# ZOOM JURY TRIALS: THE INABILITY TO PHYSICALLY CONFRONT WITNESSES VIOLATES A CRIMINAL DEFENDANT'S RIGHT TO CONFRONTATION

Meghan O'Connell*

*"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."*[1]

Our world was flipped upside down when the novel Coronavirus ("COVID-19") impacted the world in December 2019. Court systems across the world resorted to Zoom proceedings to keep the judiciary moving. Zoom proceedings were integrated into the American justice system swiftly and without hesitation. The incorporation of Zoom into the courtroom created urgent concerns for criminal defendants across the world. Yet, constitutional rights did not change by moving justice online. Criminal defendants are still entitled to the same rights over Zoom as they would be in a courtroom. Their right to confrontation remains despite proceedings being held virtually, which requires consideration of a defendant's constitutional right to confrontation in light of the COVID-19 pandemic. This Article addresses the question: Does a Zoom criminal jury trial violate a criminal defendant's right to confrontation?

Part I introduces a background of the novel COVID-19 pandemic and its impact on the American criminal justice system. It further introduces the thesis of this Article—Zoom jury trials violate the Confrontation Clause under the Sixth Amendment to the United States Constitution because they do not effectively

 Associate, Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A. *Magna cum laude*, Stetson University College of Law, 2022; B.S. in Legal Studies, *summa cum laude*, University of Central Florida, 2019. I would like to thank Executive Editor Samuel J. Ciulla, Editor in Chief Kathryn Alkire, and Articles and Symposia Editor James G. Meslener for their assistance throughout the writing and editing of this Article. Additionally, I would like to thank all the hard-working editors and associates from *Stetson Law Review* that worked on editing this Article.

1. U.S. CONST. amend. VI, cl. 3.

provide a criminal defendant the right to an in-person confrontation with the witnesses testifying against them. As of the date of writing this Article, no cases have been decided on the issue of the constitutionality of a criminal jury trial. The lack of present guidance on the issue requires that we analyze past judicial precedent to determine whether remote witness testimony is constitutional.

Part II provides an introduction and overview of the Confrontation Clause, including the historical background, fundamental purposes, and Supreme Court precedent on the Confrontation Clause.

Part III discusses the circuit split in opinions on two-way videoconferencing testimony, which is most analogous to a Zoom jury trial, as an alternative to in-person testimony. This Part also analyzes whether such an alternative violates the Sixth Amendment Confrontation Clause. This Article attempts to resolve the differences between the two circuits and ultimately takes a position as to which circuit engaged in the correct analysis and applied the two-part test developed by the Supreme Court in *Maryland v. Craig*.[2] While the issues of two-way videoconferencing and Zoom jury trials are slightly different, the caselaw on two-way videoconferencing is instructive and therefore will be applied to the discussion of Zoom jury trials.

Part IV includes an analysis and application of the two-part test developed by the United States Supreme Court in *Craig* to the factual circumstances surrounding the COVID-19 pandemic. Particularly, Part IV addresses the concerns with introducing Zoom as a permanent feature of our criminal justice system. The primary concerns related to the right of confrontation include issues with reliability, nonverbal communication, and witness credibility. Reliability, nonverbal communication, and witness credibility all affect the ability to effectively cross-examine a witness, which is significantly more challenging over Zoom, therefore, inhibiting a criminal defendant's right to confrontation.

Finally, Part V concludes that based on the historical background of the Confrontation Clause, Supreme Court precedent, and application of the *Craig* test, Zoom jury trials violate a criminal defendant's fundamental right to confrontation granted under the Sixth Amendment. Part V further suggests that

2. 497 U.S. 836, 850 (1990).

our country should resist the urge to adopt Zoom trials as a permanent alternative to an in-person judicial process to reinforce the right to confrontation.

## *I. INTRODUCTION*

In 2020, COVID-19[3] impacted the globe, spreading rapidly, causing panic and uncertainty.[4] In January 2020, the United States reported its first case of COVID-19.[5] One month later, the World Health Organization declared a Global Health Emergency, followed by the Trump Administration declaring a public health emergency after reported cases of COVID-19 rose to over 9,000 cases.[6] Following the rise in cases, the World Health Organization officially declared COVID-19 a global pandemic.[7] Within three months, governors across the country issued statewide stay-at-home orders in an attempt to reduce the spread of the pandemic.[8] As the year ended, the United States reported over twenty million cases and 346,000 deaths related to COVID-19.[9]

The World Health Organization defines a pandemic as a "worldwide spread of a new disease."[10] Indeed, our country has

3. COVID-19 is a disease originating from a virus called SARS-CoV-2. *COVID-19*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/COVID-19 (last visited Nov. 6, 2022). SARS is an acronym for severe acute respiratory syndrome. *SARS*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/SARS (last visited Nov. 6, 2022).

4. Amy McKeever, *Coronavirus Is Spreading Panic. Here's the Science Behind Why.*, NAT'L GEOGRAPHIC (Mar. 17, 2020), https://www.nationalgeographic.com/history/article/why-we-evolved-to-feel-panic-anxiety.

5. The first patient to test positive for COVID-19 was a thirty-five-year-old man who had just returned from visiting family in Wuhan, China. Michelle L Holshue et al., *First Case of 2019 Novel Coronavirus in the United States*, 382 NEW ENG. J. MED. 929, 929 (2020). He went to a local urgent care after experiencing a cough and fever for a few days. *Id.*

6. *A Timeline of COVID-19 Developments in 2020*, AM. J. OF MANAGED CARE (Jan. 1, 2021), https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020.

7. Vincent Denault & Miles L. Patterson, *Justice and Nonverbal Communication in a Post-Pandemic World: An Evidence Based Commentary and Cautionary Statement for Lawyers and Judges*, 45 J. NONVERBAL BEHAV. 1, 1 (2020).

8. Jiachuan Wu et al., *Stay-at-Home Orders Across the Country, What Each State Is Doing – or Not Doing – Amid Widespread Coronavirus Lockdowns.*, NBC NEWS (Mar. 25, 2020), https://www.nbcnews.com/health/health-news/here-are-stay-home-orders-across-country-n1168736.

9. *U.S. Hits 20 Million-Mark in COVID-19 Cases*, ASSOCIATED PRESS (Jan. 1, 2021, 1:18 PM), https://www.pbs.org/newshour/health/u-s-hits-20-million-mark-in-covid-19-cases.

10. Derrick Bryson Taylor, *Is the Coronavirus an Epidemic or a Pandemic? It Depends on Who's Talking*, N.Y. TIMES (Feb. 28, 2020), https://www.nytimes.com/2020/02/28/health/coronavirus-pandemic-epidemic.html.

been hit with pandemics in the past.[11] What distinguishes past pandemics from COVID-19, however, is that the COVID-19 pandemic completely shut down the globe. Never before have we seen entire countries completely shut down in an attempt to prevent mass infection.[12]

In addition to its impacts across the world, the COVID-19 pandemic halted the functioning system of justice that operates throughout the United States.[13] Already presented with a substantial backlog of cases awaiting trial, courts faced an indefinite wait for judicial proceedings to resume pre-pandemic operations.[14] Government shutdowns across the country prompted questions as to how courts would continue to operate in such uncertain circumstances. Courts across the country took differing positions on how to proceed in light of the COVID-19 pandemic. Some states immediately shut down, while others tried to remain open for as long as possible.[15] Because of the varying degrees of state action following the start of the COVID-19 pandemic, this Article focuses on federal courts; specifically, which federal laws were put in place to assist with the transition to virtual proceedings during the COVID-19 pandemic.

In March of 2020, President Trump signed the Coronavirus Aid Relief and Economic Security Act ("CARES Act"), which expanded federal courts' ability to conduct certain criminal proceedings by audio or videoconference.[16] Prior to President Trump signing the CARES Act, federal courts were limited in the types of cases that could be held by telephone or videoconference.[17]

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11. One particular example of a past pandemic that has repeatedly been compared to COVID-19 is the 1918 Influenza Pandemic that spread throughout the United States. Brian Beach et al., *The 1918 Influenza Pandemic and Its Lessons for COVID-19*, 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27673, 2020), https://www.nber.org/system/files/working_papers/w27673/w27673.pdf.

12. Lois Zoppi, *How Does the COVID-19 Pandemic Compare to Other Pandemics?*, NEWS MED., https://www.news-medical.net/health/How-does-the-COVID-19-Pandemic-Compare-to-Other-Pandemics.aspx (Mar. 16, 2021).

13. *Pandemic Disrupts Justice System, Courts*, A.B.A. J. (Mar. 16, 2020), https://www.americanbar.org/news/abanews/aba-news-archives/2020/03/coronavirus-affecting-justice-system/.

14. *Id.*

15. Kara Scannell & Erica Orden, *In Hardest-Hit States, Coronavirus Is Grinding Justice to a Halt*, CNN (Mar. 13, 2020, 7:43 PM), https://www.cnn.com/2020/03/12/politics/legal-system-weight-of-coronavirus/index.html.

16. JOANNA R. LAMPE & BARRY J. MCMILLION, CONG. RSCH. SERV., IN11344, THE FEDERAL JUDICIARY AND THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT ("CARES ACT") 1 (2020).

17. FED. R. CRIM. P. 53.

Section 15002(b)(1) of the CARES Act allows courts to virtually conduct the criminal proceedings outlined in the Act upon a finding by the Judicial Conference that the current conditions created by COVID-19 "will materially affect the functioning" conditions of the court.[18] The provisions within the CARES Act relating to virtual criminal proceedings overrule existing federal statutes, including Federal Rule of Criminal Procedure 53, to permit the proceedings explicitly listed within the CARES Act to be held virtually.[19] Importantly, the CARES Act does not permit criminal jury trials to be conducted remotely.[20] The CARES Act only authorized the following proceedings to be conducted remotely:

- Initial appearances;
- Detention hearings;
- Arraignments;
- Hearings related to revocation of pretrial release, or revocation of probation or supervised release;
- Misdemeanor pleas and sentencing;
- Proceedings under the Federal Juvenile Delinquency Act; and
- Felony pleas and felony sentencings.[21]

Just weeks after President Trump signed the CARES Act, the Judicial Conference of the United States invoked emergency procedures, finding that the COVID-19 pandemic "will materially affect the functioning of the federal courts generally."[22] Following these actions by the President and the Judicial Conference, both

18. LAMPE & MCMILLION, *supra* note 16. Prior to the enactment of the CARES Act, there were only a limited number of proceedings that could be conducted by videoconference. In such instances, however, the defendant's written consent was required. *Id. See* FED. R. CRIM. P. 5(g), 10(c), and 43(b)(2).

19. LAMPE & MCMILLION, *supra* note 16, at 1–2.

20. *Id.* at 2.

21. *Id.* at 1–2. Felony pleas and sentencings are only permitted to be held virtually if the chief judge of a district court concludes that such proceedings "cannot be conducted in person without seriously jeopardizing public health and safety, and the district judge in a particular case finds for specific reasons that the plea or sentencing, in that case, cannot be further delayed without serious harm to the interests of justice." *Id.* at 2.

22. *Id.* at 1.

federal and state courts introduced remote technology into the courtroom.[23] While courtrooms have gradually incorporated remote technology, the onset of the COVID-19 pandemic forced courts to turn to videoconferencing platforms, such as Zoom, to prevent the American justice system from coming to a standstill.[24] Following the integration of Zoom into American courtrooms, legal scholars have suggested that virtual remote trial proceedings may become a permanent feature of our justice system.[25]

The introduction of remote proceedings, however, poses risks to a criminal defendant's constitutional rights when considered as an alternative to in-person proceedings.[26] If the progression of the incorporation of videoconferencing platforms, such as Zoom, into the courtroom progresses, the next logical step would be a fully remote criminal jury trial.[27] Potential constitutional violations of such a proceeding include the right to a speedy and public trial, the right to effective assistance of counsel, the right to a fair and impartial jury, and the right to confront witnesses.[28] These constitutional rights are at risk of violation because of the delays that the COVID-19 pandemic brought to the justice system and the

23. Janna Adelstein, *Courts Continue to Adapt to Covid-19*, BRENNAN CTR. FOR JUST. (Sept. 10, 2020), https://www.brennancenter.org/our-work/analysis-opinion/courts-continue-adapt-covid-19.

24. Jennifer Lapinski et al., *Zoom Jury Trials: The Idea Vastly Exceeds the Technology*, TEX. LAW. (Sept. 29, 2020, 4:12 PM), https://www.law.com/texaslawyer/2020/09/29/zoom-jury-trials-the-idea-vastly-exceeds-the-technology/. Zoom is a collaboration platform that provides audio and video conferencing abilities from phones, laptops, and tablets. Maggie Tillman, *What Is Zoom and How Does It Work? Plus Tips and Tricks*, POCKET-LINT (Feb. 15, 2021), https://www.pocket-lint.com/apps/news/151426-what-is-zoom-and-how-does-it-work-plus-tips-and-tricks.

25. *See* Allie Reed & Madison Alder, *Zoom Courts Will Stick Around as Virus Forced Seismic Change*, BLOOMBERG L.: U.S. L. WEEK (July 30, 2020, 4:50 AM), https://news.bloomberglaw.com/us-law-week/zoom-courts-will-stick-around-as-virus-forces-seismic-change (explaining that virtual court proceedings may stay long after the pandemic).

26. *Constitutional Protections Implicated by the Reopening of Criminal Courts in the Face of the COVID-19 Pandemic*, AM. COLL. OF TRIAL LAW. 19 (July 29, 2020), https://www.actl.com/docs/default-source/task-force-on-advocacy-in-the-21st-century/2020---constitutional-protections-in-reopening-of-criminal-courts-in-the-pandemic.pdf?sfvrsn=abe61769_10.

27. The Florida Supreme Court authorized criminal jury trials to be conducted remotely. Specifically, the Florida Supreme Court entered an administrative order on February 17, 2021, authorizing certain criminal jury trials to be held over Zoom if both parties agree. In order to do so, the defendant must provide written and oral consent on the record of their agreement to a remote jury trial. Comprehensive COVID-19 Emergency Measures for the Florida State Courts, Fla. Admin. Order No. AOSC20-23 (Fla. May 21, 2020).

28. *Constitutional Protections Implicated by the Reopening of Criminal Courts in the Face of the COVID-19 Pandemic*, *supra* note 26.

risky alternative of having one's fate be decided by a virtual jury. Deciding to appear before a jury is already a daunting decision for a criminal defendant.[29] The right to make that decision, however, is constitutionally guaranteed.[30] Another concern with virtual criminal trials is that the implementation of Zoom jury trials into the criminal justice system may force criminal defendants to prioritize some constitutional rights while sacrificing others.[31]

While there are many constitutional concerns and potential challenges to Zoom jury trials, this Article will focus solely on the Confrontation Clause issues under the Sixth Amendment to the United States Constitution. The Confrontation Clause provides criminal defendants with essential guarantees, including the right to cross-examine witnesses.[32] This right is limited to criminal defendants—it does not apply in civil cases.[33] As the following Part discusses, there is long-established Supreme Court precedent on the Confrontation Clause determining its scope and applicability. The following Part also analyzes the historical background of the Confrontation Clause and addresses the probable violation of this right if Zoom jury trials become a feature of our justice system.

## *II. THE CONFRONTATION CLAUSE*

The Confrontation Clause, which is found in the Sixth Amendment of the Constitution,[34] provides that a criminal defendant has the right to be "confronted with the witnesses

29. Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), https://www.nacdl.org/getattachment/8e5437e4-79b2-4535-b26c-9fa266de7de8/why-innocent-people-plead-guilty-_-jrakoff_ny-review-of-books-2014.pdf.

30. U.S. CONST. amend. VI.

31. *Constitutional Protections Implicated by the Reopening of Criminal Courts in the Face of the COVID-19 Pandemic*, *supra* note 26, at 23; *see also* Henry E. Hockeimer Jr. et al., *INSIGHT: Virtual Criminal Jury Trials Threaten Fundamental Rights*, BLOOMBERG L. (June 23, 2020, 4:00 AM), https://news.bloomberglaw.com/tech-and-telecom-law/insight-virtual-criminal-jury-trials-threaten-fundamental-rights (explaining that in some cases, criminal defendants must choose between waiving the right to a speedy trial and waiting until in-person trials resume or choosing a virtual trial where they may have to waive many of the other fundamental rights granted to them under the Sixth Amendment to the Constitution).

32. U.S. CONST. amend. VI.

33. U.S. CONST. amend. VI, cl. 3.

34. The Confrontation Clause originates from clause three of the Sixth Amendment, which was part of the Bill of Rights to the United States Constitution that was ratified by the states on December 15, 1791. *The Bill of Rights*, CTR. FOR LEGIS. ARCHIVES, NAT'L ARCHIVES AND RECS. ADMIN., https://www.archives.gov/files/legislative/resources/education/bill-of-rights/images/handout-3.pdf (last visited Nov. 18, 2022).

against him" in all criminal prosecutions.[35] This right applies to both in-court and out-of-court statements offered against a criminal defendant at trial.[36] The Fourteenth Amendment to the U.S. Constitution extends the right of confrontation to the states.[37]

### A. Brief History of the Confrontation Clause

The right to confrontation is not a new concept; it dates back to old English common law and Roman law.[38] Originally, however, criminal defendants were not guaranteed the right to confrontation.[39] Even in the limited situations where criminal defendants were entitled to legal representation, their counsel was prohibited from cross-examining witnesses.[40] Instead, only the judge was permitted to question witnesses.[41] Over time, however, attorneys' ability to question witnesses increased immensely.[42] The Sixth Amendment to the United States Constitution guarantees that every criminal defendant has a right to confrontation in *all* criminal cases.[43] The establishment of the right to confrontation reaffirms the fundamental right of a criminal defendant to challenge the evidence and witnesses against them.[44] As mentioned above, the right to confrontation undeniably applies at any criminal trial. It remains unclear, however, whether that right applies to criminal pretrial hearings.[45]

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35. U.S. CONST. amend. VI, cl. 3.

36. Crawford v. Washington, 541 U.S. 36, 50–51 (2004).

37. U.S. CONST. amend. XIV.

38. Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 85 (1995) (explaining how the right to confrontation was adopted and implemented into the justice system after strong resistance and denial in old English common law). Further, the United States Supreme Court in the case of *Crawford v. Washington* explained that the common law English tradition is one of live testimony in court subject to adversarial testing. 541 U.S. at 43.

39. Jonakait, *supra* note 38, at 82–83. Further, criminal defendants were prevented from having legal counsel in cases of serious felonies. *Id.*

40. *Id.* at 83.

41. *Id.* at 85. Witness interrogation involved a two-step process in the eighteenth century. First, the witness provided a narrative of their testimony and then was questioned by the judge. The second part of the interrogation is most similar to cross-examination in the present judicial process. *Id.* at 85 n.36.

42. *Id.* at 88.

43. U.S. CONST. amend. VI, cl. 3.

44. *See* Jonakait, *supra* note 38, at 96.

45. Legal scholars have published articles targeting this issue and addressing the inconsistent approaches taken by both state and federal courts. Some courts take the

The right to confrontation is not only recognized in the text of our Constitution and judicial precedent—the right was historically built into the construction of American courtrooms.[46] The architectural structure and design of a courtroom reflect this principle.[47] Undoubtedly, there are "connections between justice and the structure of the space in which it has been administered."[48] The witness stand, where witnesses swear under oath that the testimony they will give is the truth, provides a stage for attorneys to cross-examine witnesses.[49] The bench where the judge sits is positioned to look down over the witness stand and counsel, assuring that all courtroom actors behave in a manner consistent with justice.[50] The attorney's podium is positioned facing directly at the witness stand to assist in the mechanism of cross-examination.[51] The jury box is positioned to directly face the witnesses as they testify, requiring witnesses to be under watch as they provide testimony.[52] These design features are strategically placed within a courtroom to ensure the right to confrontation is preserved by impressing the witness "with the seriousness of the matter and guarding against the lie by the possibility of penalty of

position that the right to confrontation undeniably applies at criminal pretrial hearings, while others believe such right is only guaranteed at trial where evidence is presented, and guilt or innocence is decided by the trier of fact. Christine Holst, *The Confrontation Clause and Pretrial Hearings: A Due Process Solution*, 5 UNIV. ILL. L. REV. 1599, 1600 (2010) (suggesting that issues of confrontation at pretrial hearings should be viewed under a procedural due process analysis as opposed to a Sixth Amendment analysis).

46. Phillip C. Hamilton, *The Practical and Constitutional Issues with Virtual Jury Trials in Criminal Cases*, A.B.A. (Feb. 26, 2021), https://www.americanbar.org/groups/litigation/committees/criminal/articles/2021/spring2021-practical-and-constitutional-issues-with-virtual-jury-trials-in-criminal-cases/.

47. The courtroom is "converted into a stage in which space, sight lines and acoustics are critical in assessments about the credibility of the speaker and the statement they are making." Linda Mulcahy, *Architects of Justice: The Politics of Courtroom Design*, 16 SOC. LEGAL STUD. 383, 385 (2007).

48. Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 YALE J.L. & HUMAN. 311, 315 (2012).

49. *Witness Stand*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/courthouseplanning/space-planning-standards/witness (last visited Nov. 6, 2022).

50. *Judges Bench*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/courthouseplanning/space-planning-standards/judges-bench (last visited Nov. 6, 2022).

51. *Attorney Tables*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/courthouseplanning/needs-of-persons-with-disabilities/attorney-tables (last visited Nov. 6, 2022).

52. The standard organization of the courtroom, including the placement of the witness stand, ensures "clear sight lines to stage adversarial confrontation." Spaulding, *supra* note 48, at 330.

perjury."[53] These design features simply cannot be replicated in a virtual space.

### B. Fundamental Purposes of the Confrontation Clause

The Confrontation Clause serves to ensure that evidence admitted against the criminally accused at trial is reliable.[54] As the Supreme Court recognized in *Craig*, "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."[55] Reliability is an important consideration when admitting testimony or evidence against a criminal defendant because the judge or jury will use that evidence to determine the defendant's guilt or innocence. Four elements advance the constitutional right to confront witnesses and to challenge the reliability of the evidence: "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact."[56] The Confrontation Clause demands not necessarily that the evidence itself be reliable, but that the "reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[57] This means that if an inherently unreliable piece of evidence or witness testimony is admitted against a criminal defendant, an effective means exists for the defense to demonstrate to the jury that such evidence is unreliable.

Physical presence is a crucial element to the right of confrontation. It is one of the four elements that serve as the basis of the Confrontation Clause and what is required for the right of confrontation to be preserved.[58] The history of Supreme Court precedent establishes that the Confrontation Clause strictly requires in-person testimony by witnesses with limited exceptions.[59] As the Supreme Court recognized in the decision of

53. Maryland v. Craig, 497 U.S. 836, 846 (1990) (quoting California v. Green, 399 U.S. 149, 158 (1970)).

54. *Id.*

55. *Id.* at 845.

56. *Id.*

57. Crawford v. Washington, 541 U.S. 36, 61 (2004).

58. *Craig*, 497 U.S. at 846.

59. Jessica A. Roth, *The Constitution Is on Pause in America's Courtrooms*, THE ATLANTIC (Oct. 10, 2020), https://www.theatlantic.com/ideas/archive/2020/10/constitution-pause-americas-courtrooms/616633/.

*Pointer v. Texas*,[60] "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'"[61] Physical confrontation "[is] considered crucial to the Confrontation Clause in order to enable cross-examination."[62] Physical presence is seen as a means of ensuring effective cross-examination in a jury trial. Indeed, cross-examination is "the focal right afforded by the Clause."[63]

### C. Supreme Court Precedent on the Confrontation Clause

As far back as 1895, the United States Supreme Court has issued opinions on the coverage and limitations of the Confrontation Clause.[64] Since the Sixth Amendment was added to the U.S. Constitution, the Supreme Court has established the firm roots and guarantees under the Clause but also has recognized exceptions to the Confrontation Clause. The judicial precedent on the Clause has adapted with time, becoming increasingly more lenient on judicially created exceptions to the constitutional right to confrontation.

Only a few Supreme Court decisions, however, addressed the Confrontation Clause in the early years of its existence. The few decisions that did address the Confrontation Clause highlight the well-established principle "that cross-examination was at the heart of the right [to confrontation]."[65] As early as 1892, the Supreme Court emphasized the importance of face-to-face confrontation.[66] In *Lewis*, the Court recognized "[i]t is the right of any one, when prosecuted on a capital or criminal charge, to be confronted with the accusers and witnesses . . . ."[67] The Court stressed the importance of face-to-face confrontation, stating face-to-face confrontation "enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an

60. 380 U.S. 400 (1965).
61. Coy v. Iowa, 487 U.S. 1012, 1017 (1988) (quoting *Pointer*, 380 U.S. at 404).
62. Jeremy A. Blumenthal, *Reading the Text of the Confrontation Clause: "To Be" or Not "To Be"?*, 3 UNIV. PENN. J. CONST. L. 722, 735 (2001).
63. *Id.* at 728.
64. Mattox v. United States, 156 U.S. 237, 243 (1895).
65. Jonakait, *supra* note 38, at 121.
66. *See* Lewis v. United States, 146 U.S. 370 (1892).
67. *Id.* at 373.

innocent person."[68] While important, however, the Supreme Court has unequivocally stated that the right to confrontation is not absolute.[69] In *Coy v. Iowa*, the Court expressly reserved the question of whether any exceptions exist to the Confrontation Clause.[70] Later, in *Craig*, the Court decided the question reserved in *Coy* and formulated a test to determine if an exception to the Confrontation Clause exists.[71] The Court recognized that exceptions might exist if they were "necessary to further an important public policy."[72] These exceptions, however, have historically been limited to testimony by witnesses such as child molestation victims who are fearful of testifying in the presence of their abuser.[73]

Much of the Supreme Court precedent on the Confrontation Clause has been ambiguous as to whom it applies—whether it only applies to witnesses who testify in-person at trial or witnesses who never appear in the courtroom, but whose out-of-court statements are offered against a criminal defendant.[74] Eventually, in *Crawford v. Washington*, the Court clarified that the Confrontation Clause applies to both in-court and out-of-court testimony.[75] The distinction between the two types of statements is important to the Confrontation Clause analysis. In-person testimony occurs when a witness is on the stand testifying *in court*, subject to cross-examination. When a witness does not appear to testify at trial, the prosecution may nonetheless offer to admit their prior out-of-court statements into evidence. In that case, the prosecution will offer the statements under Federal Rule of Evidence 804 ("FRE 804") as an out-of-court statement made by an unavailable witness.[76] FRE 804 carves out exceptions for when

68. Maryland v. Craig, 497 U.S. 836, 846 (1990) (citing Coy v. Iowa, 487 U.S. 1012, 1019–20 (1988)).

69. *Id.* at 844.

70. 487 U.S. at 1021.

71. *Craig*, 497 U.S. at 845–46.

72. *Coy*, 487 U.S. at 1021.

73. *Craig*, 497 U.S. at 853. Remote testimony by a child victim is now allowed under statutory law. *See* 18 U.S.C. § 3509(b)(1).

74. Matthew J. Tokson, Comment, *Virtual Confrontation: Is Videoconference Testimony by an Unavailable Witness Constitutional?*, 74 U. CHI. L. REV. 1581, 1584 (2007).

75. Crawford v. Washington, 541 U.S. 36, 50–51 (2004).

76. FRE 804 provides an exception to the rule against hearsay when the declarant of the statement is unavailable to testify at trial. FED. R. EVID. 804. To admit a statement under FRE 804, the proponent of such statement must meet certain requirements. *Id.* First, the proponent must establish that the declarant of the statement is in fact unavailable. FED.

statements of an unavailable declarant are admissible.[77] This Article, however, focuses on the instances where witnesses testify at trial, and therefore it is of no concern to this Article whether a statement by an unavailable witness, who does not testify at trial, is admissible at trial.

In 2004, the Supreme Court in *Maryland v. Craig* developed a two-part test (the "*Craig* Test"), to determine when admitting videoconferencing testimony against a criminal defendant violates the Confrontation Clause.[78] First, the denial of physical confrontation must be "necessary to further an important public policy."[79] Second, the testimony must be sufficiently reliable.[80]

In *Craig*, the Court addressed the issue of whether the Sixth Amendment prohibits a child witness from testifying against a criminal defendant by way of one-way closed circuit television.[81] The defendant, Sandra Ann Craig, was charged with multiple counts of sexual offenses against a minor child.[82] At trial, the State sought to permit the alleged child victim to testify by way of one-way closed circuit television under a Maryland state statute authorizing such a method of child testimony in cases of sexual misconduct against a child.[83] One-way closed circuit television distances the child victim from being in the view of the defendant while they are testifying.[84] Although the defendant can see the child witness as they testify, they are limited to doing so by way of a video monitor display in the courtroom.[85] Further, the child witness never has to see the defendant as they are testifying.[86]

The trial court in *Craig* found that although the Maryland statute deprived the defendant of the opportunity to be face-to-face with his accuser, the defendant retained the ability to observe the

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R. EVID. 804(a). FRE 804(a) provides the criteria that the proponent of a statement must meet for a witness to be considered unavailable. *Id.* Once a declarant is found to be unavailable within the meaning of FRE 804(a), the offered statement must fit within one of the recognized exceptions under FRE 804(b). FED. R. EVID. 804(b). Examples of statements included within 804(b) are former testimony, statements against interest, and dying declarations. *Id.*

77. FED. R. EVID. 804.
78. *Craig*, 497 U.S. at 850.
79. *Id.*
80. *Id.*
81. *Id.* at 840.
82. *Id.*
83. *Id.*
84. *Id.* at 841.
85. *Id.*
86. *Id.*

witness testify, cross-examine the witness, and have their testimony be viewed by the jury.[87] On appeal, the court rejected Craig's assertion that face-to-face confrontation is required in all cases under the Sixth Amendment.[88] Instead, the court took a narrower approach, holding that the right to "eyeball-to-eyeball confrontation" is required unless necessary to obtain the testimony of the child victim.[89] Although the court of appeals reversed the decision of the trial court, the Supreme Court reversed and remanded the case, finding that the defendant's constitutional rights had not been violated and that the Confrontation Clause did not guarantee in-person confrontation in all situations.[90] To assist future courts in deciding whether a criminal defendants rights had been violated, the Court created a two-part test to determine when in-person confrontation is not required.[91]

After laying out the two-part test, the Supreme Court determined that the testimony of a child victim satisfied the two-part test and allowed the witness to testify by one-way videoconferencing, where the defendant could see the witness testify but the witness could not see the defendant.[92] The child witness would testify in front of the judge and counsel for the prosecution and the defense.[93] The child witness, however, would be shielded from having to testify in view of the defendant.[94] Further, while the Court in *Craig* noted that a face-to-face encounter is not required in every instance, the Court recognized the importance of physical presence, stating that physical presence acts as a guaranty of the essential purposes and values underlying the Confrontation Clause.[95] Indeed, physical presence is one of the four elements that serve the fundamental purpose of the Confrontation Clause.[96] As the majority in *Craig* noted, the "central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary

87. *Id.* at 842.
88. *Id.* at 843.
89. *Id.*
90. *Id.* at 849–52.
91. *Id.* at 850.
92. *Id.* at 857.
93. *Id.*
94. *Id.*
95. *Id.* at 847.
96. *Id.* at 846.

proceeding before the trier of fact."[97] Ultimately, the Court concluded in *Craig* that the State's interest in protecting an alleged child victim is sufficiently outweighs, in some cases, a criminal defendant's Sixth Amendment right to confrontation.[98]

Following the Supreme Court's decision in *Craig*, Congress passed Section 3509, which gives federal courts the authority to permit two-way videoconferencing testimony by a child abuse victim "if the court finds that the child is unable to testify in open court in the presence of the defendant. . . ."[99] Two-way video conferencing testimony is fundamentally different than one-way videoconferencing or closed circuit television in that two-way videoconferencing permits the child witness to see the courtroom and the defendant on a video monitor as they testify, and the judge, jury, and defendant can view the child during their testimony.[100] The effect of Section 3509 is to allow exceptions to the general rule requiring *in-person* testimony,[101] where such testimony would cause harm to a child victim.[102]

Justice Scalia's dissent in *Craig*, joined by Justice Brennan, Justice Marshall, and Justice Stevens, supports the position this Article takes in strongly resisting the implementation of Zoom jury trials into the criminal justice system and the importance of a criminal defendant's right to confrontation. In his dissent, Justice Scalia repeatedly turned to the explicit text of the Confrontation Clause and noted that the right to confrontation applies in all criminal prosecutions.[103] Further, he pointed out that the purpose of the Confrontation Clause is to ensure that despite many of the policy interests that may arise, none of them would overcome a criminal defendant's constitutional right to confrontation.[104] Disagreeing with the majority, Justice Scalia pointed out that the majority's reasoning in saying "we cannot say that face-to-face confrontation . . . is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers" is

97. *Id.* at 845.
98. *Id.* at 853.
99. 18 U.S.C. § 3509.
100. *Craig*, 497 U.S. at 854.
101. In-person testimony has historically meant to include physical, face-to-face testimony. 18 U.S.C. § 3509. Because of the unprecedented nature of COVID-19, it raises an interesting question of whether "in-person" testimony will ever include remote testimony via Zoom.
102. *Id.*
103. *Craig*, 497 U.S. at 860–61.
104. *Id.*

like saying being tried before a jury is not an indispensable element of the right to a jury trial.[105] Justice Scalia recognized that undoubtedly there are exceptions to the Confrontation Clause.[106] He noted, however, that the requirement "[t]hat the defendant should be confronted by the witnesses who appear at trial is not a preference 'reflected' by the Confrontation Clause; it is a constitutional right unqualifiedly guaranteed."[107] The basis of Justice Scalia's strong disagreement with the majority was his firm belief that "to confront plainly means to encounter face-to-face."[108] In his view, there is no way around that principle. No matter what way you view the Confrontation Clause, Justice Scalia asserts "the Sixth Amendment requires confrontation, and we are not at liberty to ignore it."[109]

Thus, post-*Craig*, a witness may testify by two-way videoconference technology if the court finds that the *Craig* two-part test has been established. Other than the *Craig* rule, there are no recognized exceptions to the Confrontation Clause that permit a witness to testify anywhere other than in the presence of a criminal defendant.

As Justice Scalia noted in the decision of *Coy v. Iowa*,[110] "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"[111] In *Coy*, the Court permitted a thirteen-year-old child victim to testify out of the sight of the criminal defendant.[112] The Supreme Court concluded that the defendant's right to face-to-face confrontation had been violated because the defendant did not have the right to physically confront the witness.[113] Justice Scalia emphasized the importance of the well-known, common-sense principle that it is important to meet someone face-to-face, especially your accusers.[114] Further, Justice

105. *Id.* at 862.
106. *Id.* at 863.
107. *Id.*
108. *Id.* at 864.
109. *Id.* at 870.
110. Coy v. Iowa, 487 U.S. 1012 (1988).
111. *Id.* at 1019.
112. The trial court permitted the child witness to testify in the courtroom where a big screen was to be placed between the defendant and the witness stand during the victim's testimony. *Id.* at 1014.
113. *Id.* at 1020. Justice Scalia noted "[w]e have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Id.* at 1016.
114. *Id.*

Scalia said "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'"[115] The precedent governing the right to confrontation permits exceptions to such right "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."[116]

## *III. VIDEOCONFERENCING AS CONFRONTATION: CIRCUIT SPLIT REGARDING THE CONSTITUTIONALITY OF TWO-WAY VIDEOCONFERENCING TESTIMONY AT TRIAL*

The Supreme Court and the federal circuit courts have not directly addressed the issue of whether Zoom videoconferencing violates a defendant's right to confrontation. A few circuit courts, however, have issued opinions on two-way videoconferencing.[117] A fully remote Zoom jury trial would be most analogous to two-way videoconferencing and, thus, is relevant to the discussion of Zoom trials. Two-way videoconferencing is a process used in courtrooms that allows a witness to testify from a separate location in the courthouse.[118] During such testimony, the witness can see the defendant, and the defendant can see the witness as they testify.[119] Notably, however, the instances of two-way videoconferencing that were allowed in courts pre-COVID-19 did not include a fully remote process—the witnesses and all actors were still present in the courthouse.[120]

While the Supreme Court has yet to address the constitutionality of two-way videoconferencing, both the Second and Eleventh Circuits have issued opinions on the matter. The Second Circuit held that two-way video conferencing is constitutionally permissible,[121] while the Eleventh Circuit held that two-way videoconferencing is not constitutionally

115. *Id.* at 1017 (citing Pointer v. Texas, 380 U.S. 400, 404 (1965)).
116. Maryland v. Craig, 497 U.S. 836, 850 (1990).
117. *See* United States v. Moses, 137 F.3d 894, 897–98 (6th Cir. 1998); United States v. Weekley, 130 F.3d 747 (6th Cir. 1997); United States v. Quintero, 21 F.3d 885, 892 (9th Cir. 1994); United States v. Garcia, 7 F.3d 885, 887–88 (9th Cir. 1993); United States v. Carrier, 9 F.3d 867 (10th Cir. 1993); United States v. Farley, 992 F.2d 1122, 1125 (10th Cir. 1993).
118. United States v. Yates, 438 F.3d 1307, 1310 (11th Cir. 2006).
119. *Id.*
120. *See* United States v. Gigante, 166 F. 3d 75 (2d Cir. 1999); *Yates*, 438 F.3d 1307.
121. *Gigante*, 166 F.3d at 81.

permissible.[122] Particularly relevant to this Article, the Second and Eleventh Circuits took contrasting positions on the applicability of the *Craig* test to two-way videoconference testimony.

In *United States v. Gigante*, brought before the Second Circuit, the trial court permitted a witness to testify via two-way video conferencing, arguing that it sufficiently provided "face-to-face confrontation."[123] There, the defendant, Vincent Gigante, was charged with various charges that ranged from murder to racketeering offenses.[124] One of the witnesses the Government sought to call to testify at trial was Peter Savino, a participant in the Federal Witness Protection Program who was ill at the time the trial took place.[125] Ultimately, the court permitted Savino to testify by two-way videoconferencing.[126] The witness was sworn, placed under oath, and "testified in full view of the jury, court, and defense counsel . . . ."[127] The trial court said that the closed circuit television procedure utilized for the witness's testimony preserved the four characteristics of the Confrontation Clause.[128] Seemingly absent from the court's consideration, however, was the fourth characteristic, physical presence, which is undoubtedly important to confrontation. The defendant was convicted of multiple counts of RICO violations and conspiracy to commit murder charges.[129]

On appeal, one of the challenges to the conviction was that the defendant's constitutional right to confrontation had been violated when the trial court permitted a witness to testify by two-way videoconferencing from a remote location. The Second Circuit declined to apply the *Craig* test to two-way videoconferencing and took it upon itself to create a new standard for determining when videoconferencing is permitted in the courtroom—a finding of "exceptional circumstances."[130] In holding the *Craig* test was inapplicable to two-way videoconferencing, the Second Circuit

122. *Yates*, 438 F.3d at 1315.
123. *Gigante*, 166 F.3d at 81.
124. *Id.* at 78.
125. *Id.* at 79. Additionally, Savino was undergoing medical supervision for an inoperable form of cancer at the time that he was supposed to provide testimony during the trial of Gigante. *Id.*
126. *Id.* at 80.
127. *Id.*
128. *Id.*
129. *Id.* at 78.
130. *Id.* at 81.

distinguished *Gigante* from *Craig*, where only one-way videoconferencing was at issue.[131]

Specifically, the court refused to apply the *Craig* test in *Gigante* because the trial judge authorized two-way videoconferencing instead of one-way videoconferencing.[132] The court said because two-way videoconferencing preserves face-to-face confrontation it was not necessary to enforce and apply the *Craig* test to the facts of *Gigante*.[133] Thus, under the Second Circuit's ruling in *Gigante*, two-way videoconferencing is constitutionally permissible as long as the court makes a finding of "exceptional circumstances."[134]

Further, under the court's reasoning in *Gigante*, videoconference testimony and out-of-court testimony are treated the same, despite the inherent differences between the two.[135] The court made no meaningful distinction between a witness who testifies in the presence of the criminal defendant and one who never even sees the defendant face-to-face during trial. The failure to distinguish the two totally separate categories of witness testimony is directly contrary to the rules of evidence, which govern the admissibility of out-of-court statements.[136] The Second Circuit's treatment of video testimony as synonymous with in-person testimony deviates from the well-founded principles underlying the right to confrontation guaranteed by the Sixth Amendment. The only recognized exception to the requirement of physical presence of witnesses in criminal trials is that contemplated under the *Craig* test, which the *Gigante* court refused to apply—once again straying from legal precedent.

The Eleventh Circuit in *United States v. Yates* took a different approach than the Second Circuit. In *Yates*, the court applied the two-part test developed in *Craig* to determine if the denial of face-to-face confrontation was "necessary to further an important public policy" and whether the "reliability of the testimony" was otherwise assured.[137] At trial, the Government wanted two witnesses to testify via video conferencing from Australia.[138] The

131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *See id.* at 80–82.
136. *See* FED. R. EVID. 804.
137. United States v. Yates, 438 F.3d 1307, 1314 (11th Cir. 2006).
138. *Id.* at 1309–10.

trial court permitted the witnesses to testify, and both defendants, the judge, and the jury could see the testifying witness on a television monitor.[139] The Government relied on *Gigante* and argued that the court should not apply the two-part test in *Craig* because this case dealt with two-way videoconferencing as opposed to one-way videoconferencing.[140] The court rejected the argument by the Government and refused to limit the application of the *Craig* test to instances of one-way videoconferencing.[141] Disagreeing with the Second Circuit's refusal to apply the *Craig* test in *Gigante*, the Eleventh Circuit held that *Craig* is the proper test for admissibility of two-way conference testimony.[142] The court reasoned that "[b]ecause Defendants were denied a physical face-to-face confrontation with the witnesses against them at trial, we must ask whether the requirements of the *Craig* rule were satisfied."[143] Notably, had the Second Circuit applied *Craig*, like the majority of other circuits, they would have reached the same result in *Gigante*.[144]

Applying *Craig*, the Eleventh Circuit found that two-way videoconferencing violated the defendant's constitutional right to confrontation and reasoned that "the simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation."[145] The court stated there was no "necessity of the type *Craig* contemplates" to justify two-way videoconferencing in *Yates*.[146] Further, the court found that videoconferencing was not an effective replacement for face-to-face confrontation and was not necessary to "further an important public policy."[147] Ultimately, the court in *Yates* rejected the approach taken by the Second Circuit in *Gigante*, aligning its decision with the Supreme Court's indication that a finding of "exceptional circumstances" as outlined by the Second Circuit in

139. *Id.* at 1310.
140. *Id.* at 1312–13.
141. *Id.* at 1313.
142. *Id.*
143. *Id.* at 1314.
144. *Id.* at 1313.
145. *Id.* at 1315.
146. *Id.* at 1316.
147. *Id.* at 1318–19.

*Gigante* is not enough.[148] As the court noted in *Yates*, "the Second Circuit stands alone in its refusal to apply *Craig*."[149]

Other circuits have applied the *Craig* test to determine the admissibility of two-way video testimony during the trial.[150] The Ninth Circuit in *United States v. Garcia* applied the two-part test developed in *Craig* to child victim testimony by two-way videoconferencing—an almost identical set of facts to which the Second Circuit in *Gigante* refused to apply the *Craig* test.[151] Further, the court reiterated the requirement under *Craig* that before the court permits two-way videoconference testimony there must be a case-specific finding of necessity.[152] Another example of the *Craig* test's application to a case of closed circuit testimony is the case of *United States v. Moses*.[153]

In *Moses*, the Sixth Circuit faced review of the trial court's decision to permit a child abuse victim to testify by way of closed circuit television.[154] In its analysis, the court recognized that the application of the *Craig* test involves a balancing of interests between protecting the victim and preserving the criminal defendant's constitutional right to confrontation.[155] Ultimately, the court concluded, based on the application of the *Craig* standard and reasoning, that the district court was incorrect in allowing the child abuse victim to testify by closed circuit television.[156]

In 2002, the Advisory Committee on the Criminal Rules suggested a revision to Federal Rule of Criminal Procedure 26 that would have allowed testimony by means of two-way video conferencing technology upon a finding of exceptional circumstances (the standard proposed by the Second Circuit in

148. *Id.* at 1312–13. The Supreme Court, when presented with an opportunity, refused to pass on to Congress a proposed amendment to Federal Rule of Civil Procedure 26, which would have explicitly permitted video testimony upon a finding of exceptional circumstances. Richard Friedman, *Remote Testimony*, 35 UNIV. MICH. J.L. REFORM 695, 695–96 (2002).

149. *Yates*, 438 F.3d at 1313–14.

150. *See* United States v. Moses, 137 F.3d 894, 897–98 (6th Cir. 1998); United States v. Weekley, 130 F.3d 747, 753–54 (6th Cir. 1997); United States v. Quintero, 21 F.3d 885, 892 (9th Cir. 1994); United States v. Carrier, 9 F.3d 867, 869–70 (10th Cir. 1993); United States v. Garcia, 7 F.3d 885, 887–88 (9th Cir. 1993); United States v. Farley, 992 F. 2d 1122, 1125 (10th Cir. 1993).

151. *Garcia*, 7 F.3d at 887.

152. *Id.*

153. *Moses*, 137 F.3d at 897–98.

154. *Id.* at 897.

155. *Id.*

156. *Id.* at 902.

*Gigante*).[157] Rule 26 of the Federal Rules of Criminal Procedure relates to witness testimony in federal courts.[158] Specifically, the most recent version of Rule 26 provides "[i]n every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§ 2072–2077."[159]

The Supreme Court refused to transmit to Congress the proposed amendments to the Federal Rules of Criminal Procedure, including Rule 26, submitted to the Court by the Judicial Conference.[160] The proposal submitted by the Advisory Committee provided:

> In the interest of justice, the court may authorize contemporaneous, two-way video presentation in open court of testimony from a witness who is at a different location if:
>
> (1) the requesting party establishes *exceptional circumstances* for such transmission;
>
> (2) appropriate safeguards for the transmission are used; and
>
> (3) the witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)-(5).[161]

The Court declined to adopt the proposed revision to Rule 26 that would have allowed testimony by two-way videoconference.[162] Following the Supreme Court's refusal to adopt the questionable proposal, Justice Scalia filed a statement explaining that the proposed amendment to Rule 26 is "contrary to the rule enunciated in *Craig*."[163] Further, Justice Scalia, on behalf of the majority of the Court stated "[v]irtual confrontation might be sufficient to protect virtual constitutional rights. I doubt whether it is sufficient to protect real ones."[164] Such opinion by the Supreme Court

157. Friedman, *supra* note 148, at 695–96.
158. FED. R. CRIM. P. 26.
159. *Id.*
160. Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89, 93 (2002) (statement by Scalia, J.).
161. *Id.* at 99 (emphasis added).
162. *Id.* at 93.
163. *Id.*
164. *Id.* at 94.

evidences the fact that the Second Circuit in *Gigante* went astray from the well-founded principles of the Confrontation Clause.

## *IV. ANALYSIS*

The judicial system in the United States and finders of fact rely a great deal on witness testimony to reach a decision reflecting the interests of justice. The courts meticulously govern the conditions and requirements under which witnesses must testify. In most cases, the witness must be sworn under oath.[165] The purpose of the oath, where witnesses who take the stand swear under penalty of perjury that they will tell the truth and nothing but the truth, is to ensure that only reliable testimony is admitted against a criminal defendant.[166] Further, witnesses have historically been required to be physically present when testifying in court in a criminal trial against the criminally accused.[167] Indeed, physical presence serves one of the essential functions of the Confrontation Clause.[168] The ultimate determination of whether Zoom jury trials violate a criminal defendant's Sixth Amendment right to confrontation requires application of the *Craig* test to the uncertain state of the world at the height of the COVID-19 pandemic.

### A. Why *Gigante* Was Wrong and *Yates* Was Right: *Craig* is the Proper Test

As described above, the Second and Eleventh Circuits reached differing opinions related to the applicability of the *Craig* test to determine the constitutionality of two-way videoconference testimony.[169] This Article takes the position that the *Craig* test applies to two-way videoconference testimony, like the Eleventh Circuit's holding in *Yates*, and argues that the court in *Gigante* took a position contrary to the law and the intentions of the Supreme Court. The problem with the exceptional circumstances

165. FED. R. EVID. 603.

166. Maryland v. Craig, 497 U.S. 836, 845–46 (1990). The oath impresses upon the witness the seriousness of the judicial process and the understanding that if the testimony they provide is false, they can be prosecuted for lying under oath. *Id.*

167. *Id.*

168. *Id.*

169. United States v. Gigante, 166 F.3d 75, 81 (2d Cir. 1999); United States v. Yates, 438 F.3d 1307, 1319 (11th Cir. 2006).

test, developed out of thin air by the Second Circuit in *Gigante*, is that it provides an overwhelmingly easy standard for the Government to overcome to permit videoconference testimony against a criminal defendant.[170] All that is required is a showing of "exceptional circumstances," a shockingly vague and ambiguous term for a standard that is proposed to allow exceptions to one of the fundamental guarantees to a criminal defendant under the Sixth Amendment to the U.S. Constitution.

When a criminal defendant's constitutional rights are at stake, it is more than concerning that the Second Circuit found such a minimal standard sufficient. The exceptional circumstances approach bears little support, and the Supreme Court declined to adopt such a standard when presented with the opportunity to do so.[171] While not binding, the Supreme Court's indication that the exceptional circumstances approach is inadequate at best[172] should serve as guidance for future courts when faced with a decision on the constitutionality of videoconference testimony, particularly in light of the COVID-19 pandemic. Such opinion by the Supreme Court evidences the fact the Second Circuit in *Gigante* went astray from the well-founded principles of the Confrontation Clause in its refusal to apply the *Craig* test to two-way videoconference testimony. Further, the court in *Gigante* focused heavily on the distinction between one-way and two-way videoconferencing technology in its refusal to apply the *Craig* test.[173] Specifically, the court stated that because the Supreme Court in *Craig* dealt with one-way videoconferencing, then that must mean that because *Gigante* dealt with two-way videoconferencing, the *Craig* two-part test is inapplicable.[174] This argument is dismantled by the fact that other circuits adopted and applied the *Craig* two-part test to cases dealing with both one-way and two-way videoconferencing technology—exactly what the Second Circuit refused to do in *Gigante*. The Second Circuit's attempt in *Gigante* to poke a hole in the Confrontation Clause is contrary to the historical

170. Anne Bowen Paulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1108–09 (2004).

171. Friedman, *supra* note 148, at 695–96.

172. The Supreme Court refused to adopt the exceptional circumstances test when presented with the opportunity to do so in an amendment to Rule 26(b) of the Federal Rules of Criminal Procedure. Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89, 93 (2002) (statement by Scalia, J.).

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

174. *Id.*

understanding of the Confrontation Clause and is unlikely to be followed by other courts.

The *Craig* test is the proper test to determine whether two-way videoconferencing testimony is appropriate and whether the form of witness testimony violates a criminal defendant's right to confrontation. Without the application of the *Craig* test, courts would be forced to make decisions, which have the possibility of violating the U.S. Constitution, without a uniform standard to rely on. The two-part test established by the Supreme Court in *Craig* promotes uniformity and prohibits two-way video testimony where such testimony would violate the Sixth Amendment.[175] Therefore, the question of whether Zoom jury trials violate a defendant's right to confrontation requires application of the *Craig* two-part test.

### B. Applying the *Craig* Test to Zoom Jury Trials After the COVID-19 Pandemic

If Zoom were to ever become the new normal it would have to be established that the circumstances surrounding the pandemic satisfy both prongs of the Craig test. First, the Government would have to demonstrate that holding a virtual criminal jury trial during the COVID-19 pandemic is "necessary to further an important public policy."[176] Second, the Government would have to establish that the testimony offered by all witnesses remotely is "sufficiently reliable."[177] This Article takes the position that the COVID-19 pandemic does not justify holding a criminal jury trial entirely remotely. In other words, a virtual remote criminal jury trial is not "necessary to further an important public policy."[178] Additionally, even if the Government could establish the first prong, the second prong stops it at the door. In most cases, the Government would not be able to establish that testimony by witnesses, against a criminal defendant, where they are entirely remote, appearing from their kitchen, living room, or bedroom, is sufficiently reliable to satisfy the second prong of the *Craig* test. The basis of this argument will be explained in a later section of this Article. Consequently, Zoom jury trials do not fit within the limited exception to the Confrontation Clause under *Craig* and,

175. Maryland v. Craig, 497 U.S. 836, 850 (1990).
176. *Id.*
177. *Id.*
178. *Id.*

thus, remote witness testimony during criminal jury trials is unconstitutional.

### *1. Virtual Criminal Jury Trials: Necessary to Further an Important Public Policy?*

Our country has undoubtedly been faced with pandemics before.[179] Never before, however, has our country comes to a halt as it did in March of 2020 when COVID-19 cases throughout the United States were swiftly on the rise.[180] The onset of the COVID-19 pandemic was "accompanied by a large degree of fear, anxiety, uncertainty, and economic disaster worldwide."[181] The news media caused a frenzy of panic and fear related to COVID-19 that our country has not experienced before.[182] The panic caused by the COVID-19 pandemic spread like wildfire, causing state-wide shutdowns almost immediately.[183] Even after the shutdowns, however, some businesses continued to operate—those that were deemed "essential" businesses[184] or "essential critical infrastructure workers."[185] Throughout the pandemic, businesses such as supermarkets, restaurants, and other businesses remained open for operation, at least in part.[186] Seemingly absent

179. Silvio Daniel Pitlik, *COVID-19 Compared to Other Pandemic Diseases*, 11 RAMBAM MAIMONIDES MED. J. 1 (July 2020).

180. Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Mar. 17, 2021), https://www.nytimes.com/article/coronavirus-timeline.html.

181. Pitlik, *supra* note 179, at 1.

182. Chandan Maji, *Impact of Media-Induced Fear on the Control of COVID-19 Outbreak: A Mathematical Study*, INT'L J. OF DIFFERENTIAL EQUATIONS, Feb. 10, 2021, at 1, 1–2 (explaining that the extensive media coverage for the COVID-19 pandemic, which created mass panic and fear was "much more prominent" than any pandemic our country has faced in the past, including Ebola).

183. Amanda Moreland et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement—United States, March 1–May 31, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1198, 1198 (2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6935a2-H.pdf.

184. *COVID-19: Essential Workers in the States*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 11, 2021), https://www.ncsl.org/research/labor-and-employment/covid-19-essential-workers-in-the-states.aspx. In the context of determining what is included under "essential" businesses, twenty-three states created their own guidance, twenty-one states followed the federal guidance, and seven states had no guidance, including: North Dakota, South Dakota, Nebraska, Iowa, Arkansas, North Carolina, and South Carolina. *Id.*

185. Christopher C. Krebs, *Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response*, U.S. DEP'T OF HOMELAND SEC.: CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY 1 (Mar. 19, 2020), https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf.

186. *Id.*

from all definitions of "essential businesses," however, were courthouses.[187] Without explicitly being listed as "non-essential," courthouse doors were closed indefinitely and criminal defendants were not sure when they would have their day in court. For the deprival of an in-person criminal jury trial to be constitutionally permissible, the Government must show that it is "necessary to further an important public policy."[188]

One potential policy argument in favor of virtual criminal jury trials following the COVID-19 pandemic is that there is an important public interest in ensuring the safety of the public.[189] Such an argument, however, fails for a number of reasons. Ultimately, any public policy argument asserted in favor of a Zoom criminal jury trial will not pass the first prong of the *Craig* two-part test. Such application requires the balancing of the public policy interest of the State against the constitutional rights of the criminal defendant.[190] Applying the balancing test in this case, a virtual criminal jury trial is not "necessary to further an important public policy."[191] The prevailing reason for the rejection of this policy argument is that when balancing the constitutional right to confrontation with the public policy interest, the fundamental right to confrontation substantially outweighs the policy interests. While maintaining the health and safety of the community is unquestionably important, that policy interest does not outweigh a criminal defendant's fundamental constitutional right to confrontation when there are feasible means to have an in-person criminal jury trial that does not jeopardize public health.

#### a. A Criminal Defendant's Constitutional Rights Fundamentally Outweigh Any Public Policy Interest That May Justify a Zoom Jury Trial

If a criminal jury trial were to be removed out of the courtroom and held virtually over Zoom, the defendant's fundamental and constitutional right to confrontation does not disappear. The right is not dispensable. The right follows a criminal defendant wherever he goes. Along with the many other fundamental rights

187. *Id.*
188. Maryland v. Craig, 497 U.S. 836, 850 (1990).
189. Deniz Ariturk et al., *Virtual Criminal Courts*, 2020 U. CHI. L. REV. ONLINE 57 (2020).
190. *Craig*, 497 U.S. at 850.
191. *Id.*

guaranteed to criminal defendants under the U.S. Constitution, the right to confrontation must not be violated.[192] Only when "necessary to further an important public policy and only where the reliability of the testimony is otherwise assured"[193] may the right to confrontation be excused. When balancing the public policy interest of holding a criminal jury trial remotely against the right to confrontation guaranteed to criminal defendants under the Sixth Amendment to the United States Constitution, the constitutional right to confrontation prevails. Indeed, the explicit text of the Sixth Amendment makes no mention of "face-to-face" or "physical" confrontation.[194] While there is no language requiring face-to-face confrontation, there certainly is the long-established preference for witnesses to physically appear in front of a criminal defendant throughout legal precedent and Confrontation Clause jurisprudence.[195]

Physical presence is a crucial part of any Confrontation Clause analysis because physical presence acts to ensure the reliability of the evidence presented at trial. That is where the second prong of the *Craig* test comes into play. This second step is designed to act as a gatekeeper of reliable testimony.[196] Even if the Government can overcome the first part of the two-part test, it must overcome one more hurdle to permit a witness to testify by videoconferencing technology.

### *2. Is Testimony by Witnesses Through Zoom Sufficiently Reliable?*

In order to satisfy the second prong of the *Craig* two-part test, the Government must establish that the testimony by witnesses entirely remotely is *sufficiently* reliable.[197] While there is no explicit definition of "sufficiently reliable" anywhere in the Confrontation Clause jurisprudence, in order to permit the testimony of a witness via videoconferencing technology, the reliability of the testimony must be otherwise assured.[198] The overarching purpose behind the Confrontation Clause is to prevent

192. U.S. CONST. amend. VI.
193. *Craig*, 497 U.S. at 850.
194. *See* U.S. CONST. amend. VI.
195. *See supra* text accompanying notes 63–70.
196. *Craig*, 497 U.S. at 850.
197. *Id.*
198. *Id.*

unreliable testimony from being offered against a criminal defendant.[199] A trial by Zoom removes assurances of reliability that an in-person jury trial would otherwise guarantee. The inability to preserve the reliability of the testimony against a defendant over Zoom puts a criminal defendant's right to confrontation at risk. The prime concerns with the reliability of witness testimony through Zoom are: the inability of the jury to fully view the witness's nonverbal cues, the inability of defense counsel to effectively cross-examine the witness, and the inability of the jurors and attorneys to make meaningful eye contact with the witness as they are testifying.

In-person observation of a witness's testimony by the trier of fact ensures that the testimony the trier of fact finds important to convict or acquit the criminal defendant is reliable. Indeed, ensuring the reliability of evidence presented during a criminal trial is one of the main functions of the Confrontation Clause.[200] In essence, the trier of fact serves as a gatekeeper, preventing unreliable testimony from being entered against a criminal defendant.[201] One of the ways in which the judicial system acts to ensure the reliability of the evidence presented against a criminal defendant is through the crucible of cross-examination.[202] Cross-examination presents an opportunity to challenge the credibility of a witness testifying at trial and allows the attorney to highlight the unreliability in the testimony that they presented to the trier of fact—an element that is key to the right of confrontation.[203]

Replacing in-person trials with Zoom jury trials will interfere with the ability to effectively cross-examine a witness to test the credibility of their testimony. Cross-examination occurs after a witness has given their testimony on direct examination by the party who called them to testify at trial.[204] Direct examination occurs after much preparation and rehearsal between the directing

199. *See* U.S. CONST. amend. VI.

200. *See Craig*, 497 U.S. at 846.

201. Anne M. Gaeta & Elizabeth A. Sitnick, *The Judge's Role as Gatekeeper: Responsibility & Powers, Reliability and Admissibility Under* Daubert, BERKMAN KLEIN CTR. FOR INTERNET & SOC'Y AT HARV. UNIV., https://cyber.harvard.edu/daubert/ch3.htm (Apr. 25, 1999).

202. Jim M. Perdue, Sr., *The Five Question Rule: Cross Examination Simplified*, 29 TRIAL 2 (1993).

203. *Id.*

204. J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS, AND ETHICS 277 (4th ed. 2010).

attorney and the witness.[205] Cross-examination, on the other hand, never affords the opportunity to be rehearsed.[206] Much of what attorneys learn about witnesses they are cross-examining is through nonverbal communication as they are testifying on direct examination, particularly the demeanor and body movements of the witness.[207] Without the ability to observe a witness's nonverbal communication, the reliability of their testimony is diminished, preventing an attorney from effectively cross-examining the witness. Further, in-person testimony requires an *in-person* cross-examination and confrontation—witnesses are not shielded from confrontation by a computer screen in the comfort of their own home.

Triers of fact may judge a witness "by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."[208] Cross-examinations are "integral to the conduct of a fair trial and a meaningful application of the presumption of innocence."[209] Zoom cross-examinations prevent attorneys from observing most of a witness's nonverbal cues which assists in effective cross-examination, thereby depriving criminal defendants of their Sixth Amendment right to confrontation.

To understand how the effectiveness of cross-examinations is diminished over Zoom, it is essential to understand the importance of nonverbal communication in witness testimony.

### a. The Importance of Nonverbal Communication

In the United States justice system, triers of fact (judges and juries) are legally authorized and oftentimes required to consider and determine witness credibility based on the witness's demeanor.[210] One of the ways attorneys, judges, and juries determine the credibility of a witness is through observation of the

205. *Id.*

206. *Id.* at 277–78.

207. Janet Lee Hoffman & Andrew Weiner, *The Juror as Audience: The Impact of Non-Verbal Communication at Trial*, 32 OR. STATE BAR LITIG. J. 1, 2 (2013), http://jhoffman.com/wp-content/uploads/2013/12/Juror-as-Audience.pdf.

208. Denault & Patterson, *supra* note 7, at 2 (first quoting Mattox v. United States, 156 U.S. 237 (1895); and then quoting Coy v. Iowa, 487 U.S. 1012 (1988)).

209. *Id.* at 5.

210. James P. Timony, *Demeanor Credibility*, 49 CATH. UNIV. L. REV. 903 (2000) (explaining that judges and juries have judged the credibility of witnesses in the courtroom for over one hundred years judging the credibility of witnesses based on their demeanor is not a new concept).

witness's nonverbal communication.[211] Nonverbal communication generally refers to messages conveyed through means other than words, including facial expressions, body movements, and physical gestures.[212] Nonverbal communication provides evidence of reliability, which assists the trier of fact in determining a witness's credibility.[213] The determination of credibility based on nonverbal communication is admittedly a subjective process—the credibility determination will differ from juror to juror.[214]

In a traditional jury trial, the jury is presented with numerous opportunities to observe non-verbal communication, including when judges talk to witnesses and lawyers during a sidebar conference, when witnesses testify, when lawyers examine and cross-examine witnesses, when lawyers make their opening statements and closing arguments, and when lawyers speak to their clients.[215] The concerns with the permanent adaptation of Zoom technology into the courtroom are that videoconference platforms such as Zoom may not highlight the important nonverbal cues provided by the witness while they testify.[216]

Admittedly, many of the concerns with incorporating Zoom into the criminal justice system are unsupported by any empirical evidence or case law. There is substantial research, however, on how humans communicate.[217] For over fifty years, researchers have known that an important part of how humans communicate is through nonverbal cues and gestures.[218] Nonverbal cues become even more important in a group setting.[219] In those instances, it is not only the verbal cues of the person you are speaking to but "it's often the side glances, eye rolls, and shrugs between our peers and other participants that offer direction" to understand our

211. Vincent Denault, *Furtive Looks, Nervousness, Hesitation: How Nonverbal Communication Influences the Justice System*, THE CONVERSATION (May 1, 2019, 7:10 PM), https://theconversation.com/furtive-looks-nervousness-hesitation-how-nonverbal-communication-influences-the-justice-system-114145.

212. *Id.*

213. *Id.*

214. Timony, *supra* note 210, at 905.

215. Denault & Patterson, *supra* note 7, at 4.

216. Steve Blank, *What's Missing from Zoom Reminds Us What It Means to be Human*, MEDIUM (Apr. 27, 2020), https://medium.com/@sgblank/whats-missing-from-zoom-reminds-us-what-it-means-to-be-human-651be7cbff39.

217. *Id.*

218. During a conversation we "watch other's hands, follow their gestures, focus on their facial expressions and their tone of voice." *Id.*

219. *Id.*

behavior.[220] The problem with analyzing nonverbal cues over videoconferencing platforms such as Zoom is that videoconferencing apps "offer a fixed gaze from one camera angle."[221] Often we are limited in view to the person's upper half of their body—preventing the viewer behind the computer screen from viewing their posture, hand movements, and other important nonverbal cues. This limited view inhibits an attorney's ability to pick up on cues and challenge a witness during a time when traditionally that witness would be on the stand, vulnerable to cross-examination, and the attorney would observe a weakness in their testimony by way of a nonverbal cue or change in position as they are sitting on the witness stand. It is those minor moments that cause such a big impact on a criminal defendant's rights.

Observation of witness testimony is an indispensable asset that comes with in-person judicial proceedings. Zoom jury trials simply cannot replicate the in-person observation of witnesses during trial that is accomplished by methods of non-verbal communication such as eye contact and body language. Two-way videoconferencing only provides the ability to have artificial eye contact, which barely measures up to the level of effectiveness that in-person eye contact provides.[222] Indeed, it is almost impossible to make direct eye contact on videoconferencing platforms such as Zoom.[223]

Eye contact is one of the most important ways of communicating with nonverbal cues.[224] The frequency and duration of eye contact during conversation varies from culture to culture.[225] For example, "Arabs, Latin Americans, and Southern Europeans make more eye contact during conversation than Asians and Northern Europeans."[226] In America, people tend to stand closer to one another but deviate eye contact occasionally to glance away from or between the eyes of the person speaking.[227] Importantly, the effect of cultural differences and preferences in

220. *Id.*
221. *Id.*
222. Paulin, *supra* note 170, at 1108–09.
223. R. Dallon Adams, *Virtual Meeting 101: Body Language Tips for Zoom, Teams, and Life*, TECHREPUBLIC (July 10, 2020, 6:40 AM), https://www.techrepublic.com/article/virtual-meeting-101-body-language-tips-for-zoom-teams-and-life/.
224. Leanne S. Bohannon et al., *Eye Contact and Video-Mediated Communication: A Review*, 34 DISPLAYS 177 (2013).
225. *Id.* at 2.
226. *Id.*
227. *Id.*

eye contact while communicating is unknown. In the context of videoconferencing technology, however, eye contact remains integral to effective communication.[228] When someone utilizes videoconference technology, the camera is often at the top of their computer screen or sometimes on the side. The problem with this placement, however, is that each person who is participating in the conversation is looking at the person on the screen with whom they are communicating. Their eyes are not focused on staring into their camera to replicate in-person eye contact. The only practical, recognized solution to completely solve the discrepancy is to place a camera in the middle of the computer screen.[229] In the context of criminal jury trials, however, such an option would not be feasible. Requiring such an advanced technological system for each witness who testifies at a virtual criminal trial is not a feasible solution.

## *V. CONCLUSION*

The adaptation of Zoom technology into the United States court system was undoubtedly a workable, temporary solution to get through the COVID-19 pandemic. The permanent introduction and incorporation of remote proceedings into the justice system, however, poses severe risks to a criminal defendant's constitutional right to confrontation. In-person cross-examination will never be reproducible on Zoom. There is something fundamentally different about the virtual and physical space of a courtroom. That difference is a constitutional one—one infringes on a defendant's constitutional right while the other protects it. Zoom jury trials prevent an attorney from effectively confronting the witnesses against the criminal defendant and prevent the criminal defendant from being physically present when his accusers testify against him. These constitutional violations create a strong wave of support for resisting the adaptation of virtual witness testimony during criminal jury trials into the justice system.

Years of Supreme Court precedent make clear that confrontation and cross-examination are important rights that are

228. Jefferson Graham, *For Video Meetings, the Eyes Have It. Use These Tips to Make a Better Impression Online*, USA TODAY (May 31, 2020), https://www.usatoday.com/story/tech/2020/05/18/videoconferencing-tips-great-virtual-meetings/3119138001/.

229. Bohannon et al., *supra* note 224.

necessary to ensure fair and just criminal prosecutions.[230] Zoom jury trials, which remove and distance the jury, witnesses, and courtroom actors both physically and emotionally from the courtroom and judicial process, effectively invade and jeopardize the rights of confrontation and cross-examination that are fundamentally guaranteed during an in-person jury trial. The simple fact is that remote witness testimony is not the same as in-person testimony—there are fundamental differences that cannot be replicated on Zoom. Our country should resist the urge to rid our system of justice of courtrooms and instead demand that we resume in-person criminal trials.

At the time of writing this Article, fifty-seven percent of adults aged eighteen or older have received the first dose of the COVID-19 vaccine.[231] As the months progress and more individuals become fully vaccinated, the courts are slowly starting to get back to normal. The constantly changing number of COVID-19 cases and the introduction of the new Delta variant, however, keep the future of the state of the world up in the air. Because of the unpredictable nature of COVID-19, the justice system still relies heavily on Zoom to keep justice moving.

The COVID-19 pandemic presents an opportunity for court systems throughout the United States to innovate and implement the advancements of technology without sacrificing the fundamental rights granted to a criminal defendant under the U.S. Constitution. Whatever the solution to the issue of criminal jury trial operations during a pandemic may be, the constitutional right to confrontation under the Sixth Amendment should be preserved at all costs, and remote witness testimony should be removed from the list of possibilities.

230. *See, e.g.*, Lewis v. United States, 146 U.S. 370 (1892); Coy v. Iowa, 487 U.S. 1012 (1988); Maryland v. Craig, 497 U.S. 836 (1990); Crawford v. Washington, 541 U.S. 36 (2004).

231. Jill Diesel et al., *COVID-19 Vaccination Coverage Among Adults—United States, December 14, 2020–May 22, 2021*, 70 MORBIDITY & MORTALITY WKLY. REP. 922, 923 (2021), https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7025e1-H.pdf.