

# **CONFRONTATION AND COVID(EO): Analyzing and Understanding the Right to Confrontation In Response to a Global Pandemic, and Beyond**

Judge Chris Brown\*

## INTRODUCTION

The Supreme Court’s decision in *Crawford v. Washington*<sup>1</sup> was issued in March 2004, when I was barely passing law school, and struggling to remember why I even wanted to be an attorney in the first place. I was told Justice Scalia’s opinion in *Crawford* was monumental, rooted in the purpose and history of the Sixth Amendment’s Confrontation Clause. I heard our evidence professor re-wrote her entire curriculum around it. On the fly, she threw out all her lesson plans about *Ohio v. Roberts*.<sup>2</sup> Discussions about what constituted “adequate indicia of reliability,” “firmly rooted hearsay exceptions,” and “particularized guarantees of trustworthiness” were discarded because *Crawford* rendered them unnecessary.

Instead, we were taught an entirely new and facially simple test: whether out-of-court statements were testimonial or non-testimonial. Hypotheticals abounded. Under this new analysis, attorneys (and law students) were left to guess what was implied by this testimonial/non-testimonial distinction, rooted in the history of Anglo-Saxon common law at or near the time of the Founding. In *Crawford*’s wake, trial courts across the country had to decide how the decision would impact criminal trials and procedure in the long term.

Unfortunately for a struggling law school student in 2004, *Crawford* also discarded (along with my professor’s lesson plans) any lengthy discussion of *Maryland v. Craig*,<sup>3</sup> which, unlike *Crawford*, addressed whether a witness need be *physically* present for purposes of satisfying the demands of the Confrontation Clause. In trying to understand the admissibility of out-of-court statements under the newly-issued *Crawford* decision, concerns about a witness’s physical presence for in-court testimony were placed on the backburner.

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<sup>1</sup> *Crawford v. Washington*, 541 U.S. 36, 36 (2004).

<sup>2</sup> *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

<sup>3</sup> *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

Following *Crawford*, the Supreme Court clarified its holding four times in the past 20 years.<sup>4</sup> These decisions, even if arguably inconsistent, were necessary to provide trial courts guidance on the admissibility of out-of-court statements in criminal prosecutions. However, in the 35 years since *Craig*, federal and state trial and appellate courts have been tasked with interpreting its applicability. In 2004, it may have been easy to assume *Craig* was settled law (which may explain why it was not a focus in my evidence class).

Unfortunately, concerns regarding remote testimony came to the forefront in March 2020 when the Novel Coronavirus (“COVID-19”) became so widespread that it constituted a global pandemic. Beyond killing hundreds of thousands of Americans,<sup>5</sup> shutting down the global economy,<sup>6</sup> and disrupting personal and commercial travel,<sup>7</sup> COVID-19 forced the court system to grapple with the following questions: 1) when should trial courts reopen? 2) what will jury trials look like during a public health crisis? and 3) how can the courts conduct trials during a global health emergency while honoring and following the mandates of our federal and state constitutions?

Since 2020, the justice system has utilized greater tools than those available in 1990 when *Craig* was decided. In that time, videoconferencing technology has advanced exponentially. Hardwiring? Gone. Reels and reels of video and audio cables? Obsolete. Peer-to-Peer (“P2P”) connections? Why bother? If you have a computer or smartphone, a webcam, and a Wi-Fi connection, you can make it to court.<sup>8</sup> Specifically, in the COVID era (roughly considered from March 2020 to mid-

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<sup>4</sup> See *Davis v. Washington*, 547 U.S. 813, 822 (2006) (establishing “primary purpose” test in determining whether statements are testimonial or non-testimonial when made during “ongoing emergencies”); *Whorton v. Bockting*, 549 U.S. 406, 409 (2007) (*Crawford* is not retroactive in collateral appeals); *Michigan v. Bryant*, 562 U.S. 344, 358–59 (2011) (applying *Davis* to “other circumstances” outside of “ongoing emergencies”); *Ohio v. Clark*, 576 U.S. 237, 244 (2015) (further clarifying the “primary purpose” test under *Crawford* and *Davis* for statements made to non-law enforcement individuals).

<sup>5</sup> E.g., Farida B. Ahmad et al., *COVID-19 Mortality Update — United States, 2022*, 72 MORBIDITY & MORTALITY WKLY. REP. 493, 493 (2023) (COVID-19 was listed as an underlying or contributing cause of death for 244,986 people in 2022).

<sup>6</sup> E.g., Jakub Hlávka and Adam Rose, *COVID-19’s Total Cost to the U.S. Economy Will Reach \$14 Trillion by End of 2023*, UNIV. S. CAL. LEONARD D. SCHAEFFER CTR. FOR HEALTH POL’Y & ECON.: EVIDENCE BASE (May 16, 2023), [https://healthpolicy.usc.edu/article/covid-19s-total-cost-to-the-economy-in-us-will-reach-14-trillion-by-end-of-2023-new-research/#:~:text=From%202020%20to%202023%2C%20the,dollars%2C%20according%20\[https://perma.cc/A6NR-J2FL\].](https://healthpolicy.usc.edu/article/covid-19s-total-cost-to-the-economy-in-us-will-reach-14-trillion-by-end-of-2023-new-research/#:~:text=From%202020%20to%202023%2C%20the,dollars%2C%20according%20[https://perma.cc/A6NR-J2FL].)

<sup>7</sup> E.g., GIAN MARIA MILESI FERRETTI, HUTCHINS CTR. ON FISCAL & MONETARY POL’Y, BROOKINGS INST., *THE TRAVEL SHOCK* (2021), <https://www.brookings.edu/articles/the-covid-19-travel-shock-hit-tourism-dependent-economies-hard/> [https://perma.cc/B4WN-CPEF].

<sup>8</sup> For purposes of this article, the terms “Zoom,” “Skype,” “satellite video,” and “remote video” are used interchangeably in reference to “two-way videoconferencing.” Unless otherwise

2022), the videoconferencing technology application “Zoom” became synonymous with live, two-way remote video across America.<sup>9</sup>

Today, depositions, bond hearings, victim impact statements, even full criminal trials may be conducted through a two-way monitor. Do these technological advances permit full cross-examination of a witness? Do they allow a jury to fully and comprehensively measure the witness’s demeanor? If the video feed glitches, how should trial courts respond?

This article aims to analyze and understand *in-court* Confrontation rights in light of advanced technology and the public necessity of conducting remote trials via two-way videoconferencing. In doing so, the article highlights the distinction between physical presence at trial versus out-of-court statements made by an unavailable declarant. The goal is to discuss a possible framework for trial courts and practitioners—in Ohio and throughout the United States—to reconcile the right to *physical* Confrontation with the public need for a fast, speedy, and reliable resolution of criminal cases, while maintaining public safety.

In this article, I will first discuss the recent history of Confrontation Clause cases in the United States Supreme Court. Then I will review how the *Craig* holding has been applied by Ohio courts, both in the pre- and post-COVID era. Finally, I will review cases from other jurisdictions around the country which have grappled with the Constitutional challenges of video testimony in criminal cases.

At the conclusion, I posit that *Craig* was undisturbed by *Crawford*. While some courts continue to confuse the difference between “testimonial reliability” in *Craig* with “evidentiary reliability” in *Crawford*, I argue *Craig* should be read broadly to allow for witnesses to appear via two-way video testimony. This interpretation is consistent with the Constitutions of the United States and Ohio, the Ohio Rules of Criminal Procedure, and in line with current and advancing videoconferencing technology.

## I. THE CONFRONTATION CLAUSE AND THE UNITED STATES SUPREME COURT

The Sixth Amendment to the United States Constitution reads: “In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him. . . .”<sup>10</sup>

In *Roberts*, the court addressed the admissibility of out-of-court statements offered by an otherwise unavailable declarant. Under the holding of *Roberts*, out-of-

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indicated, all terms are used to describe where a witness is visible on a screen or monitor with full audio capabilities, so that the parties, attorneys, jury, and judge are able to observe the witness.

<sup>9</sup> See Eric Scigliano, *Zoom Court is Changing How Justice is Served*, ATLANTIC (Apr. 13, 2021), <https://www.theatlantic.com/magazine/archive/2021/05/can-justice-be-served-on-zoom/618392/> [https://perma.cc/5N32-25UT].

<sup>10</sup> The federal right to confrontation was incorporated and made applicable to the states through the 14th Amendment in *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

court statements were permitted if they showed “indicia of reliability.”<sup>11</sup> Admissibility of such “reliable” statements was tied either to a “firmly rooted hearsay exception” or “a showing of particularized guarantees to trustworthiness.”<sup>12</sup> “Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception,” or with “a showing of particularized guarantees of trustworthiness.”<sup>13</sup> It is fair to say that, under *Roberts*, the rules of evidence were the guidepost for admitting out-of-court statements. So long as such statements complied with the rules governing hearsay, or if there were other guarantees of trustworthiness, those out-of-court statements were generally admitted.

In *Maryland v. Craig*, the United States Supreme Court decided whether *physical* confrontation was required to comport with the Sixth Amendment’s Confrontation Clause. Craig was charged with sexually abusing a six-year-old child. The trial court applied a procedure under Maryland law which permitted the child victim to testify by one-way closed-circuit video rather than appearing in open court.<sup>14</sup> The trial court held that, under Maryland’s statutory provision, a child witness could testify outside of the courtroom so long as the testimony occurred during the proceeding, the defense attorney had opportunity to question the child witness, the testimony was shown to the defendant and jury via closed-circuit camera, and the trial court determined testifying in court would “result in the child suffering serious emotional distress such that the child cannot reasonably communicate.”<sup>15</sup>

After his conviction, Craig ultimately appealed to the United States Supreme Court, arguing his Sixth Amendment Confrontation rights were violated by employing Maryland’s closed-circuit procedure. In a 5-4 decision, the Supreme Court upheld the use of closed-circuit testimony during the trial. Justice O’Connor, writing for the majority, held the Sixth Amendment does not guarantee “the *absolute* right to a face-to-face meeting with witnesses against them at trial.”<sup>16</sup> (emphasis in original). Instead, the Court found exceptions to literal face-to-face confrontation are permitted “only when the necessary to further an important public policy.”<sup>17</sup>

The Supreme Court in *Craig* held “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

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<sup>11</sup> *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Maryland v. Craig*, 497 U.S. 836, 843 (1990).

<sup>15</sup> *Id.* at 842–43 (citations omitted).

<sup>16</sup> *Id.* at 844.

<sup>17</sup> *Id.* at 844 (citing *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988)).

and only where the reliability of the testimony is otherwise assured.”<sup>18</sup> Under *Craig*, the preference for literal face-to-face confrontation at trial could give way to other means of testimony “in certain narrow circumstances.”<sup>19</sup>

“The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”<sup>20</sup> The *Craig* factors for in-person courtroom confrontation should “ensur[e] that evidence admitted against an accused is reliable.”<sup>21</sup> In assessing the reliability of *trial* testimony, the Confrontation right calls for the following:

- (1) insur[ing] 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) forc[ing] the witness to submit to cross-examination. . . [and]
- (3) permit[ting] 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.<sup>22</sup>

As opposed to literal physical confrontation, O’Connor referred to these “reliability” elements as “elements of effective confrontation.”<sup>23</sup> Unfortunately, in justifying its reasoning, O’Connor relied on the logic of *Roberts* and previous cases dealing with out-of-court statements, and not the physical presence of a witness giving testimony at trial. As will be discussed below, it is this conflation between 1) an unavailable declarant’s out-of-court statements, and 2) the physical presence of the witness, otherwise available by video, which has muddied the analysis in trial and appellate courts throughout the country.

As to the former, in 2004, Justice Antonin Scalia, writing for a unanimous court in *Crawford*, drastically altered the Sixth Amendment standard for admitting *out-of-court* statements in a criminal trial where the declarant does not testify. The Court looked at the text of the Confrontation Clause and engaged in a lengthy discussion of the purpose behind its adoption and the prevailing common law at the time of the Founding. The *Crawford* Court held the “two inferences” therefrom was 1) to remove *ex parte* communications as evidence at trial, and 2) to prohibit admission

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<sup>18</sup> *Id.* at 850.

<sup>19</sup> *Id.* at 848

<sup>20</sup> *Id.* at 845.

<sup>21</sup> *Id.* at 846 (citing *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987)).

<sup>22</sup> *Id.* at 845–46 (citations omitted).

<sup>23</sup> *Id.* at 851.

of *testimonial* statements against an accused, absent a showing of unavailability and a prior chance for cross-examination of the witness.<sup>24</sup>

In dispensing with *Roberts*' "indicia of reliability" test, Scalia—using strong, straight-forward language—wrote: "[The Sixth Amendment] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."<sup>25</sup> According to Scalia, the opportunity for cross-examination was the best test to determine whether out-of-court statements comport with the Confrontation Clause, not the governing rules of evidence.<sup>26</sup>

At this juncture, it is important to note *Craig*'s reliability factors are not the same as the "indicia of reliability" requirements stated in *Roberts*. Under *Roberts*, the reliability of an out-of-court statement was determined by the applicable hearsay rules. *Crawford* dispensed with *Roberts*' "indicia of reliability" analysis as being too "malleable," leading to "unpredictable" outcomes.<sup>27</sup> However, the thirty-three page majority opinion in *Crawford* makes no mention of *Craig*. And for good reason: reliability under *Craig* refers simply to placing the witness under oath, the defendant's right to cross-examine the witness, and the court's ability to observe the witness's demeanor. Although *Craig* referred to *Roberts* in its reasoning, the reliability issues in *Craig* refers to the physical presence of a witness at trial, not out-of-court statements from an unavailable declarant as in *Crawford*.

## II. OHIO COURTS AND THE CONFRONTATION CLAUSE

Unlike the Sixth Amendment, Ohio's Bill of Rights utilizes different language regarding confronting witnesses in criminal trials. Article I, Section 10 of the Ohio Constitution states, in pertinent part: "In any trial, in any court, the party accused shall be allowed . . . to meet the witnesses face to face." (emphasis added). The Supreme Court of Ohio recently read the federal confrontation right as co-extensive with Ohio's right to "meet the witness face to face." In *State v. Arnold*,<sup>28</sup> the Ohio Supreme Court held "Section 10, Article I [of the Ohio Constitution] provides no greater right of confrontation than the Sixth Amendment."<sup>29</sup>

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<sup>24</sup> *Crawford v. Washington*, 541 U.S. 36, 50–56 (2004).

<sup>25</sup> *Id.* at 61.

<sup>26</sup> Not everyone agrees *Crawford* overruled *Roberts*. Writing for the court in *Ohio v. Clark*, Justice Alito referred to *Crawford* as simply "adopt[ing] a different approach" to the Confrontation Clause in admitting out-of-court statements. 576 U.S. 237,243 (2015). As one might expect, Justice Scalia took umbrage with this characterization of the court's decision (and his opinion). *Id.* at 252–54. (Scalia, J., concurring).

<sup>27</sup> *Crawford*, 541 U.S. at 60–62.

<sup>28</sup> *State v. Arnold*, 2010-Ohio-2742, 933 N.E.2d 775, 126 Ohio St. 3d 290, 293 (2010) (citing *State v. Self*, 564 N.E.2d 446, 56 Ohio St. 3d 73, 79 (1990)).

<sup>29</sup> However, as will be discussed below, *Arnold*'s interpretation of Ohio's Confrontation right

The *Arnold* decision dealt with “whether...the out-of-court statements made by a child to an interviewer employed by a child-advocacy center violates the right to confront witnesses. . . .”<sup>30</sup> After reviewing previous Ohio Confrontation cases in light of *Crawford*, as well as cases from other jurisdictions interpreting *Crawford*, the Ohio Supreme Court held statements made at Child Advocacy Centers (“CAC”) to a nurse were non-testimonial in nature when made for purposes of medical treatment and diagnosis.<sup>31</sup>

In Ohio, *Craig*’s “physical presence” exception to courtroom confrontation was addressed in *State v. Marcinick*.<sup>32</sup> In that case, the Eighth District Court of Appeals approved the video testimony of Sandra Ward, a clinical social worker living in Belgium and employed with NATO. One of the child victims, age 5, disclosed to Ward they were abused by Marcinick in Ohio, while the family was on leave from their stepfather’s military service. This initial disclosure launched an investigation, ultimately resulting in Marcinick being charged with fifteen counts of sexual assault against multiple minor victims. After a bench trial, Marcinick was convicted of ten counts of gross sexual imposition under Ohio law.<sup>33</sup>

The Eighth District held Ward’s video testimony regarding the initial disclosure was permissible under *Craig*.<sup>34</sup> The court of appeals found the two-way video link did not violate the Confrontation Clause “under the narrow and specific facts” of the case.<sup>35</sup> The court found the state demonstrated Ward’s unavailability, and that the two-way video link “preserved the reliability elements of confrontation: the witness testified under oath; was subject to cross-examination; and, the trial court and [defendant] could observe the witness’ demeanor while testifying.”<sup>36</sup>

In reaching this conclusion, the Eighth District relied, in part, on the Florida Supreme Court’s ruling in *Harrell v. State*.<sup>37</sup> The court held that satellite testimony was permitted if “justified on a case-specific finding, based on important state

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may be in peril.

<sup>30</sup> *Arnold*, 126 Ohio St. 3d at 292–93.

<sup>31</sup> *Id.* at 303.

<sup>32</sup> *State v. Marcinick*, 2008-Ohio-3553, No. 89736, 2008 WL 2766174, at ¶18 (Ct. App. July 17, 2008).

<sup>33</sup> *Id.* ¶¶ 1–9.

<sup>34</sup> *Id.* ¶ 22.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Harrell v. State*, 709 So. 2d 1364, 1371 (Fla. 1998).

interests, public policies, or necessities of the case,” in addition to *Craig*’s reliability requirements.<sup>38</sup>

Other Ohio courts of appeal have followed *Marcinick*’s reasoning. In *State v. Johnson*,<sup>39</sup> the First District permitted three witnesses to testify out of the presence of a defendant charged with murder. During the trial, the three witnesses indicated they felt intimidated by a large group of “15 to 20 young individuals” who repeatedly walked into the courtroom during their trial testimony; the trial court permitted the witnesses to testify by video “to prevent what was an obvious attempt by the defendant’s friends and family to intimidate the witnesses.” Citing *Craig*, the First District held that no specific statutory provision was required to invoke the two-way video testimony procedure, and that video testimony was permitted “under the unique circumstances of [the] case.”<sup>40</sup>

In *State v. Oliver*, the Eighth District Court of Appeals faced an interesting factual situation that required the court to differentiate “unavailability” and “inconvenience.”<sup>41</sup> Here, the trial court permitted two witnesses to testify via Skype. The first witness, Sandra McLaughin-Tablers (“Sandra”), lived in Kentucky and was caring for her husband James, who was recovering from a recent surgery and on daily dialysis.<sup>42</sup> The second witness, Susan Connors (“Susan”), lived in Florida and stated traveling to Ohio to testify would be difficult due to her job.<sup>43</sup> After *Oliver* was convicted of burglary, he appealed, arguing his Confrontation rights were violated.<sup>44</sup>

The Court applied *Craig* and *Marcinick*, finding the trial court did not err in allowing Sandra to testify by Skype. The Court held Sandra was unavailable for confrontation purposes due to living out of state and needing to care for her husband. The Court also held the Skype testimony met the other reliability elements of physical confrontation: oath, cross-examination, and an opportunity to observe her demeanor.<sup>45</sup> However, the Eighth District found that the trial court erred in allowing Susan to testify by Skype because she “was not unavailable to testify in person but rather inconvenienced.”<sup>46</sup> This distinguishing fact, the specific reason the witness cannot appear in person, speaks to *Craig* and *Marcinick*’s first prong, that remote

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<sup>38</sup> *Marcinick*, ¶ 18 (citing *Harrell*, 709 So. 2d at 1369, and *Maryland v. Craig*, 497 U.S. 836, 849–51 (1990)).

<sup>39</sup> *State v. Johnson*, 2011-Ohio-3143, 195 Ohio App. 3d 59, 76, 958 N.E.2d 977, 991 (2011).

<sup>40</sup> *Id.* at 64–76.

<sup>41</sup> *State v. Oliver*, 112 N.E.3d 573 (2018).

<sup>42</sup> *Id.* at 579.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 581.

<sup>46</sup> *Id.*

testimony be necessary to further “important state interests, public policies, or necessities of the case.”<sup>47</sup> Difficulty in traveling, without more, will likely not rise to the level of necessity required for remote testimony.<sup>48</sup>

The Second District applied the same reasoning in *State v. Howard*.<sup>49</sup> In that case, Howard was convicted of two counts of murder, two counts of felonious assault, and other charges out of a 2018 shooting incident in Dayton. The Court permitted David Coleman, a surviving victim of the incident, to testify remotely from Las Vegas.<sup>50</sup> The Second District found this was necessary because Coleman was paralyzed out of the shooting and confined to a wheelchair.<sup>51</sup> Prior to testifying before the jury, Coleman informed the trial court about his medical conditions, his level of care, and that traveling to Ohio would exacerbate his many maladies.<sup>52</sup>

Citing to *Craig*, *Marcinick*, and *Johnson*, the Court of Appeals found Coleman’s medical concerns were sufficient to permit remote testimony.<sup>53</sup> The Court found the other reliability factors of “effective confrontation” were met, and refuted Howard’s claims that Howard was unable to see or hear portions of Coleman’s testimony after independently reviewing the video transcript.<sup>54</sup>

Beginning in late 2021, Ohio courts began issuing decisions addressing remote testimony necessitated by the COVID-19 pandemic. In *State v. Castonguay*,<sup>55</sup> the defendant was convicted of Grand Theft and Misuse of a Credit Card after a bench trial. Shortly before trial, the prosecution filed a notice requesting three witnesses residing outside of Darke County be allowed to testify remotely, which was granted.<sup>56</sup>

The Second District gave sanction to the trial court’s use of remote video testimony. After discussing the framework set forth in *Craig*, *Marcinick*, and *Howard*, the court found “the effect of the Covid-19 ‘conundrum’ has served to make it a matter of public policy and health concerns to allow witnesses to testify

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<sup>47</sup> *State v. Marcinick*, No. 89736, 2008 WL 2766174, at ¶18 (Ohio Ct. App. July 17, 2008).

<sup>48</sup> Although the court found Susan’s remote testimony was allowed in error, such error was harmless because it was cumulative to other evidence, including security footage of the burglary. *Oliver*, 112 N.E.3d at 581–82.

<sup>49</sup> *State v. Howard*, 2020-Ohio-3819, 156 N.E.3d 433 (Ct. App. 2020).

<sup>50</sup> *Id.* ¶¶ 9–12.

<sup>51</sup> *Id.* ¶¶ 55–56.

<sup>52</sup> *Id.* ¶¶ 56–59.

<sup>53</sup> *Id.* ¶¶ 53–55.

<sup>54</sup> *Maryland v. Craig*, 497 U.S. 836, 851 (1990); *Howard*, 2020-Ohio-3819 ¶¶ 60–61.

<sup>55</sup> *State v. Castonguay*, No. 2021-CA-2, 2021 WL 4129533, ¶ 14 (Ohio Ct. App. Sep. 10, 2021).

<sup>56</sup> *Id.* ¶ 13.

remotely.”<sup>57</sup> The mere fact of an ongoing public health crisis was sufficient, on its own, to permit video testimony under *Marcinick* and *Craig*. As long as the state (and the court) complied with *Craig*’s reliability factors, COVID-19 was a proper justification in and of itself.<sup>58</sup>

Similarly, the First District upheld a post-COVID criminal conviction based in part on remote testimony in *State v. Banks*.<sup>59</sup> The defendant was charged with two counts of cruelty to companion animals, which was heard by the court.<sup>60</sup> The witness, Mark Curnutte, did not receive his subpoena and was only available to testify by Zoom.<sup>61</sup> At trial, the witness elaborated that he was a teacher who was busy grading papers, had computer office hours with students as part of his teaching responsibilities, and “was not showered or shaved” and not “appropriately dressed.”<sup>62</sup>

Prior to the pandemic, and under *Craig*, *Marcinick*, and *Oliver*, these reasons would surely count as mere “inconvenience,” insufficient to sidestep the witness’ in-person appearance. However, prior to trial, the judge took notice of a recent Hamilton County Municipal Court administrative order that Hamilton County was under a “red alert level 3 emergency due to Covid.”<sup>63</sup> The trial court noted the administrative order limited in person appearances and was similar to guidance from the Ohio Supreme Court.<sup>64</sup> In allowing Curnutte to testify remotely, the court held that “[p]reventing the spread of COVID-19 is an important public policy that may warrant an exception to face-to-face confrontation.”<sup>65</sup> The court referenced a then-recent Ohio Supreme Court decision disqualifying a trial judge who failed to follow COVID mitigation procedures issued by Governor DeWine and the Ohio Department of Health.<sup>66</sup> The court’s ruling rested on the trial judge’s COVID

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<sup>57</sup> *Id.* ¶ 39.

<sup>58</sup> The court went on to hold that the fact there was one instance at trial where the video feed “froze” was of no consequence and was therefore harmless error. *Id.* ¶¶ 39–40.

<sup>59</sup> *State v. Banks*, 2021-Ohio-4330, Nos. C-200395, C-200396, 2021 WL 5860873 (Ct. App. Dec. 10, 2021).

<sup>60</sup> *Id.* ¶ 2.

<sup>61</sup> *Id.* ¶ 3.

<sup>62</sup> *Id.* ¶ 7.

<sup>63</sup> *Id.* ¶ 3.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* ¶ 24 (citations omitted).

<sup>66</sup> *Id.*

concerns in light of the administrative order, regardless of the fact the witness did not express personal safety concerns himself.<sup>67</sup>

The decisions and rationales of *Castonguay* and *Banks* differ markedly from the Ninth District's holding in *State v. Stefanko*.<sup>68</sup> In the lead up to Erica Stefanko's trial for aggravated murder (originally scheduled in June 2020), Governor DeWine declared a state of emergency due to the public health concerns presented by COVID-19.<sup>69</sup> The Ninth District acknowledged that the Ohio Supreme Court and Summit County Court of Common Pleas had issued several administrative orders "governing the conduct of cases during the COVID-19 public health emergency."<sup>70</sup>

The witness at issue was Chad Cobb ("Cobb"), a co-defendant who pleaded guilty to Aggravated Murder and Kidnapping out of the same incident in 2013 and was serving a term of life without parole. After several years, Cobb eventually provided information to the primary investigator implicating Stefanko, leading to Stefanko's indictment in 2019.<sup>71</sup> In the weeks before trial (now rescheduled for November 2020), the trial judge stated "[Mr. Cobb] will not be transported from the Ohio Department of Rehabilitation and Corrections for purposes of trial."<sup>72</sup> Later, the trial court ordered everyone in the courtroom be masked, and that the trial would be live-streamed by Court TV, but spectators would be barred. The trial court's ruling was based on safety and practical considerations related to COVID-19.<sup>73</sup> Cobb and two other witnesses ultimately testified at trial by videoconference technology over Stefanko's objection.<sup>74</sup>

Stefanko was convicted by a jury of aggravated murder and murder. She appealed her convictions, asserting, in part, it was error to allow videoconferencing testimony by the three witnesses and requiring the in-person witnesses to mask while testifying.<sup>75</sup> After reviewing *Craig* and its application by the federal courts and courts of other states, the Ninth District turned to *Castonguay* and *Banks*.<sup>76</sup>

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<sup>67</sup> The court did not directly address whether a witness need express personal health concerns related to COVID-19, holding that even if it was error to permit Curnutte to testify remotely, such error was harmless. *Id.* at ¶¶ 25–26.

<sup>68</sup> *State v. Stefanko*, 2022-Ohio-2569, 193 N.E.3d 632 (Ct. App. 2022).

<sup>69</sup> *Id.* at 635.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 634–35.

<sup>72</sup> *Id.* at 636.

<sup>73</sup> *Id.* at 637–39. (The author notes the *Stefanko* panel never mentioned the holdings of *Marcinick*, *Johnson*, or *Oliver* throughout its decision).

<sup>74</sup> *Id.* at 636.

<sup>75</sup> *Id.* at 636–37.

<sup>76</sup> *Id.* at 637–39.

Specifically, the court noted both decisions found any possible Confrontation violations were harmless.<sup>77</sup>

However, in *Stefanko*, the court reached the opposite conclusion. The Ninth District found that “[t]he trial court did not consider any evidence or make any individualized determinations regarding the availability of these witnesses.”<sup>78</sup> The court found the record was insufficient “with respect to what restrictions were in place and whether it was possible to comply with the restrictions.” or whether Cobb “was at an increased risk from COVID-19 or that he was experiencing symptoms that could place other individuals at risk.”<sup>79</sup> The *Stefanko* court held, in contrast with *Castonguay* and *Banks*, that it “cannot conclude that the circumstances presented by the COVID-19 public health emergency justify remote testimony in a criminal trial as a matter of course and without the determinations contemplated by the United States Supreme Court.”<sup>80</sup>

The court took issue with the idea that the public health orders, standing alone, justified remote testimony. “Neither the administrative orders adopted by the Ohio Supreme Court nor the administrative orders of the Summit County Court of Common Pleas . . . established the necessity of remote testimony in any individual case or contemplated their provisions would trump application of the Confrontation Clause.”<sup>81</sup> The court looked at the different administrative orders from the Ohio Supreme Court and Summit County Common Pleas Court, specifically that Summit County suspended all jury trials from November 6, 2020 through December 31, 2021 “unless authorized by the administrative judge” in cases “when speedy-trial rights are implicated.”<sup>82</sup> The court noted both the State and *Stefanko* “expressed reservations about the use of remote testimony” and “favored a continuance” when concerns of increased health risks arose.<sup>83</sup>

In further distinguishing their holding from *Castonguay* and *Banks*, the court stated it “cannot conclude . . . that the error was harmless.”<sup>84</sup> Cobb’s testimony as a convicted co-defendant was central to the state’s case, both for his personal observations, and in “corroborat[ing] and explain[ing]” the statements of other state’s witnesses.<sup>85</sup>

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<sup>77</sup> *Id.* at 640.

<sup>78</sup> *Id.* at 641.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 640–641.

<sup>83</sup> *Id.* at 641.

<sup>84</sup> *Id.* at 642.

<sup>85</sup> *Id.*

It is possible that a number of factors, had they been directly addressed, may have created a better record with which the Ninth District could have affirmed Stefanko's conviction. If Stefanko insisted on going to trial in November 2020 by invoking her speedy trial rights? If the trial judge tied the COVID-19 pandemic to the specific needs of the case? If the appellate court was more accepting of the on-the-ground reality that trials were potential hotspots for "super-spreader" events?<sup>86</sup> Any of these alterations may have made it easier to affirm Stefanko's conviction for a kidnapping and murder that happened in 2012. The Ninth District never addressed the *Craig* reliability factors, or *Marcinick*'s discussion of "important state interests, public policies, or necessities of the case," because it decided it did not need to do so.

Instead, the most likely explanations for the holding of Stefanko (in this author's opinion) are either 1) the *Stefanko* court believed the Sixth Amendment's mandates are more important than the public health concerns presented, or 2) the *Stefanko* court was simply unsympathetic to the dangers of COVID-19. In my experience as a trial judge in Franklin County, managing a trial schedule in the fall of 2020 was unpredictable at best and impossible at worst. New information, data, guidelines, and regulations were issued on a weekly basis. Navigating how to open our courts and protect the public, while adhering to constitutional rights of all parties was the most difficult challenge I will likely face in my judicial career. Every judge and attorney faced this concern, some with trepidation for reopening, others reluctant to limiting court access, but all with an awareness we were experiencing a unique and frightening event that required flexibility and compassion to survive. This was the reality trial courts faced. Unfortunately, COVID-19 did not seem to be of great concern for the *Stefanko* court.<sup>87</sup>

These cases all lead to the recent Ohio Supreme Court decision in *State v. Carter*.<sup>88</sup> Eli Carter was convicted at trial of two counts of sexual battery of an adopted daughter, based in part on the remote testimony of Michael Mullins, the CEO of the private school where Carter worked.<sup>89</sup> The week prior to trial, the State requested Mullins testify remotely due to Mullins living in Minnesota, the uncertain

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<sup>86</sup> See Paul Duggan, *Maryland Public Defender Complains of 'Superspreader' Court Hearings*, WASH. POST, (Nov. 24, 2020, 5:09 PM) [https://www.washingtonpost.com/local/public-safety/maryland-court-hearings-covid/2020/11/24/75c62d68-2e86-11eb-96c2-aac3f162215d\\_story.html](https://www.washingtonpost.com/local/public-safety/maryland-court-hearings-covid/2020/11/24/75c62d68-2e86-11eb-96c2-aac3f162215d_story.html) [<https://perma.cc/D9D5-JGHZ>].

<sup>87</sup> It appears Erica Stefanko was ultimately convicted of aggravated murder and sentenced to life imprisonment with parole eligibility after 30 years. However, details are unavailable due to a January 12, 2024 order sealing the Summit County docket from public access. See *Offender Search*, OHIO DEP'T OF REHAB. & CORR., [appgateway.drc.ohio.gov/OffenderSearch](http://appgateway.drc.ohio.gov/OffenderSearch) (input the offender's name in the search tool).

<sup>88</sup> *State v. Carter*, 2024-Ohio-1247, 174 Ohio St. 3d 619, 238 N.E.3d 87 (2024).

<sup>89</sup> *Id.* ¶¶ 1, 12.

weather conditions for travel to Ohio, and “the increase in COVID spread.”<sup>90</sup> The trial court found Mullins was unavailable and so allowed him to testify remotely.<sup>91</sup> Mullins testified at trial that Carter admitted to sexual conduct with his adopted daughter before resigning his teaching position.<sup>92</sup>

The court held it was error to allow Mullins to testify remotely, finding the trial court did not make the requisite “case-specific finding” under *Craig*.<sup>93</sup> The court found Mullins’ travel concerns were too generalized and that there was no evidence that a potential spike in COVID-19 infections was directly related to Mullins’ in-person appearance.<sup>94</sup> “Rising COVID-19 cases in Minnesota is too general an observation to support a case-specific finding that requiring Mullins to testify in person would jeopardize the health of anyone involved with the trial.”<sup>95</sup> However, the Carter court ultimately ruled the error of permitting Mullins to testify by video was harmless beyond a reasonable doubt.<sup>96</sup>

Unfortunately, the Ohio Supreme Court forced a legal square peg discussion of *Crawford* into a factual round hole of *Craig*. The court stated that *Crawford* “casts some doubt on the holding in *Craig*” even though it acknowledged “[t]he majority in *Crawford* did not overrule or even mention *Craig*.”<sup>97</sup> The mind boggles at how a more recent decision can cast doubt on older precedent without ever mentioning the older case. Nevertheless, this concern was easily wiped away with one line: “[*Crawford*] overruled *Roberts* regarding testimonial statements...a case that *Craig* heavily relied on to justify its holding.”<sup>98</sup>

Of greater import for the future of Confrontation rights in Ohio is the court’s express willingness to examine whether Ohio’s Confrontation Clause should provide greater protection than United States Supreme Court precedent in examining federal Confrontation rights. Justice Fischer, in a concurring opinion joined by Justices Donnelly and Deters, wrote “we should revisit our conclusions that the Ohio Constitution’s Confrontation Clause must be interpreted in lockstep with the Confrontation Clause of the Sixth Amendment to the United States Constitution.”<sup>99</sup> Justice Fischer cited to Judge Bergeron’s concurrence in *Banks*. Judge Bergeron

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<sup>90</sup> *Id.* ¶ 12.

<sup>91</sup> *Id.* ¶ 13.

<sup>92</sup> *Id.* ¶¶ 2021.

<sup>93</sup> *Id.* ¶ 36.

<sup>94</sup> *Id.* ¶¶ 40–41.

<sup>95</sup> *Id.* ¶ 43.

<sup>96</sup> *Id.* ¶¶ 46–53.

<sup>97</sup> *Id.* ¶¶ 30–31.

<sup>98</sup> *Id.* ¶ 31.

<sup>99</sup> *Id.* ¶ 56 (Fischer, J., concurring).

noted *Arnold* conflicted with *State v. Storch*,<sup>100</sup> which contained dicta positing that Ohio's Confrontation guarantee "is more detailed in the rights it sets forth."<sup>101</sup>

Justice DeWine, who authored the majority opinion, spent several paragraphs discussing the differences between the two separate Confrontation Clauses, but ultimately held that because Carter did not ask to reconsider *Self* (and *Arnold*), the issue was not properly before the court.<sup>102</sup> However, it is clear that four Ohio Supreme Court justices appear ready to give independent force to Ohio's Confrontation right if properly presented.

### III. RECENT CONFRONTATION CLAUSE RULINGS THROUGHOUT THE UNITED STATES

"Zoom"-ing out from Ohio cases, I wanted to review cases in other states involving remote testimony and the Confrontation Clause. These cases do not strictly address remote testimony during the COVID-19 pandemic, per se, and I do not attempt to cover appeals from federal district courts.<sup>103</sup> However, these cases all address the Confrontation Clause and the understanding (or lack thereof) between out-of-court hearsay statements versus physical presence at trial.

The Supreme Courts of Michigan and Montana have both recently issued narrow decisions regarding remote testimony under *Craig*. In *People v. Jemison*,<sup>104</sup> the Supreme Court of Michigan overturned a Criminal Sexual Conduct conviction because the DNA forensic analyst testified remotely in violation of the Confrontation Clause. The court found the trial judge erred by allowing remote testimony based on *Craig*, which predated the U.S. Supreme Court decision in *Crawford*.<sup>105</sup> Shockingly, the Michigan Supreme Court held "*Crawford* did not specifically overrule *Craig*, but it took out its legs."<sup>106</sup> Therefore, Michigan's highest court would consider *Craig* only "according to its narrow facts."<sup>107</sup> This is in spite

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<sup>100</sup> *State v. Storch*, 612 N.E.2d 305, 66 Ohio St. 3d 280 (1993).

<sup>101</sup> *State v. Banks*, 2021-Ohio-4330, ¶ 42 (Ct. App. 2021) (Bergeron, J., concurring) (citing *Storch*, 66 Ohio St. 3d at 288). This author notes *Arnold* was decided after *Crawford*, whereas *Storch* analyzed out-of-court statements under *Roberts* and Ohio Evidence Rule 807 (governing the admissibility of out-of-court statements made by children in child abuse cases).

<sup>102</sup> *Carter*, 2024-Ohio-1247 ¶¶ 32–34.

<sup>103</sup> A thorough summary of federal appeals court decisions regarding remote testimony can be found in *State v. Stefanko*, 2022-Ohio-2569, ¶¶ 21–22, 193 N.E.3d 632, 638–39 (Ct. App.). For brevity's sake, I have focused on decisions rendered in courts at the state level.

<sup>104</sup> *People v. Jemison*, 952 N.W.2d 394 (Mich. 2020).

<sup>105</sup> *Id.* at 395–96.

<sup>106</sup> *Id.* at 396.

<sup>107</sup> *Id.*

of the fact that, as stated above, *Crawford*'s majority decision never once mentions in-court presence at issue in *Craig*.

Nevertheless, the Michigan Supreme Court assessed under *Crawford* the remote testimony of a DNA forensic analyst who resided in Utah. The facts in *Jemison* bear mention: the victim was raped and robbed in 1996 by an unknown assailant and filed a police report that same day.<sup>108</sup> The victim submitted to a sexual assault examination as well, including completion of a "rape kit," which collects physical evidence of potential sources of DNA.<sup>109</sup> However, "[t]he rape kit was not analyzed until 2015," nearly twenty (20) years after the attack.<sup>110</sup> Eventually, the kit was tested by a forensic analyst in Utah, who found a suspect match through CODIS (Combined DNA Index System).<sup>111</sup> The analyst testified remotely at Jemison's trial. Jemison was ultimately convicted of first-degree sexual criminal conduct and sentenced to up to forty years in prison.<sup>112</sup>

The *Jemison* court reviewed *Craig* entirely under the *Roberts/Crawford* framework for out-of-court hearsay statements. "Fourteen years passed between *Craig* and *Crawford*, and things changed."<sup>113</sup> The court held *Crawford* "restored face-to-face testimony as a fundamental element of the confrontation right."<sup>114</sup> The Michigan Supreme Court then held *Craig* only applies in Michigan as follows:

[A] child victim may testify against the accused by means of one-way video (or similar *Craig*-type process), when the trial court finds, consistently with statutory authorization and through a case-specific showing of necessity, that the child needs special protection.<sup>115</sup>

This decision was made under the Sixth Amendment to the United States Constitution and Article I, Section 20 of the Michigan Constitution. The author notes *Jemison*'s holding was not based on independent rights afford to the accused under Michigan's own political charter.

The Montana Supreme Court reached a similar conclusion in *State v. Bailey*,<sup>116</sup> involving the testimony of Montana Crime Lab toxicologist Eric Miller ("Miller"), who testified remotely as to the defendant's blood-alcohol content in a DUI case.<sup>117</sup>

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 397.

<sup>113</sup> *Id.* at 398.

<sup>114</sup> *Id.* at 399.

<sup>115</sup> *Id.* at 400.

<sup>116</sup> *State v. Bailey*, 2021 MT 157, 404 Mont. 384, 489 P.3d 889 (Mont. 2021).

<sup>117</sup> *Id.* ¶ 11.

This case was decided, in part, under Montana’s Confrontation Clause, which allows two-way video testimony only upon a showing that “the personal presence of the witness is impossible or impractical due to considerations of distance or expense.”<sup>118</sup>

However, after Bailey’s DUI trial, the Montana Supreme Court held, in a separate case, that the State was still required to demonstrate the need for remote testimony was “necessary to further an important public policy,” and therefore, judicial economy was not sufficient, in and of itself, to permit remote testimony.<sup>119</sup> While acknowledging the backlog of work for the state crime lab, under the recent *Mercier* decision, the court found Bailey’s confrontation rights were violated.<sup>120</sup>

In *Haggard v. State*,<sup>121</sup> Texas’ Ninth District Court of Appeals reached the same conclusion as the *Jemison* court. Relying on *Crawford*, the court pondered whether “the role of reliability in a Confrontation Clause analysis has been called into question.”<sup>122</sup> However, the ruling in *Haggard* rested on *Craig*’s “lack of a case-specific finding” that the witness, a sexual assault nurse examiner residing in Montana, could testify remotely out of necessity.<sup>123</sup>

*Haggard* was cited as authority in *McCumber v. State*<sup>124</sup> from Texas’ Ninth District Court of Appeals. In *McCumber I*, the trial court conducted a hearing on whether the witness should be allowed to testify remotely. The trial court found the witness adequately demonstrated a need under *Craig* to testify without being physically present. The Ninth District rejected the use of remote testimony for the witness based on the witness’ subjective fear of retaliation and threats of violence by the defendant’s family members.<sup>125</sup>

However, the Texas Criminal Court of Appeals recently reversed the Ninth District court, finding “the trial court’s necessity finding was sufficient and was justified by the witness’s fear of retaliation.”<sup>126</sup> In *McCumber II*, the Criminal Court of Appeals found the trial court’s credibility determination that the witness was being intimidated was entitled to deference, and the Ninth District “erred in substituting its own view of [the witness’] credibility rather than deferring to the trial

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<sup>118</sup> *Id.* ¶ 42.

<sup>119</sup> *Id.* ¶ 41. (citing *State v. Mercier*, 2021 MT 12, ¶ 16, 479 P.3d 967, 974 (2021)).

<sup>120</sup> *Id.* ¶ 45.

<sup>121</sup> *Haggard v. State*, 612 S.W.3d 318 (Tex. Crim. App. 2020).

<sup>122</sup> *Id.* at 326–27.

<sup>123</sup> *Id.* at 327.

<sup>124</sup> *McCumber v. State (McCumber I)*, No. 09-22-00157-CR, 2023 Tex. App. LEXIS 4321 (June 21, 2023) (*McCumber I*).

<sup>125</sup> *Id.* at 29–30.

<sup>126</sup> *McCumber v. State (McCumber II)*, 690 S.W.3d 686, 689 (Tex. Crim. App. 2024).

court's credibility judgment."<sup>127</sup> The court noted that retaliation is a criminal offense, and protecting witnesses from harm or harassment is a compelling public policy interest.<sup>128</sup>

I find the *Bailey* and *McCumber II* decisions better reasoned than those in *Jemison* and *Carter*. Neither *Bailey* nor *McCumber II* mentions *Crawford* because those courts understood the issues faced were about remote two-way testimony in a trial setting. The *Bailey* court was implementing a recently issued decision, which relied on *Craig*, pursuant to its independent state constitution to protect the rights of an accused. Chief Justice McGrath, the lone dissenter in *Bailey*, wrote to express flatly that “a showing of ‘necessity’ is not required by the Confrontation Clause for the use of modern two-way video communication technology.”<sup>129</sup> While noting that *Mercier* was a plurality opinion, McGrath would expand *Craig* to allow greater use of remote testimony without a case-specific need for such testimony. The *McCumber II* court gives great deference to a trial court’s factual finding that remote testimony is necessary as to a particular witness.

Under *Craig*, the reasons offered for the witness’s need to testify by video must be specific to the case in order to further a public policy interest. The reliance on a *Crawford* analysis, such as in *Stefanko*, *Jemison*, and *Carter*, set the bar so high as to be nearly impossible to clear. That is because a *Crawford* analysis is inappropriate for video trial testimony. The *Craig* decision is the correct lens with which to decide whether Zoom testimony satisfies the U.S. Constitution. In line with the correct *Craig* analysis, courts in other jurisdictions have upheld the use of remote testimony in response to COVID-19 and its related health concerns.<sup>130</sup>

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<sup>127</sup> *Id.* at 693.

<sup>128</sup> *Id.* at 692.

<sup>129</sup> *State v. Bailey*, 2021 MT 157, ¶ 51, 404 Mont. 384, 489 P.3d 889 (2021) (McGrath, C.J., dissenting).

<sup>130</sup> *See State v. D.K.*, 507 P.3d 859 (Wash. Ct. App. 2022) (permitting remote testimony because witness demonstrated necessity due to seriousness of COVID-19 and *Craig*’s reliability factors were otherwise followed); *People v. Coulthard*, 307 Cal. Rptr. 3d 383 (Ct. App. 2023) (permitting remote testimony based on state’s showing that witness was at risk of COVID-19 infection based on witness’s specific health and travel limitation).

## CONCLUSION

What I propose is a relatively simple analysis for determining how to view Confrontation Clause objections:

- 1) Does the prosecution seek to offer out-of-court statements made *prior to trial* (i.e. hearsay statements), when a witness is beyond the reach of the court, or otherwise refuses to testify? If so, the court should apply *Crawford*'s testimonial/non-testimonial test to determine admissibility of those out of court statements; or
- 2) Does the prosecution seek to offer trial testimony remotely by a witness without the witness being physically present? If so, the court should apply *Craig*'s test for necessity and reliability (oath, cross-examination, and opportunity to observe the witness' demeanor) in determining whether to allow two-way video testimony.

To this end, the author humbly suggests the Michigan and Ohio Supreme Courts employed the wrong analysis in *Jemison* and *Carter*. By focusing their decisions on *Crawford*, the *Jemison* and *Carter* panels have potentially prohibited any type of remote testimony in Michigan and Ohio courtrooms. The *Roberts/Crawford* cases all involve statements made by an out-of-court declarant. The *Craig* decision and its progeny all involve witnesses who are available to testify at trial without being physically present in the courtroom.

*Crawford* discarded the "indicia of reliability" under *Roberts* in favor of "the crucible of cross-examination"<sup>131</sup> as the test for weighing out-of-court hearsay. And yet, remote witnesses are subjected to cross-examination under *Craig*. A remote witness, though not present in the same physical space as the accused, is put through "testing in the crucible of cross-examination."<sup>132</sup> The jury can see the witness while testifying remotely. The jury can observe their demeanor, hear their answers, watch if the witness is dodging the question, or refusing to answer at all. This all occurs live, as it is happening, same as if the witness was in the chair next to the bench. The concerns *Crawford* sought to correct (weighing out of court statements offered for their truth), *Craig* already does so, because the remote witness *is actually testifying in open court before the finder of fact*. The prejudice *Crawford* sought to fix (the potential of the accused being convicted by statements made without the benefit of cross-examination) simply does not exist under remote video testimony.

This distinction was completely lost on the *Jemison* and *Carter* courts. As a result, remote testimony in Michigan and Ohio is, or may soon become effectively wiped out, regardless of an ongoing global pandemic or any other valid, case-specific necessity. This author suggests that video testimony is functionally

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<sup>131</sup> *Crawford v. Washington*, 541 U.S. 36, 61, 68 (2004).

<sup>132</sup> *Id.*

equivalent to in-person testimony. By adhering to the *Craig* reliability factors (oath, cross-examination, and observation of the witness), trial courts can ensure “effective confrontation” while maintaining the integrity of the rights of the accused in a criminal trial. Remote testimony, when necessary, accomplishes the objective of the adversarial process: to arrive at the truth.

Finally, as far as Ohio courts are concerned, readers will want to keep an eye on the recently enacted Criminal Rule 40. Effective July 1, 2023, this rule allows for remote testimony as follows:

- (B)(1) With the agreement of the parties or for good cause shown, the court may permit the remote presence and participation of a witness, including that of a defendant, for any proceeding if all of the following apply:
  - (a) The court gives appropriate notice to all parties;
  - (b) The court finds that the remote appearance of the witness is based on important state interests, public policies, or necessities of the case;
  - (c) The witness is administered the oath or affirmation using live two-way video and audio conference technology that allows the person authorized to administer the oath to verify the identity of the witness at the time the oath is administered;
  - (d) The witness is subject to full cross-examination;
  - (e) The video arrangements allow the witness to speak, and to be seen and heard by the court, all parties, and the jury if applicable.
- (2) Every witness testifying remotely, including those outside this state, in a trial or other proceeding in open court in Ohio shall affirm on the record that the witness has submitted to the jurisdiction of the Ohio court for the purpose of enforcement of his or her oath or affirmation.<sup>133</sup>

Criminal Rule 40 codifies the holdings of *Craig* and *Marcinick* in permitting video testimony in the absence of in-person availability. The new rule requires a showing of necessity, oath or affirmation, full cross-examination, and the ability of the court, counsel, and jury to observe the demeanor of the witness. Criminal Rule 40 requires notice to all parties as well, thereby affording Due Process to all affected parties in a case.

If the Ohio Supreme Court were to move away from *Self* and *Arnold* and find Ohio’s Confrontation clause provides greater protection than the Sixth Amendment, I believe Criminal Rule 40 would still survive constitutional scrutiny. Video testimony is functionally equivalent to “meet[ing] the witness face to face.”<sup>134</sup> These requirements may be met whether the witness is ten feet, ten miles, or ten time zones

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<sup>133</sup> Ohio Crim. R. 40.

<sup>134</sup> OHIO CONST. art. I, § 10.

away from the accused. Two-way video technology should be made available for trial courts to utilize to protect the witness from harassment, to protect the public from a public health crisis, while protecting the function of the adversarial process, i.e. to hear all available evidence before arriving at the truth.

But for now, Article I, Section 10 provides the same guarantees as the Sixth Amendment under Ohio law. As long as a trial court complies with Criminal Rule 40 and *Craig*, and the necessities of the case demonstrate the need for video testimony, physical presence of the witness is not mandatory.

When ruling on a request for video testimony, I believe the best practice is to conduct an evidentiary hearing prior to trial. One common thread in the cases discussed above is the existence or absence of case-specific findings detailing the necessity for video testimony. Video testimony in cases such as *Carter* and *Stefanko* was found to have been allowed in error due to generalized concerns that were not specific to those cases. In comparison, use of Zoom testimony in *Howard* and *McCumber II* was upheld because the trial court conducted a preliminary hearing prior to making a fact-specific finding of the need for video testimony. If a court permits remote testimony after a full hearing, a trial court's ruling should be offered deference by a reviewing panel.

Finally, regardless of a potential new interpretation of Ohio's Confrontation Clause alluded to in *Carter*, trial courts should carefully consider the important distinction between the out-of-court declarant versus the available but not physically present witness before ruling on an objection to video testimony of a witness. The two scenarios are distinct and should be evaluated distinctly. Just because an attorney invokes the Confrontation Clause does not mean the court should look immediately to *Crawford* and related cases. I was a student laboring under this confusion when my law school classmates and I were taught of *Crawford's* sea change. However, after 20 years and enduring a global health crisis, it is time to refocus on what *Craig*, and the Confrontation Clause itself, does and does not permit.<sup>135</sup>

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<sup>135</sup> There is a moral argument to be made that the Confrontation Clause should provide flexibility when Ohio, America, and the world are faced with a public health crisis like COVID-19. Hundreds of thousands of people died as a result of this outbreak. Whatever the United States and Ohio Constitutions mean, they must not be so rigid as to risk the potential of serious illness or death in order to conform to their requirements. As of October 2024, dozens of Ohioans are dying from COVID-19 each and every week. See Samantha Hendrickson, *As Ohio COVID Deaths near 1,000 for 2024, Health Director Urges Vigilance*, COLUMBUS DISPATCH, <https://www.dispatch.com/story/news/healthcare/2024/10/25/ohio-covid-deaths-near-1000-for-2024-vaccinations-urged/75822694007/> [<https://perma.cc/G7Z6-NMPU>].