' Sixth Amendment rights since the defendants and witnesses would be allowed to see one another; (2) the foreign witnesses were not willing to travel to the United States for trial; (3) it was important for the prosecution to provide the jury with crucial evidence; and (4) "the Government also ha[d] an interest in expeditiously and justly resolving the case." *Id*.

12. *Id*.

13. *Id*. at 1310–1311.

14. *Id*. at 1311.

15. 497 U.S. 836 (1990). *Craig* requires the satisfaction of a two-prong test: (1) denying the defendant a physical, face-to-face confrontation is necessitated by an important public interest; and (2) the alternative form of testimony is reliable. *Id.* at 855–857. For a more thorough discussion of the test announced in *Craig*, consult *infra* Part II(A).

16. *Yates*, 438 F.3d at 1313–1318.

17. *See* Stephanie Francis Ward, *Video Testimony Turns Off 11th Circuit*, 5 ABA J. eReport 8 (Feb. 24, 2006) (available on Lexis at "5 ABA J. eReport 8") (acknowledging that a circuit split, albeit a small one, does exist).

18. The Sixth, Eighth, Ninth, and Tenth Circuits have all applied the *Craig* test to analyze the admissibility of two-way video testimony at trial. *E.g. U.S. v. Moses*, 137 F.3d 894, 897–898 (6th Cir. 1998); *U.S. v. Weekley*, 130 F.3d 747, 753–754 (6th Cir. 1997); *U.S. v. Bordeaux*, 400 F.3d 548, 554–555 (8th Cir. 2005); *U.S. v. Turning Bear*, 357 F.3d 730, 737 (8th Cir. 2004); *U.S. v. Rouse*, 111 F.3d 561, 568 (8th Cir. 1997); *U.S. v. Quintero*, 21

cally rejected the applicability of the *Craig* test to two-way video testimony.[19] The Second Circuit applies a test that is similar to the one used in determining whether or not to permit a Rule 15 deposition.[20] The dissenting judges in *Yates*, Judges Birch, Marcus, and Tjoflat, agreed with the Second Circuit that the *Craig* test should not apply to two-way video testimony.[21] Instead, they believed that the standard set out in *Crawford v. Washington*[22] provides the proper analysis.[23] This issue is legally significant because there is considerable debate surrounding which test courts should use, and the United States Supreme Court has yet to resolve the issue.[24]

Furthermore, the admissibility of two-way video testimony is particularly significant to states, such as Florida, that have booming tourism industries. In 2004 alone, nearly 76.8 million tourists visited Florida, thereby making Florida "the top travel destination in the world."[25] Of the nearly 80 million tourists who visited Florida in 2004, 6.3 million of them were from countries other than the United States.[26] As a result, Florida "[topped] all [United

F.3d 885, 892 (9th Cir. 1994); *U.S. v. Garcia*, 7 F.3d 885, 887–888 (9th Cir. 1993); *U.S. v. Carrier*, 9 F.3d 867, 870–871 (10th Cir. 1993); *U.S. v. Farley*, 992 F.2d 1122, 1125 (10th Cir. 1993).

19. *U.S. v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999). For a complete discussion of this case, consult *infra* Part II(B)(4).

20. For a discussion of the test used by the Second Circuit and the text of Rule 15, see *infra* Part II(B)(4) and notes 92–93. Generally speaking, the Second Circuit's test would allow the use of two-way video testimony when the witness' testimony is material to the case and the witness is unavailable to appear at trial. *Gigante*, 166 F.3d at 81.

21. *Yates*, 438 F.3d at 1319–1336 (Birch, Marcus, and Tjoflat, JJ., dissenting).

22. 541 U.S. 36 (2004).

23. For a discussion of the *Crawford* test, consult *infra* Part III(B)(1).

24. Richard D. Friedman, a professor at the University of Michigan Law School, argues that *Yates* is "the type of situation where if [it] is presented to the [United States] Supreme Court, the [C]ourt ought to resolve it." Ward, *supra* n. 17.

25. St. of Fla., *Florida Quick Facts*, http://www.stateofflorida.com/Portal/DesktopDefault.aspx?tabid=95 (accessed Mar. 13, 2007). In 2005, the number of tourists visiting Florida rose to 83.6 million, and the first and second quarter reports are already predicting an even greater number for 2006. Visit Florida, *Visit Florida Research*, http://media.visitflorida.org/about/research/ (accessed Mar. 13, 2007). For the first and second quarters of 2006, Florida has received 46.2 million visitors, which is 100,000 more tourists than Visit Florida recorded for the first two quarters of 2005. *Id.* The State of Florida relies heavily on these incoming tourists to provide an economic benefit of nearly fifty-seven billion dollars a year to its economy. St. of Fla., *supra* n. 25.

26. Visit Florida, *supra* n. 25. Of the 6.3 million foreign visitors in 2004, 1.9 million were Canadian; 1.5 million were British; 282,000 were German; 223,000 were Colombian; 221,000 were Venezuelan; 181,000 were Brazilian; 121,000 were French; 95,000 were

States] destinations for international travelers with a twenty-four percent market share of overseas visitors and a thirty-five percent market share of Canadian visitors."[27] With so many foreign tourists traveling to the Sunshine State, it is likely some of them will end up being witnesses, or even worse, victims of Florida crimes.[28] In light of this possibility, the availability of remote testimony via two-way videoconferencing is essential.

C. Overview

Part II of this Article contains a brief history of the Supreme Court's interpretation and application of the Confrontation Clause, as well as a discussion of the cases leading to the current circuit split and the Eleventh Circuit's opinion in *Yates*. Part III examines the majority and dissenting opinions in *Yates*. Finally, Part IV presents arguments as to why courts should permit the use of two-way video testimony, explains why courts should not

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Spanish; 95,000 were Argentinean; and 79,000 were Italian. *Id*. The average length of stay for these foreign visitors was 18.2 nights for Canadians and 11.5 nights for all overseas visitors. *Id*.

27. *Id*.

28. It was only a little over a decade ago that nine foreign tourists were murdered in Florida, leading foreign countries to refer to Florida as the "State of Terror" or offer tips on "How to Survive in the Florida Jungle." Mireya Navarro, *Miami Tourism Gains as Crime Rate Drops*, N.Y. Times A12 (June 21, 1995); Reuters, *Crime against Tourists Prompts Florida Drive*, N.Y. Times A12 (Feb. 24, 1993). Of the nine tourists murdered in 1992 and 1993, four of the victims were German, and five of the murders occurred in the Miami area. Navarro, *supra* n. 28. One of the Miami murders involved Barbara Meller Jensen, a Berlin special-education teacher. *Id.*; *see also* Time Magazine, *Fighting Fear in Florida*, http://www.time.com/time/magazine/printout/0,8816,978248,00.html (Apr. 19, 1993) (describing the brutal murder of tourist Barbara Meller Jensen). Mrs. Jensen had just arrived for vacation in Florida when she got lost driving from the Miami International Airport to her hotel on the beach. Navarro, *supra* n. 28. As she strayed off of Interstate 95 in Miami, her rental car was bumped by another car, "in which three men where stalking rental cars to rob tourists." *Id.* Mrs. Jensen pulled over to the side of the road when two men got out of the other car and stole her purse. *Id.* As she attempted to retrieve her purse, she tripped and fell under the other car as it sped off. *Id.* "Her skull was crushed as her horrified mother, son and daughter looked on." *Id.* Another example of a crime against a foreign tourist involved the murder of Gary Colley. BBC, *1993: UK Tourist Shot Dead in Florida*, http://news.bbc.co.uk/onthisday/hi/dates/stories/september/14/newsid_2516000/2516777.stm (Sept. 14, 1993). Mr. Colley, a British tourist, was shot to death after he and his girlfriend, Margaret Ann Jagger, fell asleep in their rental car at a rest stop off Interstate 10 in Tallahassee, Florida. *Id.* This attack came only six days after another German tourist, Uwe-Wilhelm Rakebrand, was murdered as he was driving to his hotel from the Miami airport. Larry Rohter, *Tourist Killed in Florida, Prompting New Patrols*, N.Y. Times A1 (Sept. 15, 1993).

extend the *Craig* test beyond the scope of one-way videoconferencing, and sets forth the proper legal analysis to determine the admissibility of two-way video testimony.

II. HISTORICAL CONTEXT

A. Supreme Court's Interpretation of the Confrontation Clause

The Supreme Court first interpreted the Confrontation Clause in *Mattox v. United States*.[29] *Mattox* involved a defendant who had previously been convicted of murder.[30] The defendant successfully appealed and was awarded a new trial.[31] At the new trial, the court permitted testimony from two witnesses who had testified at the previous trial, but were now deceased, to be read into the record.[32] As a result, the defendant was tried and convicted of murder once again.[33] The defendant appealed, claiming that his confrontation rights had been violated.[34] In its opinion, the Court seemed to suggest that the Sixth Amendment not only requires that the defendant be able to confront the witnesses against him personally, but that this confrontation take place in front of the jury, so that the jury may look at them and judge by their "demeanor upon the stand" and the manner in which they testify whether they are "worthy of belief."[35] However, the Court ultimately relaxed the "face-to-face" requirement and admitted the prior testimony.[36]

While *Mattox* stressed the importance of confronting the witnesses in the jury's presence, in *Coy v. Iowa*,[37] the Supreme Court

29. 156 U.S. 237 (1895).
30. *Id*.
31. *Id*. at 238.
32. *Id*. at 240.
33. *Id*.
34. *Id*.
35. *Id*. at 242–243.
36. *Id*. at 250. The Honorable Nancy Gertner, United States District Court Judge for the District of Massachusetts, argues that the underlying themes prevalent in later Confrontation Clause cases are first presented in *Mattox*. Nancy Gertner, *Videoconferencing: Learning through Screens*, 12 Wm. & Mary Bill Rights J. 769, 776 (2004). These themes are "that the constitutional requirement of physical confrontation before the jury could be modified by the 'necessities of the case,' to prevent a 'manifest failure of justice,' and in conformity to the evidentiary exceptions that were in place at the time the Constitution was adopted." *Id*. (quoting *Mattox*, 156 U.S. at 243–244).
37. 487 U.S. 1012 (1988).

emphasized another face-to-face requirement. In *Coy*, the State charged the defendant with the sexual assault of two thirteen-year-old girls.[38] At trial, pursuant to an Iowa statute intended to protect child victims of sexual abuse, the Government requested that a screen be placed between the defendant and the girls while they testified.[39] The screen would allow the defendant to barely see the witnesses; however, the witnesses would be unable to see the defendant at all.[40] The defendant objected to this procedure, claiming that it violated his Sixth Amendment rights by denying him face-to-face confrontation with his accusers.[41] The trial court rejected this argument and found the defendant guilty.[42] On appeal, the Supreme Court reversed the defendant's conviction, finding that a criminal defendant has the right to physically confront the witnesses against him.[43]

Nevertheless, not more than two years later, in the case of *Maryland v. Craig*, the Supreme Court limited the face-to-face confrontation requirement announced in *Coy*. In *Craig*, the State charged the defendant, an owner of a day-care center, with sexually abusing a six-year-old girl.[44] Before trial, the State moved the court to invoke a Maryland law that would permit child-abuse witnesses to testify by one-way closed-circuit television.[45] After

38. *Id*. at 1014.

39. *Id*.

40. *Id*. at 1014–1015.

41. *Id*. at 1015.

42. *Id*.

43. *Id*. at 1022. Justice Scalia, writing for the Court, reasoned that the face-to-face confrontation was necessary to "'ensur[e] the integrity of the fact-finding process.'" *Id*. at 1020 (quoting *Ky. v. Stincer*, 482 U.S. 730, 736 (1987)). Justice Scalia noted that "[a] witness 'may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is.'" *Id*. at 1019 (quoting *Jay v. Boyd*, 351 U.S. 345, 375–376 (1956) (Douglas, J., dissenting)). Further, "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' In the former context, even if the lie is told, it will often be told less convincingly." *Id*.

44. 497 U.S. at 840. Specifically, the defendant was charged with child abuse, first and second degree sexual offenses, perverted sexual practice, assault, and battery. *Id*.

45. *Id*. The one-way videoconferencing procedure allows the witness, the prosecution, and the defense attorney to leave the courtroom and enter a separate room, while the judge, jury, and defendant remain in the courtroom. *Id*. at 841. The prosecution and defense then examine and cross-examine the witness, while a video monitor presents the witness' testimony to those in the courtroom. *Id*. Throughout this entire process the witness cannot see the defendant, but the defendant is able to see the witness. *Id*. The defendant does remain in contact with his attorney, who may object to the testimony and allow

hearing an expert describe the serious emotional distress that testifying in front of the defendant would cause the witness, the court granted the State's motion.[46] The defendant objected to the procedure, claiming that it violated her confrontation rights; however, the court rejected this argument.[47] Based on the witness' testimony, the jury convicted the defendant on all counts, and she appealed.[48]

The Supreme Court granted certiorari so that it could resolve the Confrontation Clause problems raised by *Craig*. On review, the Supreme Court explicitly limited its decision in *Coy* by recognizing that, although the Confrontation Clause prefers a face-to-face confrontation,[49] it does not "[guarantee] criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial."[50] The Court claimed that the purpose[51] of the Confrontation Clause, which is to ensure the reliability of the evidence against a defendant, can be preserved absent a physical confrontation under certain circumstances.[52] Based on the foregoing reasons, the Court announced that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[53]

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the court to rule on the objections as if the witness were testifying in the courtroom. *Id*. at 842.

46. *Id*. at 842–843.

47. *Id*. at 842. Although the defendant was able to view the witness, the defendant specifically objected to the one-way procedure since it did not allow the witness to view her while the witness testified. *Id*. at 841.

48. *Id*. at 843.

49. *Ohio v. Roberts*, 448 U.S. 56, 63 (1980).

50. *Craig*, 487 U.S. at 844.

51. *See Cal. v. Green*, 399 U.S. 149, 158 (1970), stating that the Confrontation Clause has the following purposes:

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

Id. (citation omitted).

52. *Craig*, 497 U.S. at 845.

53. *Id*. at 850. The Sixth, Eighth, Ninth, and Tenth Circuits, along with the majority in *Yates*, all assert the applicability of the *Craig* test to situations where testimony is presented via two-way videoconference. See *infra* Parts II(B) and III(A) for a discussion on

Applying its newly established test, the Supreme Court found that the one-way procedure used in this case had not violated the defendant's Sixth Amendment rights.[54] Specifically, the Court found that the State's interest in protecting the child-abuse victim from further psychological damage was sufficient to outweigh the defendant's interest in physically confronting her accusers.[55] Furthermore, the Court found the one-way procedure reliable since it preserved the elements of the confrontation right: the witness was sworn in, the witness was subject to cross-examination, and the jury was able to view the witness' demeanor as she testified.[56]

B. Circuit Split

Five circuit courts, excluding the Eleventh Circuit's decision in *Yates*, have specifically addressed whether the *Craig* analysis should be applied to two-way videoconferencing. However, only one circuit—the Second—has determined that it does not, while the Sixth, Eighth, Ninth, and Tenth Circuits have all determined that *Craig* is the proper analysis.

1. United States v. Carrier

The Tenth Circuit was one of the first circuit courts to address whether *Craig* applied to two-way video testimony when it decided *United States v. Carrier*[57] in 1993. In *Carrier*, the State charged the defendant with sexually abusing three young girls.[58] Before trial, the Government moved to allow the victims to testify

these courts' extension of the *Craig* test.

54. *Id*. at 858.

55. *Id*. at 853.

56. *Id*. at 851. In addition to the test announced in *Craig*, the Supreme Court also made a very case-specific holding. *See* 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, 159 (2005) (arguing that the Court also "found that a child witness may testify via one-way closed circuit television provided it was necessary to protect his or her welfare, that the presence of the defendant (as opposed to the courtroom atmosphere generally) would traumatize the child, and that the impact of emotional distress on the child would be more than *de minimis*"). It is based on this premise that this Article argues that the *Craig* test should be limited to cases involving the one-way video presentation of a child witness' testimony.

57. 9 F.3d 867.

58. *Id*. at 868.

through two-way closed-circuit television.[59] The district court held an evidentiary hearing and, based on the evidence presented, found that the victims would be unable to testify in court due to their fear of being in the defendant's presence. [60] At trial, the victims testified by two-way video transmission from a room next to the courtroom, which allowed the defendant, the jury, and the victim-witnesses to see one another.[61] The jury convicted the defendant based on this testimony, and the defendant appealed.[62] Despite the fact that it was a two-way transmission, the Tenth Circuit applied the *Craig* test and upheld the district court's decision to allow the victims to testify via two-way video.[63]

2. United States v. Quintero

One year later, in 1994, the Ninth Circuit also utilized the *Craig* analysis when it decided *United States v. Quintero*.[64] In *Quintero*, the Government accused the defendant of murdering his two-year-old child.[65] The defendant claimed that the child died when she fell from the back of a truck, where she had been playing with her brother, and bumped her head.[66] Nevertheless, the defendant, fearing that his other child would be taken away from him due to neglect, attempted to bury his daughter's body in a secluded place. [67] When this failed, the defendant burned the child's body and removed her head so that her remains could not be identified.[68] Eventually, the defendant's wife came forward and told of her husband's actions.[69] At trial, the court allowed the victim's four-year-old brother, who had witnessed the entire event,

59. *Id*.

60. At this hearing, the court heard testimony from a licensed child counselor and a victim's advocate on whether the girls would be able to testify in the physical presence of the defendant. *Id*. In addition, the district court judge met with the victims personally, so that he could make a determination as well. *Id*. at 869.

61. *Id*.

62. *Id*.

63. *Id*. at 870–871. Even though it involved two-way videoconferencing, the Tenth Circuit likely applied *Craig* to this case because the facts of the two cases were nearly identical.

64. 21 F.3d 885.

65. *Id*. at 888.

66. *Id*.

67. *Id*. at 888–889.

68. *Id*. at 889.

69. *Id*.

to testify through two-way, closed-circuit television.[70] The court convicted the defendant of voluntary manslaughter and he appealed.[71] On appeal, the Ninth Circuit applied the *Craig* test and found that the defendant's Sixth Amendment confrontation rights had not been violated by the use of two-way videoconferencing.[72] The court found, as in *Craig*, that the State's interest in protecting the child from suffering further emotional trauma from testifying in the defendant's presence outweighed the defendant's right to a physical confrontation.[73]

3. United States v. Weekley

The next circuit court to address the admissibility of two-way video testimony was the Sixth Circuit. In *United States v. Weekley*,[74] the defendant had kidnapped two boys, an eleven-year-old and a two-year-old, from a laundromat.[75] Upon grabbing the boys, the defendant drove the victims to a secluded field where he molested the children for two weeks.[76] Eventually, the defendant was apprehended, brought to trial, and convicted of kidnapping and sexually abusing minors.[77] At trial, the court permitted the sexually abused children to testify via two-way transmission, and the defendant appealed.[78] Following the lead of its sister circuits,[79] the Sixth Circuit utilized the *Craig* analysis and found that the two-way video testimony did not violate the defendant's right to a physical confrontation since it was necessary to protect the children from suffering further trauma.[80]

70. *Id*.
71. *Id*.
72. *Id*. at 892–893.
73. *Id*.
74. 130 F.3d 747 (6th Cir. 1997).
75. *Id*. at 749.
76. *Id*.
77. *Id*.
78. *Id*. at 752.
79. For a discussion of how the Sixth Circuit's sister circuits applied the *Craig* analysis to two-way videoconferencing, see *supra* notes 58–73 and accompanying text.
80. *Weekley*, 130 F.3d at 753–754.

4. United States v. Gigante

While several circuits were extending the *Craig* analysis to two-way videoconferencing in cases involving child victims, the Second Circuit, in *United States v. Gigante*,[81] was the first court to deal with this issue outside of the child-protection context. In *Gigante*, the defendant was the boss of one of the New York Mafia crime families, and the Government charged him with murder and racketeering.[82] The prosecution presented its case against the defendant primarily through the testimony of ex-Mafia members, who had become cooperating witnesses.[83] One of the witnesses, who was essential to the prosecution's case, was dying of cancer and could not testify in court due to his health.[84] The Government moved the court to allow this witness to testify via two-way videoconferencing.[85] After hearing all the evidence on the motion, the trial court granted the prosecution's motion and allowed the witness to testify from a remote location.[86] The defendant objected and argued that the procedure denied him his Sixth Amendment confrontation rights.[87]

On appeal, the Second Circuit upheld the use of the video testimony by finding that the two-way procedure did not violate the defendant's confrontation rights since it preserved all the characteristics of in-court testimony.[88] However, the court did not use the *Craig* test in its analysis.[89] In fact, the court stated that the *Craig* test only applied to one-way video testimony, and therefore, it did not have to identify a particular important public policy that was advanced by allowing the witness to testify remotely.[90] As a result, the court announced a new test for analyzing whether or not two-way video testimony violates the Confrontation

81. 166 F.3d 75 (2d Cir. 1999).
82. *Id*. at 78.
83. *Id*.
84. *Id*. at 79.
85. *Id*.
86. *Id*. at 80.
87. *Id*.
88. *Id*. The procedure used in *Gigante* allowed the witness to be sworn in, subjected the witness to a full cross-examination, and forced the witness to testify in front of both the defendant and the jury. *Id*.
89. *Id*. at 81.
90. *Id*.

Clause.[91] That test, based on the standard for permitting a Rule 15 deposition,[92] allows the use of two-way video testimony when there are "exceptional circumstances," which means that the witness' testimony is material to the case and the witness is unavailable to appear at trial.[93] In this case, the court found that the prosecution had met its burden by showing that the witness' testimony was essential to its case and that the witness was unavailable to testify in court due to his health.[94]

5. United States v. Bordeaux

In 2005, the Eighth Circuit responded, in *United States v. Bordeaux*,[95] to the Second Circuit's decision not to follow *Craig* when two-way videoconferencing is used. *Bordeaux* involved another defendant who had been convicted of sexually abusing a

91. *Id.*

92. Fed. R. Crim. P. 15(a)(1). Rule 15 of the Federal Rules of Criminal Procedure provides, in pertinent part:

> (a) When Taken.
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> (1) In General. A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data.
>
> . . .
>
> (c) Defendant's Presence.
>
> (1) Defendant in Custody. The officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:
>
> (A) waives in writing the right to be present; or
>
> (B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.
>
> (2) Defendant not in Custody. A defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant—absent good cause—waives both the right to appear and any objection to the taking and use of the deposition based on that right.
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> . . .
>
> (f) Use as Evidence. A party may use all or part of a deposition as provided by the Federal Rules of Evidence.

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

94. *Id.*

95. 400 F.3d 548.

child.[96] During the trial, the child was put on the stand but was unable to testify due to her fear of being in the defendant's presence.[97] As a result, the court allowed the witness to testify from another room via two-way communication.[98] The defendant objected to this procedure, claiming that it violated his Confrontation Clause rights.[99] On appeal, the Eighth Circuit concluded that *Craig* was the applicable analysis and reversed the defendant's conviction since the *Craig* standard had not been satisfied.[100]

More importantly, the Eighth Circuit specifically rejected the Second Circuit's argument that *Craig* should be limited to one-way communications only.[101] The court disagreed with the Second Circuit and held that "'confrontation' via a two-way closed-circuit television is not constitutionally equivalent to a face-to-face confrontation."[102] Thus, it concluded that "'[c]onfrontation' through a two-way closed-circuit television is not different enough from 'confrontation' via a one-way closed-circuit television to justify different treatment under *Craig*."[103]

III. COURT'S ANALYSIS

This section details the majority and dissenting opinions in *Yates*, and it includes brief discussions of the significant cases cited in these opinions.

A. Majority Opinion

The majority in *Yates* began its opinion by acknowledging that the Confrontation Clause no longer guarantees the defendant an absolute right to a face-to-face confrontation.[104] The majority recognized the Supreme Court's opinion in *Craig* and stated

96. *Id*. at 552.
97. *Id*.
98. *Id*.
99. *Id*.
100. *Id*. at 555. The Eighth Circuit reversed the conviction because "[t]he district court found that [the victim's] fear of the defendant was only one reason why she could not testify in open court; it did not find that [the victim's] fear of the defendant was the dominant reason." *Id*.
101. *Id*. at 554–555.
102. *Id*. at 554.
103. *Id*.
104. *Yates*, 438 F.3d at 1312.

that the "right to a physical face-to-face meeting . . . may be compromised under limited circumstances where 'considerations of public policy and necessities of the case' so dictate."[105]

After a brief discussion of the Supreme Court's decision in *Craig*,[106] the majority moved on to summarize the Government's arguments for the admission of the two-way video testimony.[107] The Government relied on the decision in *Gigante*[108] to argue that the *Craig* test was inapplicable to this case since two-way videoconferencing was being used, as opposed to the one-way transmission used in *Craig*.[109] The majority rejected this argument, stating that the trial court in *Gigante* should have applied the *Craig* test, and if it had, the circumstances in *Gigante* likely would have satisfied *Craig*'s necessity standard.[110] Furthermore, the *Yates* majority pointed out that the Second Circuit upheld the trial court's decision in *Gigante* only after finding that it had adequately protected the defendant's confrontation rights by "holding an evidentiary hearing and making specific factual findings regarding the exceptional circumstances that made it inappropriate for the witness to appear in the same place as the defendant."[111]

Next, the majority cited a line of cases from other circuits that have recognized *Craig* as the appropriate analysis for the admissibility of two-way video testimony.[112] It also relied on *Harrell v. Butterworth*,[113] a prior Eleventh Circuit decision. *Butterworth* involved a defendant who robbed and burglarized an Argentine couple near the Miami Airport.[114] Before trial in Florida state court, the Government petitioned the court to allow the introduction of the victims' testimony by means of two-way video transmission.[115] In arguing for the admission of this testimony,

105. *Id*. (quoting *Craig*, 497 U.S. at 848).

106. For a discussion of the *Craig* test, see *supra* Part II(A).

107. *Yates*, 438 F.3d at 1312–1313.

108. For a discussion of *Gigante*, see *supra* Part II(B)(4).

109. *Yates*, 438 F.3d at 1312–1313.

110. *Id*. at 1313. The necessity in *Gigante*, which the *Yates* majority found sufficient to meet the *Craig* test, was "to keep the witness safe and to preserve the health of both the witness and the defendant." *Id*.

111. *Id*.

112. For a thorough discussion of these cases, see *supra* Part II(B).

113. 251 F.3d 926 (11th Cir. 2001).

114. *Id*. at 928.

115. *Id*.

the Government claimed that the victims were not able to testify at trial for the following reasons: (1) one of the victims was in poor health, and (2) both witnesses resided in a foreign country and were unwilling to return to the United States for trial.[116] The trial court granted the Government's motion and allowed the foreign witnesses to testify at trial via satellite.[117] As a result of this testimony, the jury convicted the defendant on all charges.[118]

The defendant in *Butterworth* appealed to the Florida Supreme Court,[119] which held that the two-way videoconferencing used in this case "qualified as an exception to the Confrontation Clause."[120] The Court first stated the following public policy reasons as justification for an exception to face-to-face confrontation: (1) the witnesses lived beyond the subpoena power of the court and thus there was no way to compel them to appear in court;[121] (2) there was evidence that one of the witnesses was in poor health and could not travel to court;[122] and (3) the testimony of these two witnesses was "absolutely essential to this case."[123] The Court held that "[t]hese three concerns, taken together, amount to the type of public policy considerations that justify an exception to the Confrontation Clause."[124] Finally, the Court found that the videoconferencing method "satisfied the additional safeguards of the Confrontation Clause" since a clerk in Miami had sworn the witnesses in, the defendant could cross-examine the witnesses, the jury observed the witnesses as they testified, and the witnesses could see the jury.[125]

116. *Id.*

117. *Id.*

118. *Id.* at 929.

119. *See Harrell v. State*, 709 So. 2d 1364, 1366 (Fla. 1998) (answering the Florida Third District Court of Appeal's certified question of "[whether] the admission of trial testimony through the use of a live satellite transmission [violates] the Sixth Amendment to the United States Constitution, . . . where a witness resides in a foreign country and is unable to appear in court").

120. *Butterworth*, 251 F.3d at 929.

121. *Harrell*, 709 So. 2d at 1369. The Court found that this was an important consideration, because it was "clearly in [the] state's interest to expeditiously and justly resolve criminal matters that are pending in the state court system." *Id.* at 1370.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1371.

Following the Florida Supreme Court's decision, the defendant filed a federal habeas corpus petition, which the district court denied. The Eleventh Circuit Court of Appeals granted the defendant's request for a certificate of appealability, restricted to a review of the Confrontation Clause issue.[126] On review, the Eleventh Circuit held that "[t]he Florida Supreme Court's decision was neither contrary to, nor an unreasonable application of, Supreme Court law as set forth in *Craig*."[127] Specifically, the Eleventh Circuit found the *Butterworth* Court's public policy and reliability justifications as sufficient to meet the *Craig* standard.[128]

The *Yates* majority cited *Butterworth* as "circuit precedent" and based its decision to follow the *Craig* test on this opinion.[129] Next, the majority attacked the Government's second argument—that *Craig* was inapplicable because the two-way video testimony used at trial was inherently more protective of the defendants' Sixth Amendment rights than the procedure for admitting unavailable witnesses' testimony through a Rule 15[130] deposition.[131] The court disagreed, pointing out that a Rule 15 deposition preserves the defendant's right to a physical, face-to-face confrontation by allowing the defendant to be present at the deposition, while the method of two-way videoconferencing does not.[132] Additionally, two-way videoconferencing is not authorized by the Federal Rules of Criminal Procedure, while a Rule 15 deposition is allowed to admit testimony at trial.[133] In fact, in 2002, the Advisory Committee on the Criminal Rules proposed an addition to the Federal Rules of Criminal Procedure that would have permitted the use of two-way video testimony.[134] However, as the majority recognized, the United States Supreme Court failed to endorse

126. *Butterworth*, 251 F.3d at 929.

127. *Id*. at 931.

128. *Id*.

129. *Yates*, 438 F.3d at 1313.

130. To view the text of Rule 15, see *supra* note 92.

131. *Yates*, 438 F.3d at 1314. According to the Government, two-way videoconferencing is superior to the admission of Rule 15 deposition testimony because the defendants and witnesses can see one another, the jury can see the witness and evaluate his or her credibility rather than simply hearing words read into the record, and it allows for cross-examination at the time of trial. *Id*. at 1315 n. 5.

132. *Id*. at 1314.

133. *Id*.

134. Fed. R. Crim. P. 26 advisory comm. nn. (2002).

this amendment and, as a result, Congress did not adopt it.[135] For these reasons, the majority found that use of two-way video testimony requires the protections afforded by *Craig*.

After thoroughly explaining why *Craig* was the applicable test, the *Yates* majority then proceeded with the analysis. As for the first prong, the Government's interests in admitting the video testimony were insufficient to justify denying the defendants a physical, face-to-face confrontation.[136] At trial, the Government argued "important public policies of providing the fact-finder with crucial evidence . . . [and] expeditiously and justly resolving the case."[137] However, the majority held that these interests were "not the type of public policies that are important enough to outweigh the [d]efendants' rights to confront their accusers face-to-face."[138]

Additionally, the majority pointed out that not only did *Craig* require a showing of essential interests, it also demanded that the public policies "make it *necessary* to deny the defendant his right to a physical face-to-face confrontation."[139] *Yates* was not a case like *Craig*[140] or *Gigante*,[141] where there was a clear necessity to use videoconferencing to separate the witnesses from the defendants.[142] Thus, the majority held that the Government's interest in "providing the fact-finder with crucial evidence" clearly did not require the separation of the Australian witnesses and the defendants.[143] Moreover, the *Yates* majority found no necessity since

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135. *Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure*, 207 F.R.D. 89, 93–94 (2002). Specifically, Justice Scalia stated that:

> The present proposal does not limit the use of testimony via video transmission to instances where there has been a "case-specific finding" that it is "necessary to further an important public policy." To the contrary, it allows the use of video transmission whenever the parties are merely unable to take a deposition under Fed. Rule Crim. Proc. 15. . . . Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.

Id.

136. *Yates*, 438 F.3d at 1316.

137. *Id*. at 1315–1316 (internal citation omitted).

138. *Id*. at 1316.

139. *Id*.

140. In *Craig*, it was necessary for the witness to testify outside the defendant's presence to avoid inflicting any further trauma on the witness, who was an alleged victim of child abuse. 497 U.S. at 856–857.

141. In *Gigante*, it was necessary to use two-way videoconferencing in order to protect the health and safety of one of the witnesses, a former mobster. 166 F.3d at 81–82.

142. *Yates*, 438 F.3d at 1318 n. 10.

143. *Id*.

the alternative method of admitting testimony through a Rule 15 deposition was available to the Government.[144]

The *Yates* majority ultimately concluded that, based on its application of the *Craig* test, "the presentation of live, two-way video conference testimony . . . violated [the] [d]efendants' Sixth Amendment confrontation rights . . . ."[145] Accordingly, the court vacated the defendants' convictions and remanded for a new trial.[146]

B. Dissenting Opinions

Two dissenting opinions were written and filed in *Yates*. One was written by Judge Tjoflat, while Judge Marcus wrote the other. Judge Birch also dissented and joined in both of these opinions.

1. Judge Tjoflat's Dissent

In his opinion, Judge Tjoflat essentially argued two things: (1) the majority erred in the result it reached utilizing the *Craig* test, and (2) the *Craig* test was the improper framework for determining whether the two-way video testimony violated the defendants' Sixth Amendment rights.[147]

Assuming that *Craig* was the correct test, Judge Tjoflat still found that the majority's analysis was incorrect.[148] First, Tjoflat argued that the Government's public policy interests of providing the jury with critical evidence and "expeditiously and justly resolving the case"[149] were sufficient to meet its burden under the first prong of *Craig*.[150] In fact, these interests were the same public policies that the Supreme Court found important enough to justify the one-way method in *Craig*.[151] Tjoflat also argued that

144. *Id*. at 1318.
145. *Id*. at 1319.
146. *Id*.
147. *Id*. at 1320 (Tjoflat, J., dissenting).
148. *Id*.
149. *Id*.
150. *Id*.
151. *Id*. at 1322. In his dissent in *Craig*, Justice Scalia rejected the majority's contention that the State's public policy interest was shielding the witness from further trauma. *Craig*, 497 U.S. at 867 (Scalia, J., dissenting). In fact, Justice Scalia argued that "[t]he State's interest here is . . . no more and no less than what the State's interest always is

the Government's interest was not merely in providing the jury with crucial evidence; rather, it was in presenting the jury with evidence that was reliable.[152] Because of the necessity for providing the jury with important, reliable evidence, Tjoflat claimed that it was certainly within the district court's discretion to determine that live, two-way video transmission of the unavailable witnesses' testimony, as opposed to a Rule 15 deposition, was necessary to further the Government's interests.[153]

Additionally, Judge Tjoflat refuted the majority's slippery-slope argument, which suggested that allowing the two-way procedure in *Yates* would permit "every prosecutor wishing to present testimony from a witness overseas [to] argue that providing crucial prosecution evidence and resolving the case expeditiously are important public policies that support the admission of testimony by two-way video conference."[154] Tjoflat attacked this argument by pointing out that "it was not just more convenient to use two-way video transmission to obtain live testimony in this case, it was necessary to do so."[155] The reason for the necessity, Tjoflat argued, was because the witnesses were unavailable due to the fact that they were beyond the court's subpoena power.[156] However, as Tjoflat pointed out, this would not be the case with every overseas witness; only foreign nationals.[157] Thus, unless the witnesses were foreign nationals and two-way videoconferencing was needed to obtain their testimony at trial, the Government's only option would be to have the witnesses testify in the physical presence of both the court and defendant.[158]

While Judge Tjoflat disagreed with the majority's analysis under *Craig*, he found even more fault with the court's decision to

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when it seeks to get a class of evidence admitted in criminal proceedings: more convictions of guilty defendants." *Id*. Judge Tjoflat interpreted this to mean that "the State's interests were to provide the fact-finder with reliable testimony, ensure the integrity of the judicial process, and foster respect for the [Confrontation Clause]." *Yates*, 438 F.3d at 1322 (Tjoflat, J., dissenting).

152. *Yates*, 438 F.3d at 1323.

153. *Id*. at 1325.

154. *Id*. at 1316 (majority).

155. *Id*. at 1324 n. 6 (Tjoflat, J., dissenting) (emphasis omitted).

156. *Id*.

157. *Id*. "A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it . . . of a national or resident of the United States who is in a foreign country." 28 U.S.C. § 1783 (2006).

158. *Yates*, 438 F.3d at 1324 n. 6 (Tjoflat, J., dissenting).

use *Craig* as the applicable test. Like the Supreme Court in *Craig*, the *Yates* majority analyzed the witnesses' testimony as if it had been given in court.[159] Tjoflat argued that this was incorrect and distinguished *Craig* on the basis of the kind of testimony for which the videoconferencing substituted.[160] In *Craig*, the one-way procedure served as a replacement for the testimony of a witness who was available to testify in court but, in order to reduce emotional trauma, did not do so.[161] In contrast, the witnesses in *Yates* were unavailable and could not be subpoenaed to testify at trial.[162] Thus, the two-way procedure, as Tjoflat argued, "served as a stand-in for a deposition—hearsay in its purest form," because it constitutes out-of-court testimonial statements.[163]

Judge Tjoflat declared that the standard announced in *Crawford* was the proper framework for analyzing the witnesses' testimony in *Yates*.[164] The *Crawford* test, as announced by the Supreme Court, admits "[t]estimonial statements of witnesses absent from trial . . . only where the declarant [was] unavailable, and only where the defendant [ ] had a prior opportunity to cross-examine."[165] In *Yates*, Judge Tjoflat argued that the *Crawford* requirements had been met since the witnesses' statements were testimonial, the witnesses were truly unavailable due to their status as foreign nationals, and defendants' counsel was permitted to cross-examine the witnesses during trial.[166]

Based on the foregoing reasons, Judge Tjoflat would have affirmed the district court's decision because the defendants' confrontation rights were not violated by the admission of testimony via two-way videoconferencing.[167]

159. *Id*. at 1325–1326.
160. *Id.* at 1326.
161. *Id*.
162. *Id*.
163. *Id*.
164. *Id.* at 1326–1327.
165. *Crawford*, 541 U.S. at 59.
166. *Yates*, 438 F.3d at 1326–1327.
167. *Id*.

2. Judge Marcus' Dissent

Judge Marcus also wrote a dissenting opinion in *Yates*, arguing, much like Judge Tjoflat, that the majority not only erred in using the *Craig* test, but was also incorrect in its application of *Craig*.[168] Most importantly, though, Judge Marcus also felt that the court should have conducted its analysis under the *Crawford* standard.[169] Based on the majority's error, Judge Marcus would also have affirmed the district court's decision to permit the two-way video testimony.[170]

IV. CRITICAL ANALYSIS

Yates has opened the door for courts within the Eleventh Circuit to deprive the jury of essential evidence in order to preserve a defendant's Sixth Amendment confrontation rights. In light of this, two-way videoconferencing should be used to admit the testimony of witnesses who are unavailable to testify at trial because videoconferencing is superior to a Rule 15 deposition and its use is beneficial to judicial economy. Furthermore, the *Craig* test should not be extended to two-way videoconferencing, and two-way video testimony should only be admitted when: (1) exceptional circumstances exist; (2) the witness is truly unavailable; and (3) the defendant is given an adequate opportunity to cross-examine the witness.

A. Two-Way Videoconferencing Should Be Used to Admit the Testimony of Unavailable Witnesses

Typically, through its subpoena power, a court can compel a witness to come to trial and testify in the physical presence of the defendant.[171] Failure to comply with the court's order places the subpoenaed witness in contempt of court.[172] However, because of

168. *Id*. at 1332 (Marcus, J., dissenting). Judge Marcus' dissent was very similar to Judge Tjoflat's and, therefore, will not be discussed in great detail.

169. *Id*. at 1330.

170. *Id*. at 1335.

171. Fed. R. Civ. P. 45. This rule grants district courts the power to issue subpoenas "[for] attendance at a trial or hearing" and to "command each person to whom [a subpoena] is directed to attend and give testimony . . . at a time and place therein specified." Fed. R. Civ. P. 45(a)(2), (a)(1)(c).

172. Fed. R. Civ. P. 45(e).

28 U.S.C. § 1783, only residents or nationals of the United States are subject to this subpoena power.[173] Therefore, unless an overseas witness can be considered as such, district courts may not compel the witness to testify at trial.[174]

However, simply because the court cannot compel in-court testimony does not mean that the witness' statements will never be heard at trial. Presently, there are two ways in which the unavailable witness' testimony may be admitted at trial: a Rule 15 deposition[175] and two-way videoconferencing. Neither one of these methods is ideal, but when the witness is truly unavailable, both are viable alternatives to the Sixth Amendment's preference for face-to-face confrontation.

1. Two-Way Videoconferencing Is Superior to a Rule 15 Deposition

As stated in *Craig*, the purpose of the Confrontation Clause is not only to allow the defendant to confront the witnesses against him but also to ensure that the witness' testimony is given under oath, that the witness is subject to a thorough cross-examination, and that the jury and defense are able to judge the witness' credibility.[176] Two-way videoconferencing, not a Rule 15 deposition, is the only procedure which can preserve all the characteristics of in-court testimony when a witness cannot be haled into court.[177] For instance, while both processes allow for the witness to be sworn in and subject to cross-examination, only two-way video-

173. 28 U.S.C. § 1783.

174. Federal law permits district courts to subpoena a witness located in a foreign country only when the person is:

> [A] national or resident of the United States who is in a foreign country, . . . [and] the court finds that particular testimony . . . is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance . . . .

Id. at § 1783(a).

175. *See U.S. v. Drogoul*, 1 F.3d 1546, 1557 (11th Cir. 1993) (finding that "the only proper use of a [Rule 15] deposition in a criminal case is as substitute testimony when a material witness is unavailable for trial").

176. *Craig*, 497 U.S. at 845–846 (quoting *Cal. v. Green*, 399 U.S. at 158).

177. Gertner, *supra* n. 36, at 780 (discussing the Second Circuit's decision in *Gigante* to utilize videoconferencing over a Rule 15 deposition because it was more protective of the defendant's confrontation rights).

conferencing forces the witness to testify in full view of the jury, court, defense counsel, and defendant.[178]

For example, assume a witness' testimony is taken pursuant to a Rule 15 deposition. At the deposition, the witness walks into the room exuding confidence. As the questioning begins, the witness answers the background questions with ease. Then, as defense counsel begins to ask some tougher questions, the witness' demeanor changes instantly. The witness no longer is answering the questions in a loud, clear voice. In fact, the witness' voice is quite shaky and sounds nervous. As counsel continues to probe into the veracity of the witness' story, the witness begins to squirm in her seat and seems to look down almost every time she answers a question. Moreover, when counsel reminds the witness that she could face a penalty for lying under oath, the witness' eyes begin to well up, as if she is about to cry. From the witness' demeanor throughout the deposition, it is clear to the defense counsel that maybe this witness is not as credible as the Government would like her to be. Unfortunately for the attorney and his client, all of those impressions will be lost when that deposition is read into the record at trial. To combat this problem, two-way videoconferencing can be used when the witness cannot physically appear in court to testify. This procedure allows the jury to observe the witness' demeanor, just as the defense counsel did in the example above, to determine whether the witness is credible or not.[179]

Two-way videoconferencing is also superior to a Rule 15 deposition because, as the witness testifies in a live videoconference, the judge is able to hear objections and rule on them instantaneously.[180] In contrast to a deposition, this procedure also allows the judge to supervise the line of questioning as well as the

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

179. *See Drogoul*, 1 F.3d at 1552 (stating that "[t]he primary reasons for the law's normal antipathy toward depositions in criminal cases are the factfinder's usual inability to observe the demeanor of deposition witnesses, and the threat that poses to the defendant's Sixth Amendment confrontation rights") (footnote omitted); *U.S. v. Milian-Rodriguez*, 828 F.2d 679, 686 (11th Cir. 1987) (declaring that "[t]he decision whether to allow [ ] depositions is committed to the discretion of the district court, . . . but the use of depositions in criminal cases is not favored because the factfinder does not have an opportunity to observe the witness' demeanor").

180. *Yates*, 438 F.3d at 1334 (Marcus, J., dissenting).

behavior of counsel.[181] Moreover, due to the fact that the videoconference occurs at the time of trial, the discovery process will have already been completed. This will allow the defendant and his attorney to cross-examine the witness more thoroughly since they will have the advantage of knowing everything that the prosecution plans to set forth and argue at trial.[182] Furthermore, the jury will definitely be able to garner more from a television monitor "contemporaneously recording the examination than it can from deposition testimony dryly read from a transcript."[183]

2. The Benefits Two-Way Videoconferencing Provides

In addition to the advantages that two-way videoconferencing has over a Rule 15 deposition,[184] this procedure can also save money and time.[185] A perfect example of using two-way video to cut costs was in the arraignment of Ted Kaczynski, the Unabomber.[186] Kaczynski was facing several charges, including first degree murder, and was set to be arraigned in New Jersey federal court.[187] However, Kaczynski was jailed in Sacramento, California, thousands of miles away from where his arraignment was set to take place.[188] For Kaczynski to be transported across the country, it was estimated that it would have cost the government close to $30,000.[189] By using two-way videoconferencing, the New Jersey court was able to arraign Kaczynski from a remote location for only forty-five dollars.[190]

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181. *Id*.

182. *Id*.

183. *Id*. at 1334–1335; *see* Harmon, *supra* n. 56, at 161 (stating that "[w]hile a video deposition involves no confrontation and is recorded prior to trial, two-way closed circuit testimony allows the jury to observe contemporaneous interaction between the [ ] witness and defense counsel").

184. For a discussion of why videoconferencing is superior to a Rule 15 deposition, consult *supra* Part IV(A)(1).

185. *See* Michael D. Roth, Student Author, *Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth*, 48 U.C.L.A. L. Rev. 185, 190–191 (2000) (discussing the benefits of remote courtroom appearances).

186. John T. Matthias & James C. Twedt, *TeleJustice—Videoconferencing for the 21st Century*, *Fifth National Court Technology Conference*, http://www.ncsconline.org/d_tech/ctc/showarticle.asp?id=92 (Sept. 1997).

187. *Id*.

188. *Id*.

189. *Id*.

190. *Id*.

Not only can this procedure save the government substantial sums of money, it can also provide some cost savings to defendants. For instance, a private defense attorney may bill at $400 per hour to travel across the country and conduct Rule 15 depositions of witnesses who will be unavailable for trial; this can become quite expensive. But, if two-way videoconferencing is used at trial, these travel and time expenses are eliminated and the client will be charged significantly less.

In addition to its cost-savings benefit, videoconferencing also assures a time-saving function. According to Nancy Gertner, a United States District Court Judge in Massachusetts, "[t]he technology promises . . . greater efficiency in scheduling trials and hearings since the inability of witnesses to travel to a given courthouse or to dovetail court appearances with their schedules would no longer be an insurmountable obstacle."[191]

Videoconferencing is so beneficial that it is currently being used in a variety of ways in courtrooms across the country. For instance, in Florida, courts have implemented two-way videoconferencing to conduct first appearances[192] and arraignments.[193] Another example is the use of two-way video in both probable cause and parole hearings.[194] Videoconferencing has even been used in trials involving helpless victims[195] and with poverty-stricken clients in states where it is difficult for the poor to get to court.[196] Furthermore, for close to ten years now, the Federal Rules of Civil Procedure have permitted witnesses to testify from a remote location "for good cause shown in compelling circum-

191. Gertner, *supra* n. 36, at 773.

192. A first appearance occurs after the defendant has been arrested, and it is meant to inform him of his basic rights, including the right to an attorney. Frederic I. Lederer, *Technology Comes to the Courtroom, and . . .*, 43 Emory L.J. 1095, 1101 (1994). An arraignment is a hearing, which may be done in conjunction with a first appearance, whereby the defendant is formally charged with a crime and is asked to enter a plea. *Id*.

193. *Id*. at 1101–1102. These types of hearings create several problems. For example, the defendants must be transported, on a daily basis, from jail to the courthouse, which can be quite costly. *Id*. at 1101. Additionally, security concerns can arise in the form of prisoner escape or assault. *Id*. at 1101–1102. Remote arraignments alleviate these concerns by leaving the defendants at the jail and conducting the hearings by live two-way television. *Id*. at 1102.

194. Matthias & Twedt, *supra* n. 186.

195. *Craig*, 497 U.S. 836.

196. Gertner, *supra* n. 36, at 772.

stances and upon appropriate safeguards."[197] As one can see, videoconferencing has already made its way into the courtrooms of America. Remote witness testimony in criminal cases is the next logical step.

B. The *Craig* Test Should Not Be Extended

The Supreme Court's decision in *Craig* should not be extended to cover the admissibility of two-way video testimony by an unavailable witness for two reasons. First, the *Craig* test was specifically designed to cover witnesses who are available to testify in court but, due to the harm that would result from a face-to-face confrontation with the defendant, cannot do so.[198] As Judge Marcus correctly suggested in his dissent in *Yates*, the Supreme Court likely never intended for lower courts to apply its *Craig* analysis outside the particular facts and circumstances of that case.[199] The *Craig* test was simply fashioned to allow the remote testimony of a very specific type of witness: a sexually abused child who was available to testify, but for whom a face-to-face confrontation with her attacker would result in further trauma.[200] Why was a one-way procedure used in *Craig* instead of a two-way transmission? Obviously, it was to protect the child-witness from the "trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate . . . ."[201] This simply is not the case where the witnesses are truly unavailable to testify, as in *Yates*, and where there is no need to protect the witnesses from testifying in front of the defendant.

Furthermore, the *Craig* standard should only apply when testimony is to be admitted by one-way video transmission because two-way videoconferencing is significantly more protective of a defendant's Sixth Amendment confrontation rights.[202] For instance, one-way videoconferencing does not allow for the defen-

197. Fed. R. Civ. P. 43(a).
198. *Yates*, 438 F.3d at 1328–1329 (Marcus, J., dissenting).
199. *Id*. at 1331.
200. "*Craig* was tailored as a narrow solution to an exceptional problem." *Id*.
201. *Craig*, 497 U.S. at 857.
202. *Yates*, 438 F.3d at 1331–1332.

dant and witness to see one another in the presence of the jury,[203] thereby denying the defendant any confrontation whatsoever. On the other hand, the two-way procedure is a "method of [ ] communication that links multiple locations through audio and video technology," and "enables people at different locations to see and speak with each other in close to real time."[204] The key element of this two-way procedure, which distinguishes it from the one-way transmission used in *Craig*, is "to allow a confrontation between the defendants and their accusers, not to prevent one."[205] Thus, the two-way procedure permits the witness to testify within the defendant's presence, albeit via video monitor, while the one-way procedure does not. Because the two procedures are entirely different, it is an impermissible stretch to analyze the admissibility of two-way videoconferencing using *Craig*.

C. The Proper Analysis for the Admission of Two-Way Video Testimony

As the dissenting judges in *Yates* argued, the availability of the witness will determine the type of analysis that a court will use to resolve a Confrontation Clause issue.[206] Essentially, there are two tests: (1) when the witness is available to testify in court, the witness must do so unless the *Craig* requirements[207] are satisfied; and (2) when the witness is unavailable, a defendant's Confrontation Clause rights are not violated so long as the defendant has the opportunity to cross-examine the witness under the *Crawford* standard.[208] Thus, when the witness truly cannot be haled into court to testify, as in *Yates*, *Craig* does not supply the proper analysis.

While this Author agrees with the dissent on that point, there is some fault with the dissent's proposed test. The *Yates* dissent

203. For a discussion of how one-way videoconferencing works, see *supra* note 45.

204. Roth, *supra* n. 185, at 189 (analyzing issues of law and policy that are created when videoconferencing technology is incorporated in trial proceedings).

205. *Yates*, 438 F.3d at 1332.

206. *Id*. at 1329.

207. If the witness is available to testify, two-way videoconferencing would only be permissible if denying the defendant a physical, face-to-face confrontation is necessitated by an important public interest, and the videoconferencing testimony is reliable. *Craig*, 497 U.S. at 855.

208. *Yates*, 438 F.3d at 1330.

argues that, under *Crawford*, two-way video testimony should be admitted if the witness is unavailable and the defendant has the opportunity to cross-examine the witness.[209] As has been pointed out by many, "the use of remote, closed-circuit television testimony must be carefully circumscribed,"[210] and this Author would argue that the *Crawford* test fails to do so. Essentially, the dissent's test would admit even the most trivial video testimony, so long as the witness could not be produced in court and the cross-examination requirement was met. As a result, there is a potential for abuse of this procedure, and therefore a more stringent standard that would adequately protect the defendant's confrontation rights is needed. Thus, this Author suggests a three-prong test, made up of elements of both the *Gigante* and *Crawford* tests, whereby two-way video testimony may be admitted in criminal cases when: (1) exceptional circumstances exist; (2) the witness is unavailable under Rule 804(a)(4) and 804(a)(5) of the Federal Rules of Evidence;[211] and (3) the defendant is given an adequate opportunity to cross-examine the witness.

In order to illustrate how this test would work, it will be applied to the hypothetical set out in the beginning of this Article.[212]

1. Exceptional Circumstances

The "exceptional circumstances" requirement must be analyzed on a case-by-case basis. However, one way to satisfy this element would be to prove that the witness' testimony is material to the case. This provision will force the prosecution to demonstrate to the court that it will not be able to put on its case-in-chief without the witness' testimony. Applying it to the facts of the hypothetical, it is clear that this first prong would be met. Here, the witness' testimony is crucial to the prosecution's case since she is the only eyewitness to the crime. Therefore, the jury would be deprived of this critical evidence unless the court allows

209. *Id*.

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

211. Fed. R. Evid. 804(a)(4)–(a)(5).

212. *Supra* n. 3 and accompanying text. In this hypothetical and similar to *Yates*, the only eyewitness to the crime was foreign and was not willing to return to the United States to testify at trial. Based on these facts, should the court allow the witness to testify from a remote location via two-way videoconference or does the Confrontation Clause prohibit such testimony?

the witness to testify via two-way video. If the prosecution can show that there is no other evidence that would allow it to present its case, then the court should move on to part two of the analysis.

2. Witness Unavailability

Under this requirement, the witness must be unavailable according to either Rule 804(a)(4) or Rule 804(a)(5) of the Federal Rules of Evidence. Rule 804(a)(4) provides that the witness is unavailable if he or she "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity."[213] Rule 804(a)(5) defines unavailability as when the witness "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means."[214] In the hypothetical, it is clear that the witness is truly unavailable pursuant to Rule 804(a)(5) since the witness resides in England and is not a national or resident of the United States. Because the witness is foreign, the district court in Florida would have no authority to issue a subpoena compelling the witness to appear in court to testify. Thus, the only way to reliably present this testimony would be through the use of two-way videoconferencing.

3. Opportunity for Cross-Examination

The last requirement, providing the defendant with an opportunity to adequately cross-examine the witness, will typically be the easiest to satisfy. In the hypothetical, the defendant would clearly be given this chance by implementing the two-way videoconferencing procedure. In fact, the two-way transmission would preserve all the typical characteristics of an in-court cross examination, i.e. swearing in the witness and forcing the witness to testify in front of both the defendant and the jury. Therefore, hypothetically speaking, the court should permit the foreign witness to testify via videoconferencing since the prosecution was able to satisfy the three-prong test.

213. Fed. R. Evid. 804(a)(4).
214. Fed. R. Evid. 804(a)(5).

V. CONCLUSION

When a witness is truly unavailable, two-way videoconferencing should be used to present the witness' testimony from a remote location, so that the jury is not deprived of essential evidence. In determining whether to admit the video testimony, courts should not look to the Supreme Court's decision in *Craig* for guidance. Rather courts should deem the testimony admissible, so long as the state can prove that exceptional circumstances exist, the witness is unavailable according to the Federal Rules of Evidence, and the defendant is given the opportunity to cross-examine the witness.