The Rise in Remote Testimony: Exploring Sufficient Public Policies Under *Craig*

Wayne A. Comstock[*]

ABSTRACT: The Confrontation Clause protects a criminal defendant's right to confront adverse witnesses against them. The Supreme Court developed how remote testimony affects a defendant's rights under the Confrontation Clause located in the Sixth Amendment of the Constitution. Maryland v. Craig *created a two-part test for courts to determine whether one-way closed-circuit television testimony violates a defendant's rights. Namely (1) whether the stated interest is necessary to further an important public policy and (2) whether the reliability of the testimony is otherwise assured. Over time, federal and state courts extended the* Craig *test to two-way remote testimony. With the recent rise in remote testimony, courts struggle with analyzing illness as a sufficient public policy under* Craig. *This Note will propose modification to* Craig *that expands the necessity and reliability prongs and incorporates the following factors: (1) whether in-person testimony adversely affects the witness, (2) whether the witness can travel despite the adverse effect, and (3) whether the court has an alternative to remote testimony.*

[*] J.D. Candidate, The University of Iowa College of Law 2023; B.A., The University at Buffalo, 2012. I would like to extend my deepest gratitude to three women. I would like to thank my loving and supportive wife, Hiroyo, who helped me pursue my dream of becoming an attorney, the Honorable Janette Rodecap who provided mentorship and guidance, and Professor Dawn Barker Anderson who improved my legal writing in many ways.

INTRODUCTION

The Confrontation Clause is a constitutional safeguard to protect a defendant's rights in criminal proceedings.[1] Historically, courts viewed the Confrontation Clause within the hearsay context.[2] Both hearsay and the Confrontation Clause serve to protect against unreliable testimony.[3] Over

1. *Right to Confront Witness*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/right_to_confront_witness [https://perma.cc/976B-5QRH].

2. *See* Mark Spottswood, *Truth, Lies, and the Confrontation Clause*, 89 U. COLO. L. REV. 565, 574 (2018) ("And indeed, hearsay was frequently admitted during criminal trials in this period, with concerns over this practice rising only slowly and inconsistently over the course of the seventeenth and eighteenth centuries. . . . If a witness subsequently became unavailable to testify at trial, a clerk might then read their examination answers in lieu of live testimony, even if the defendant had not been present at the time of the examination. Judges began to develop the principle that confronted testimony was preferable to unconfronted hearsay based on two sets of judicial crises, one in England and the other in the Colonies." (footnote omitted)).

3. *See* Joel R. Brown, *The Confrontation Clause and the Hearsay Rule: A Problematic Relationship in Need of a Practical Analysis*, 14 FLA. STATE U. L. REV. 949, 950 (1987).

time, the Confrontation Clause implicated other issues, including the use of remote testimony during criminal trials.[4] Since 2020, remote testimony in legal proceedings remains on the rise[5] and is a basis for appeal in criminal proceedings because remote testimony implicates the Confrontation Clause.[6] The Supreme Court interpreted the primary object of a defendant's "right . . . to be confronted with the witnesses against him"[7] as "compelling [the accuser] to stand face to face with the jury in order that they may look at [the accuser],"[8] but the Court noted that face-to-face confrontation "must occasionally give way to considerations of public policy and the necessities of the case."[9]

The Supreme Court considered remote testimony under the Confrontation Clause in two landmark cases: *Coy v. Iowa* and *Maryland v. Craig*.[10] Years later, the Court addressed a related issue in *Crawford v. Washington*, the admission of out-of-statements at trial.[11] *Coy* acknowledged that exceptions to a defendant's right to confront adverse witnesses may exist,[12] meaning the privilege was not absolute. *Craig* developed a two-part test for determining when remote testimony violates a defendant's rights under the Confrontation Clause.[13]

4. *See, e.g.*, Maryland v. Craig, 497 U.S. 836, 852 (1990) ("[The] use of the one-way closed[-]circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause.").

5. Doug Austin, *Are Virtual Court Proceedings Here to Stay?*, JD SUPRA (June 24, 2021), https://www.jdsupra.com/legalnews/are-virtual-court-proceedings-here-to-3320909 [https://perma.cc/7FGM-3SAW]; *see* John Hyde, *Many Lawyers Prefer Remote Hearings, and They Shouldn't Be Muted*, LAW SOC'Y GAZETTE (Mar. 19, 2021), https://www.lawgazette.co.uk/commentary-and-opinion/many-lawyers-prefer-remote-hearings-and-they-shouldnt-be-muted/5107877.article [https://perma.cc/Y7ZV-XF45] ("Many lawyers I speak to say they do not want a return to the pre-Covid way of working. Remote hearings save on travel time and cost, they offer participants the chance to do something while proceedings are delayed, and can increase efficiency if handled properly. Practitioners tell me that remote hearings have been especially useful in civil and family matters, with fewer cases vacated and clients happier as a result. The costs of paying for expert witnesses and representatives to travel have been saved, and in cases involving children with special educational needs for example, lawyers tell me parents have found it invaluable to be able to join proceedings without needing to find childcare.").

6. *See* United States v. Donziger, No. 19-cr-561, 2020 WL 4747532, at *2–3 (S.D.N.Y. Aug. 17, 2020).

7. U.S. CONST. amend. VI.

8. Mattox v. United States, 156 U.S. 237, 242–43 (1895).

9. *Id.* at 243.

10. Coy v. Iowa, 487 U.S. 1012, 1020 (1988); *Craig*, 497 U.S. at 842–43.

11. Crawford v. Washington, 541 U.S. 36, 42 (2004).

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

13. *Craig*, 497 U.S. at 850 ("[A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.").

Crawford held that out-of-court testimonial statements required a prior opportunity to cross-examine the witness to satisfy the Sixth Amendment.[14]

Of the above cases, *Craig* is most relevant to the issue of remote testimony because of the two-part test the Court created governing one-way closed-circuit television testimony.[15] In a criminal trial, one-way closed-circuit television testimony involves a witness testifying in a room separate from the courtroom in the presence of the prosecutor, defense attorney, operators of the closed-circuit television equipment, and in the case of a child, "any person whose presence . . . contributes to the well-being of the child."[16] The judge and defendant may communicate with those persons in the room with the witness.[17] The Court determined one-way closed-circuit television testimony was not violative if (1) "necessary to further an important public policy," plus (2) "the reliability of the testimony is otherwise assured."[18] According to the *Craig* majority, one-way closed-circuit television testimony does not violate a defendant's right to confront adverse witnesses as long as the testimony is reliable and essential for public policy reasons.[19] Following the *Craig* decision, a circuit split developed regarding the applicability of *Craig* to two-way remote testimony.[20] Many several circuit courts applied the *Craig* test to two-way remote testimony,[21] as did the Supreme Court of Iowa in 2014.[22]

With the rise in remote testimony due to the COVID-19 pandemic, federal and state courts are divided as to the extent of illness qualifying as an important public policy under *Craig*'s necessity prong.[23] State courts generally may view COVID-19 concerns as sufficient public policies,[24] whereas federal

14. *Crawford*, 541 U.S. at 68 ("Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

15. *Craig*, 497 U.S. at 850 (citing *Coy*, 487 U.S. at 1021).

16. *Id.* at 840 n.1.

17. *Id.*

18. *Id.* at 850.

19. *Id.*

20. *See, e.g.*, United States v. Yates, 438 F.3d 1307, 1313–14 (11th Cir. 2006); United States v. Bordeaux, 400 F.3d 548, 553–55 (8th Cir. 2005).

21. *See Yates*, 438 F.3d at 1313 ("[F]or more than a decade, circuit courts have recognized that to allow prosecutorial presentation of child witness testimony via two-way closed-circuit television under the Child Victims' and Child Witnesses' Rights Statute, 18 U.S.C. § 3509, the findings of the trial court must satisfy the Craig test in order to satisfy the Confrontation Clause.").

22. State v. Rogerson, 855 N.W.2d 495, 504–06 (Iowa 2014).

23. *Compare* Vazquez Diaz v. Commonwealth, 167 N.E.3d 822, 838 (Mass. 2021) ("[I]n some circumstances, a virtual evidentiary hearing on a motion to suppress may be necessary to further the important public policy of protecting the public health from COVID-19."), *with* United States v. Casher, No. 19-cr-65, 2020 WL 3270541, at *3 (D. Mont. June 17, 2020) ("[T]he potential risks COVID-19 poses do not present a necessity to forego [a defendant's] confrontation rights.").

24. *Vazquez Diaz*, 167 N.E.3d at 838; State v. Comacho, 960 N.W.2d 739, 755–56 (Neb. 2021); People v. Hernandez, 488 P.3d 1055, 1060–62 (Colo. 2021).

district courts hold the opposite.[25] In the years prior to the surge in remote testimony, state courts acknowledged sufficient public policies solely related and partially related to illness,[26] but federal and state courts are still uncertain as to what illnesses may constitute sufficient public policies under *Craig*.[27]

This Note will argue that *Craig* is inadequate when analyzing illness as a sufficient public policy. Part I will discuss the history of the Confrontation Clause, provide an overview of important Supreme Court cases related to remote testimony under the Confrontation Clause, and address the circuit split among federal appellate courts that developed regarding *Craig*'s applicability. Part II will discuss the difference in federal and state approaches to COVID-19 concerns and the requisite extent of illness under *Craig*'s necessity prong. Part III will propose modification to *Craig* that includes expanding the necessity and reliability prongs with examples and incorporating factors emphasized in *State v. Rogerson* and other relevant case law.[28] As *Craig* stands, it lacks clear guidelines to assist federal and state courts when addressing remote testimony under the Confrontation Clause.[29] Similarly to the Supreme Court's approach in *Daubert v. Merrell Dow Pharmaceuticals, Incorporated*,[30] the list of factors may help courts with analyzing illness as a sufficient public policy under *Craig* and provide much needed clarity to the inadequate *Craig* standard.

---

25. United States v. Pangelinan, No. 19-10077, 2020 WL 5118550, at *3–4 (D. Kan. Aug. 31, 2020); United States v. Kail, No. 18-cr-00172, 2021 WL 1164787, at *1 (N.D. Cal. Mar. 26, 2021); *Casher*, 2020 WL 3270541, at *3.

26. *See, e.g.*, People v. Wrotten, 923 N.E.2d 1099, 1101–03 (N.Y. 2009) (explaining that the witness had a legitimate basis for being unavailable to appear in person at trial partly because they were eighty-five years of age, frail, unsteady by foot, with a record of heart problems, and unable to travel to the courthouse without endangering their health); Bush v. State, 193 P.3d 203, 214–16 (Wyo. 2008) (explaining witness had a legitimate basis for being unavailable to appear in-person at trial partly because they "suffered congestive heart failure one week before" trial); Lipsitz v. State, 442 P.3d 138, 144 (Nev. 2019) ("Admission into a treatment center for a prolonged period is a legitimate basis for the district court to find that a witness is medically unavailable to appear at trial."); White v. State, 116 A.3d 520, 540, 547 (Md. Ct. Spec. App. 2015) (explaining witness had a legitimate basis for being unavailable to appear in person at trial partly because witness's doctor indicated that witness's "debilitating back condition" would worsen as a result of flying to testify in person).

27. *See* Stephen Carroll, *COVID and the Confrontation Clause: Does Remote Testimony Pass Constitutional Muster?*, IOWA LAW., Feb. 2021, at 14; Jenia I. Turner, *Remote Criminal Justice*, 53 TEX. TECH L. REV. 197, 228 (2021) ("When it comes to the mandates of the Confrontation Clause, which apply at the trial stage, courts have divided on whether the pandemic justifies the use of remote testimony without the defendant's consent.").

28. *See, e.g.*, State v. Rogerson, 855 N.W.2d 495, 507 (Iowa 2014); *Bush*, 193 P.3d at 215; C.A.R.A. v. Jackson Cnty. Juv. Off., 637 S.W.3d 50, 59, 66 (Mo. 2022) (en banc); *Casher*, 2020 WL 3270541, at *2–3; *Pangelinan*, 2020 WL 5118550, at *3–4.

29. *See Rogerson*, 855 N.W.2d at 506–07 (surmising that courts look to case law to determine what justifications have and have not satisfied *Craig*'s necessity prong).

30. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593–95 (1993) (acknowledging factors courts may consider when determining whether the scientific methodology underlying expert testimony is valid).

I. THE HISTORY OF THE CONFRONTATION CLAUSE

This Part will provide a brief overview of the history of the Confrontation Clause in the United States, trace the history of the Confrontation Clause and remote testimony in the Supreme Court, identify the circuit split involving the applicability of *Maryland v. Craig*, and conclude with Iowa's stance on the circuit split.

A. HISTORICAL OVERVIEW

The United States Constitution guarantees all criminal defendants the right to confront adverse witnesses.[31] Although there is no clear consensus regarding the origins of the Confrontation Clause,[32] some writers maintain that it began with the English trial of Sir Walter Raleigh where the court executed him despite the complaining witness's willingness to testify in person.[33] The complaining witness accused Raleigh of conspiracy to commit treason against the Crown.[34] Raleigh's trial enraged others because Raleigh could not confront the witness against him.[35] Throughout U.S. history, the Supreme Court did not often address Confrontation Clause issues.[36] In fact, the Supreme Court did not extend the right to confront one's witnesses against them as a fundamental right required to be applied by the States until 1965 in *Pointer v. Texas*.[37] The Supreme Court initially interpreted a defendant's right to confront adverse witnesses as the right to cross-examine adverse witnesses.[38] In turn, the Supreme Court interpreted a defendant's right to

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

32. White v. Illinois, 502 U.S. 346, 359 (1992) (Thomas, J., concurring) (first citing *California v. Green*, 399 U.S. 149, 176 n.8 (1970) (Harlan, J., concurring); then citing *Dutton v. Evans*, 400 U.S. 74, 95 (1970) (Harlan, J., concurring)).

33. *See* Daniel Shaviro, *The Supreme Court's Bifurcated Interpretation of the Confrontation Clause*, 17 HASTINGS CONST. L.Q. 383, 384 (1990) ("In Justice Harlan's words, the Confrontation Clause 'comes to us on faded parchment.' Like the hearsay rules, it reflects common-law abhorrence of the Tudor and Stuart practice of trial by affidavit (as in the notorious treason trial of Sir Walter Raleigh in 1603, when a sworn affidavit by Lord Cobham, presumably obtained under duress, led to Raleigh's execution even though Cobham had recanted and was available to testify in person)." (footnote omitted)).

34. *The Treason Trial of Sir Walter Raleigh*, HARV. WIKI, https://wiki.harvard.edu/confluence/display/GNME/THE+TREASON+TRIAL+OF+SIR+WALTER+RALEIGH#:~:text=In%20a%20celebrated%20trial%20in,Stuart%20as%20queen%20of%20England [https://perma.cc/R342-9FHP].

35. *See id.*

36. Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 121 (1995) ("The Supreme Court did not interpret the Sixth Amendment provision in the years immediately after the Constitution's adoption. Its confrontation jurisprudence did not truly begin until the end of the nineteenth century . . . .").

37. Pointer v. Texas, 380 U.S. 400, 403 (1965).

38. Douglas v. Alabama, 380 U.S. 415, 418 (1965).

cross-examine as requiring a face-to-face meeting.[39] In the last several decades, though, the face-to-face requirement waned,[40] giving way to discourse regarding remote testimony.[41]

B. THE CONFRONTATION CLAUSE AND REMOTE TESTIMONY—COY V. IOWA

In 1988, the Supreme Court opened the door to removing the Confrontation Clause's absolute face-to-face requirement in *Coy v. Iowa*.[42] In *Coy*, the State charged the defendant with sexually assaulting two adolescent females.[43] Before trial, the State filed a motion pursuant to Iowa legislation that would allow the alleged victims "to testify [remotely] via closed-circuit television or [indirectly] behind a screen."[44] The trial court granted the motion over the defendant's objection, allowing the witnesses to testify behind a screen.[45] After the jury convicted the defendant, he appealed to the Supreme Court of Iowa, arguing a violation of the Confrontation Clause.[46] The Supreme Court of Iowa affirmed the defendant's conviction.[47] After granting certiorari, the U.S. Supreme Court reversed.[48] The Court held that the defendant's right to confrontation was violated because "[t]he screen at issue" acted as "a . . . damaging violation of the defendant's right to a face-to-

39. Coy v. Iowa, 487 U.S. 1012, 1016 (1988) ("[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." (citing Kentucky v. Stincer, 482 U.S. 730, 748–50 (1987) (Marshall, J., dissenting))).

40. Maryland v. Craig, 497 U.S. 836, 849 (1990) ("[O]ur precedents establish that 'the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial . . . .'" (quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980), *overruled by* Crawford v. Washington, 541 U.S. 36 (2004))).

41. *See* Michael Gentithes, *Confrontation Rights and COVID-19*, APP. ADVOC. BLOG (Sept. 22, 2020), https://lawprofessors.typepad.com/appellate_advocacy/2020/09/confrontation-rights-and-covid-19.html [https://perma.cc/WQK5-LZQJ] ("Suppose you are a criminal defense attorney preparing a case for trial. Opposing counsel informs you that the key eyewitness is medically vulnerable to COVID-19 and plans to seek court permission to testify remotely while wearing a mask. Does the confrontation clause prohibit such testimony, requiring in-person, maskless cross-examination to vindicate the defendant's constitutional rights? Several courts across the country have recently addressed this question, with surprisingly disparate results and analyses.").

42. *See Coy*, 487 U.S. at 1020–21 ("It is true that we have in the past indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests. The rights referred to in those cases, however, were not the right narrowly and explicitly set forth in the Clause, but rather rights that are, or were asserted to be, reasonably implicit . . . . To hold that our determination of what implications are reasonable must take into account other important interests is not the same as holding that we can identify exceptions, in light of other important interests, to the irreducible literal meaning of the Clause: 'a right to *meet face to face* all those who appear and give evidence *at trial*.' We leave for another day, however, the question whether any exceptions exist. Whatever they may be, they would surely be allowed only when necessary to further an important public policy." (citations omitted)).

43. *Id.* at 1014.

44. *Id.*

45. *Id.* at 1014–15.

46. *Id.*

47. *Id.*

48. *Id.* at 1022.

face encounter."[49] However, the Court noted "that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests. . . . We leave for another day, however, the question whether any exceptions exist."[50]

In the aftermath of *Coy*, commentators immediately criticized the Court's decision.[51] Some commentators expressed serious concern for the Court's refusal to protect child victims during a period of time when child sexual assaults were statistically on the rise.[52] Indeed, the rise in child sexual assaults coupled with *Coy* posed problems for prosecutors, who often relied on child victims to press charges, testify, and move toward trial.[53] In response to the increased number of child sexual assaults in the late 1980s, state legislatures passed laws that intended to protect child witnesses who chose to testify against their accused during trials.[54]

Despite the *Coy* decision,[55] one commentator argued that the aims of protecting the interests of child victims who testify at trial while also ensuring that a trial uncovers the truth of allegations are consistent with each other.[56] According to the commentator, safeguarding child victims against trauma is an important public interest, the defendant's rights must not be violated, and the public interest must be found in the specific facts of a case.[57] A proposed solution to protect both child victims and a defendant's rights involves using a court-appointed neutral party to assess a child's mental health, and where an existing mental health physician already attends to the child, the physician could potentially testify at trial in lieu of the child.[58]

Two years later, the Supreme Court, in light of the exceptions *Coy* left open, created a legal standard for children testifying remotely in *Maryland v. Craig*.[59]

---

49. *Id.* at 1020.

50. *Id.* at 1020–21.

51. *See, e.g.*, Sharon Parker Brustein, Comment, Coy v. Iowa*: Should Children Be Heard and Not Seen?*, 50 U. PITT. L. REV. 1187, 1188 (1989) ("The Court, therefore, erred when it ignored the youth of the witnesses in reaching its decision."); John A. Mayers, Note, Coy v. Iowa*: A Constitutional Right of Intimidation*, 16 PEPP. L. REV. 709, 731 (1989) ("By holding that the screen violated Coy's right of face-to-face confrontation, the majority has become careless and cavalier with their language.").

52. Brustein, *supra* note 51, at 1195.

53. *Id.* at 1189–90.

54. *Id.* at 1190.

55. *Coy*, 487 U.S. at 1021–22.

56. Brustein, *supra* note 51, at 1202–03.

57. *See id.* at 1188, 1203–04.

58. *See id.* at 1205.

59. Maryland v. Craig, 497 U.S. 836, 850 (1990).

C. MARYLAND V. CRAIG—*PRECEDENT*

The Supreme Court revisited exceptions to the Confrontation Clause in *Maryland v. Craig* by creating a legal standard for child victims testifying remotely.[60] In *Craig*, the State charged the defendant with two counts of child abuse.[61] Invoking Maryland state procedure, which permitted child victims to testify via one-way closed-circuit television, the State requested that the victim be able to testify remotely.[62] The defendant objected to the testimony, arguing that this would violate the Confrontation Clause.[63] The trial court overruled the objection stating that one-way closed-circuit television preserved the tenets of confrontation, namely cross-examination, and was therefore sufficient.[64] The jury convicted the defendant and, on appeal, "[t]he Court of Appeals of Maryland reversed and remanded for a new trial."[65] In doing so, the Court of Appeals of Maryland rejected the defendant's Confrontation Clause argument.[66]

The Supreme Court granted certiorari to resolve the Confrontation Clause issues,[67] and it held that protecting child victims against trauma is a sufficient public interest to outweigh the defendant's right to in-person confrontation.[68] In reaching the holding, the Court established a two-prong test.[69] A defendant's right to confront adverse witnesses can be satisfied without a physical, face-to-face confrontation if (1) the lack of a physical confrontation "is necessary to further an important public policy and" (2) its reliability is assured in a different way.[70] Not only did the Court find the State's interest in protecting child victims sufficient,[71] but the Court also found that one-way closed-circuit television assured the reliability of the witness's testimony by giving the defendant the opportunity to cross-examine the victim.[72] The Court seemingly borrowed the "necessity"[73] and "public policy"[74] language from *Mattox v. United States*, where Justice Brown, writing for the majority,

60. *Id.*

61. *Id.* at 840.

62. *Id.* at 840 (citing MD. CODE ANN., CTS. & JUD. PROC. § 9-102(a)(1) (1989) (transferred to art. 27, § 774 in 1996)).

63. *Id.* at 842.

64. *Id.* ("[A]lthough the statute 'take[s] away the right of the defendant to be face to face with his or her accuser,' the defendant retains the 'essence of the right of confrontation,' including the right to observe, cross-examine, and have the jury view the demeanor of the witness." (second alteration in original) (citation omitted)).

65. *Id.* at 843.

66. *Id.*

67. *Id.* at 843.

68. *Id.* at 852–53.

69. *Id.* at 850 (citing Coy v. Iowa, 487 U.S. 1012, 1021 (1988)).

70. *Id.* at 850–53.

71. *Id.* at 853.

72. *Id.* at 856–57.

73. *Id.* at 855.

74. *Id.* at 837.

acknowledged that "general rules of law of this kind . . . must occasionally give way to considerations of public policy and the necessities of the case."[75] *Mattox* shows that in addition to *Coy*'s acknowledgment of possible exceptions to the Confrontation Clause,[76] the Supreme Court considered exceptions as early as 1895.[77]

Craig is an important precedent because the Court created a new legal standard for remote testimony under the Confrontation Clause.[78] In reaching its holding, the *Craig* Court created a policy-based exception to a constitutional right, paving the way for possible exceptions to other rights.[79] One-way closed-circuit television testimony satisfies the Confrontation Clause so long as the court views the testimony as: (1) necessary for public policy reasons; and (2) sufficiently reliable otherwise.[80] The necessity prong must relate to the specific facts of the case at issue, otherwise known as a case-specific finding.[81] The case-specific finding means that the State's public interest stems from the specific facts of the case.[82] The case-specific finding focuses on individualized witness concerns, or in other words, concerns about the testifying witness's problems or needs.[83]

In the years following *Craig*, commentators could not accurately assess its effects on witness testimony in federal court.[84] One commentator argued that courts would not view the decision narrowly or broadly, but somewhere in the middle.[85] The judicial focus remained on the case-specific finding, which would likely not lead to a general allowance for one-way closed-circuit television testimony.[86] However, commentators were more certain of *Craig*'s influence

75. Mattox v. United States, 156 U.S. 237, 243 (1895).

76. Coy v. Iowa, 487 U.S. 1012, 1021 (1988).

77. *See Mattox*, 156 U.S. at 243.

78. *See Craig*, 497 U.S. at 850.

79. *See id.*

80. *See id.* at 857.

81. *See id.* at 855.

82. *Id.*

83. *Id.* ("The trial court must hear evidence and determine whether use of the one-way[,] closed[-]circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify.").

84. *See* George K. Goodhue, Comment, Maryland v. Craig*: Balancing Sixth Amendment Confrontation Rights with the Rights of Child Witnesses in Sexual Abuse Trials*, 26 NEW ENG. L. REV. 497, 525 (1991) ("A future direction the court may take in this area is difficult to prognosticate."); Eldonna M. Ruddock, Note, *Something More than a Generalized Finding: The State's Interest in Protecting Child Sexual Abuse Victims in* Maryland v. Craig *Outmuscles the Confrontation Clause*, 8 T.M. COOLEY L. REV. 389, 404–05 (1991) ("[The *Craig* decision] leaves the states without uniformity as to the showing of trauma that will satisfy a court's finding of necessity sufficient to overcome the preference for face-to-face in court testimony.").

85. Goodhue, *supra* note 84, at 523–24.

86. *See id.* ("Undoubtedly, *Maryland v. Craig* will not open the floodgates to the free-wheeling use of videotape or closed[-]circuit television procedures. The particularized finding that a child will be significantly traumatized such that she cannot reasonably communicate is after all a difficult one to make.").

on some of the states.[87] One commentator argued that Massachusetts would not likely follow *Craig* moving forward, given that Massachusetts case law "forcefully uphold[s] the rights of defendants to face-to-face contact with their accusers."[88] The uncertainty around *Craig* foreshadowed the circuit split that later developed around the decision's applicability to two-way remote testimony.[89]

D. Out-of-Court Testimonial Statements Muddy the Waters —Crawford v. Washington

Fourteen years after *Craig*, the Supreme Court tackled the Confrontation Clause's intersection with out-of-court testimonial statements.[90] In *Crawford*, the defendant was accused of stabbing a man in retaliation for allegedly attempting to rape the defendant's wife.[91] To disprove the defendant's claims of self-defense at trial, "the State played for the jury [defendant's wife's] tape-recorded statement [that she gave] to the police."[92] Traditionally, state marital privilege would have prevented the defendant's wife from testifying against the defendant in court.[93] However, in the state of Washington, marital privilege does not apply "to a spouse's out-of-court statements admissible under a hearsay exception."[94] The defendant objected to the statement as a violation of the Confrontation Clause, because he would not be able to confront his wife on the stand due to his invocation of marital privilege.[95] However, trial court admitted the statement under the hearsay exception.[96] The jury convicted the defendant of assault, and "[t]he Washington Court of Appeals reversed."[97] The Supreme Court granted certiorari on the Confrontation Clause issue.[98]

Justice Scalia, writing for the majority, reversed the conviction and held that in regard to out-of-court testimonial statements, the Sixth Amendment requires a prior opportunity for the defendant to cross-examine a witness regarding their previous statement.[99] In reaching the holding, the Court

87. *Id.* at 525 ("The *Craig* decision will have little direct application in Massachusetts.").

88. *Id.* at 525–27.

89. *See* United States v. Yates, 438 F.3d 1307, 1313–14 (11th Cir. 2006) (citing United States v. Bordeaux, 400 F.3d 548, 554–55 (8th Cir. 2005)).

90. Crawford v. Washington, 541 U.S. 36, 68–69 (2004).

91. *Id.* at 38.

92. *Id.*

93. *Marital Privilege*, Cornell L. Sch.: Legal Info. Inst. (Mar. 2022), https://www.law.cornell.edu/wex/marital_privilege [https://perma.cc/WY3Z-KN8B].

94. *Crawford*, 541 U.S. at 40 (citing State v. Burden, 841 P.2d 758, 760–61 (Wash. 1992)).

95. *Id.*

96. *Id.*

97. *Id.* at 40–41.

98. *Id.* at 42.

99. *See id.* at 68–69.

overruled the *Ohio v. Roberts* reliability test,[100] previously used for admitting out-of-courts statements.[101] The Court viewed the *Roberts* test as untenable because its application led to the admission of testimonial statements that would otherwise be barred under the Sixth Amendment.[102] The Court emphasized the importance of confrontation when a court admits testimonial statements.[103] The Court's criticism of *Roberts* is arguably remembered as the defining feature of the *Crawford* opinion.[104]

Since *Crawford*, courts have wrestled with the implications the decision has for the *Craig* line of cases, considering that the *Craig* decision was informed by the *Roberts* reliability test.[105] In *United States v. Pack*, the U.S. Court of Appeals for the Armed Forces addressed whether *Crawford* overruled *Craig*[106]:

> *Crawford* did not purport to overrule *Craig* explicitly; *Craig* is not even cited in the opinion. In light of the dissent in *Craig* and the plethora of state and federal laws permitting remote testimony . . . we expect that if the Supreme Court were overruling or undermining *Craig*, it would have said so explicitly. . . . It is important to recognize that *Crawford* did not hold that face-to-face confrontation is required in every case. Rather, it held that the Confrontation Clause required cross-examination and unavailability before testimonial hearsay could be admitted into evidence.[107]

The *Pack* decision further acknowledged that *Crawford* rejected the *Roberts* test, but it did not need to address whether tension existed between *Crawford* and *Craig*.[108] That court only had to decide whether it could disregard *Craig*

---

100. *See* Ohio v. Roberts, 448 U.S. 56, 65–66, 73 (1980), *overruled by* Crawford v. Washington, 541 U.S. 36 (2004). The Supreme Court held that an unavailable witness's prior testimony is admissible at trial so long as there are sufficient indications of reliability. *Id.*

101. *Crawford*, 541 U.S. at 62–63, 68–69 ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.").

102. *See id.* at 63–65.

103. *Id.* at 68–69 ("In this case, the State admitted [the petitioner's wife's] testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. *Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.").

104. *See* Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure:* Crawford*'s Birth Did Not Require That* Roberts *Had to Die*, 15 J.L. & POL'Y 685, 687 (2007) ("I believe *Roberts*'[s] death should be mourned rather than celebrated.").

105. United States v. Pack Jr., 65 M.J. 381, 383 (C.A.A.F. 2007) ("The narrow question in this case is whether the holding in *Craig* . . . may be disregarded by this Court in light of *Crawford*."); *see* Horn v. Quarterman, 508 F.3d 306, 318–19 (5th Cir. 2007).

106. *Pack*, 65 M.J. at 383.

107. *Id.* at 383–84 (citation omitted) (citing Crawford v. Washington, 541 U.S. 36, 69 (2004)).

108. *Id.* at 383–85.

in the military context and chose not to do so.[109] Likewise, in *Horn v. Quarterman*, the Fifth Circuit addressed whether the *Crawford* decision overruled *Craig*.[110] On appeal, the defendant argued that if *Crawford* did not overrule *Craig*, at a bare minimum, *Crawford* created tension with *Craig*.[111] The Fifth Circuit stated that it could not presume *Crawford* overruled *Craig* and acknowledged that *Craig* governed its analysis of the case.[112]

The uncertainty about whether *Crawford* overruled *Craig*, in part, stems from the fact that Justice Scalia wrote the dissent in *Craig*[113] and the majority opinion in *Crawford*.[114] In the *Craig* dissent, Justice Scalia noted that "the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures . . . undeniably among which was 'face-to-face' confrontation."[115] Justice Scalia's rebuke of reliability formed the basis of the majority opinion in *Crawford*.[116] The *Crawford* opinion described the *Roberts* reliability framework as malleable and unable to protect constitutional guarantees under the Sixth Amendment.[117] Despite the tension between *Craig* and *Crawford*, some circuit courts continued to apply *Craig* to remote testimony, resulting in a circuit split[118] that has not yet been resolved by the Supreme Court.

E. THE CIRCUIT SPLIT COMPLICATES THE APPLICABILITY OF CRAIG

When interpreting the *Craig* two-prong test, the primary issue resulting in the circuit split is whether *Craig* applies only to remote testimony via one-way closed-circuit television or whether it applies to two-way remote testimony as well.[119] The Craig majority specifically addressed one-way closed-circuit television testimony in its holding,[120] where a witness testifies in a separate room outside the presence of the defendant, and operators convey the

109. *See id.*

110. *Horn*, 508 F.3d at 318–19.

111. *Id.*

112. *Id.*

113. *See generally* Maryland v. Craig, 497 U.S. 836 (1990) (providing Justice Scalia's dissenting opinion).

114. *See generally* Crawford v. Washington, 541 U.S. 36 (2004) (majority opinion) (explaining Justice Scalia's analysis of the Confrontation Clause).

115. *Craig*, 497 U.S. at 862 (Scalia, J., dissenting).

116. *See Crawford*, 541 U.S. at 61–62.

117. *Id.* at 60.

118. *See, e.g.*, United States v. Yates, 438 F.3d 1307, 1313–14 (11th Cir. 2006) (applying the *Craig* test); United States v. Gigante, 166 F.3d 75, 81 (2d Cir. 1999) (not applying the *Craig* test).

119. *Compare Gigante*, 166 F.3d at 81 ("[A] trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice."), *with Yates*, 438 F.3d at 1314 ("We reject the Government's argument that *Craig* does not apply because two-way video conference testimony is necessarily more protective.").

120. *Craig*, 497 U.S. at 857.

testimony over television.[121] In *United States v. Gigante*, decided in 1999, the Government charged the defendant, a mafia crime boss, with conspiracy to murder and labor racketeering.[122] Six former mafia members testified against the defendant at trial; however, "[t]he jury acquitted [the defendant] or failed to reach a verdict on all charges surrounding the murders of [eight individuals]."[123] Despite his acquittal on the murder charges, the jury convicted the defendant of conspiracy to murder Peter Savino, who had testified remotely during the trial "via two-way[] closed-circuit television."[124] The two-way closed-circuit television testimony allowed Savino to testify in a remote location where courtroom participants could see him and where Savino could see courtroom participants.[125]

On appeal to the Second Circuit Court of Appeals, the defendant argued that Savino's testimony violated the defendant's rights under the Confrontation Clause.[126] The defendant further argued that *Craig* should govern the facts of the case, and as a result, the prosecution failed to identify any important public policy under *Craig*'s necessity prong.[127] The Second Circuit held that the *Craig* test only applied to one-way closed-circuit television testimony, and because the defendant challenged the use of remote, two-way, closed-circuit television testimony, *Craig* did not govern.[128] Over time, the Second Circuit approach became the minority approach, with the Second Circuit being the lone outlier in not applying *Craig* to two-way remote testimony.[129]

Legal commentators criticized *Gigante* in the years following the decision.[130] Although the *Gigante* majority did not apply *Craig*, the court nevertheless found that the remaining witness's "fatal illness and participation in the Federal Witness Protection Program" qualified as exceptional circumstances to permit the remote testimony under Rule 15 of the Federal Rules of Criminal Procedure.[131] One commentator criticized the decision as

---

121. *Id.* at 840 n.1.

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

123. *Id.* at 78–79.

124. *Id.* at 79.

125. *Id.* at 80.

126. *Id.* at 79–80 ("[The defendant's] argument that this procedure deprived him of his right to confront Savino amounts to the argument that his Sixth Amendment right could only be preserved by a face-to-face confrontation with Savino *in the same room*.").

127. *Id.* at 80–81.

128. *Id.* at 81.

129. United States v. Yates, 438 F.3d 1307, 1313–14 (11th Cir. 2006) ("The Sixth, Ninth, [Eighth] and Tenth Circuits have applied the *Craig* rule to test the admissibility of two-way video testimony at trial. . . . The Second Circuit stands alone in its refusal to apply *Craig*.").

130. *See, e.g.*, Cathleen J. Cinella, Note, *Compromising the Sixth Amendment Right to Confrontation*—United States v. Gigante, 32 SUFFOLK U. L. REV. 135, 156–57 (1998); Marc Chase McAllister, *Two-Way Video Trial Testimony and the Confrontation Clause: Fashioning a Better* Craig *Test in Light of* Crawford, 34 FLA. STATE U. L. REV. 835, 851–52 (2007).

131. *Gigante*, 166 F.3d at 81–82; FED. R. CRIM. P. 15.

an unpermitted extension of *Craig* to adult witnesses[132] and argued that the extension to adult witnesses would lead to a slippery slope moving forward whereby more and more fact patterns would suffice as sufficient public policies under *Craig*.[133] "If *Craig* and *Gigante* allow the state to protect a class of witnesses from testifying face-to-face, then rape victims, elderly victims, and others may also attempt to invoke this exception."[134] Importantly, this dilemma is at the heart of the current debate over remote testimony.

Seven years after *Gigante*, in 2006, the Eleventh Circuit addressed the same issue in *United States v. Yates*.[135] In *Yates*, the Government charged and tried the defendants with, among other things, "conspiracy to commit money laundering, and various prescription-drug-related offenses."[136] The Government requested that two key witnesses located in Australia be permitted to testify via a two-way videoconference platform because the witnesses refused to travel to the United States, and the Government lacked jurisdiction to subpoena them.[137] The district court permitted the witnesses to testify via videoconference and the defendant was convicted.[138]

On appeal, a three-judge panel of the Eleventh Circuit vacated the convictions, and the Eleventh Circuit granted a rehearing en banc.[139] The court acknowledged that the Second Circuit in *Gigante* had declined to apply *Craig* to two-way remote testimony but argued "that *Craig* supplies the proper test for admissibility of two-way video conference testimony."[140] In rejecting the Second Circuit's approach, the *Yates* majority relied on precedent and emphasized further that three other appellate courts "have applied the *Craig* rule to test the admissibility of two-way video testimony at trial."[141] The court also rejected the Government's public policy argument and held that the Government's need to use remote testimony, and its interest in resolving a case quickly, did not constitute sufficient public policies under the *Craig*

132. Cinella, *supra* note 130, at 156–57.

133. *Id.* at 159 ("[N]ow that the constitutional dam concerning face-to-face confrontation has been broken, it is difficult to predict with any certainty where the river of logical extension will flow." (quoting Ralph H. Kohlmann, *The Presumption of Innocence: Patching the Tattered Cloak After* Maryland v. Craig, 27 ST. MARY'S L.J. 389, 405 (1996))).

134. *Id.*

135. *See* United States v. Yates, 438 F.3d 1307, 1313–14 (11th Cir. 2006).

136. *Id.* at 1309–10.

137. *Id.*

138. *Id.*

139. *Id.* at 1311.

140. *Id.* at 1312–13.

141. *Id.* at 1313–14.

standard.[142] Contrary to the Second Circuit, the Eleventh Circuit applied *Craig* to two-way remote testimony.[143]

While the *Yates* decision followed the majority approach in applying *Craig* to two-way remote testimony, commentators criticized the Eleventh Circuit for following the majority approach——for not permitting the unavailable witnesses to testify—and for creating "a far higher constitutional standard."[144] One commentator argued that *Craig* should not be extended to two-way remote testimony because the Supreme Court created the two-prong test in *Craig* specifically for the facts of the case, and two-way remote testimony by its nature protects defendants' rights under the Confrontation Clause, thus making the *Craig* standard unnecessary.[145] However, this argument ignores the language in the *Craig* opinion.[146] Specifically, the Supreme Court defined the first prong of the *Craig* standard as "denial of such confrontation is necessary to further an important public policy."[147] Missing is any language limiting public policy to child witnesses or child trauma. Since the trial court applying the *Craig* standard requires "a case-specific finding,"[148] the facts of any case could theoretically qualify, so long as there existed sufficient public policy purpose. In addition, even though two-way remote testimony may better protect defendants' rights compared to one-way remote testimony,[149] making such a blanket statement ignores *Craig*'s second prong whereby a court must find that "the reliability of the testimony is otherwise assured."[150] The criticisms of the circuit decisions are relevant as they guide state court determinations of *Craig*'s applicability.

142. *Id.* at 1315–16 ("[T]he prosecutor's need for the video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the Defendants' rights to confront their accusers face-to-face.").

143. *Id.* at 1313–14.

144. Matthew J. Tokson, Comment, *Virtual Confrontation: Is Videoconference Testimony by an Unavailable Witness Constitutional?*, 74 U. CHI. L. REV. 1581, 1598 (2007) ("The holding in *Yates* . . . creates practical problems for federal courts with valid reasons for wanting to use video testimony rather than Rule 15 depositions." (footnote omitted)); Michael R. Rocha, Note, *Going Too Far in* United States v. Yates*: The Eleventh Circuit's Application of* Maryland v. Craig *to Two-Way Videoconferencing*, 36 STETSON L. REV. 365, 386 (2007) ("[T]he *Craig* test should not be extended to two-way videoconferencing, and two-way video testimony should only be admitted when: (1) exceptional circumstances exist; (2) the witness is truly unavailable; and (3) the defendant is given an adequate opportunity to cross-examine the witness.").

145. *See* Rocha, *supra* note 144, at 391–92 & nn.198–99 (citing *Yates*, 438 F.3d at 1328–29, 1331 (Marcus, J., dissenting)).

146. *See* Maryland v. Craig, 497 U.S. 836, 851 (1990).

147. *Id.* at 850.

148. *Id.* at 855–56.

149. *See* Rocha, *supra* note 144, at 391–92.

150. *Craig*, 497 U.S. at 850.

F. IOWA'S STANCE ON REMOTE TESTIMONY

The Supreme Court line of Confrontation Clause cases began with an Iowa statute,[151] and in 2014, the Supreme Court of Iowa weighed in on the circuit split involving the application of *Craig* to two-way remote testimony.[152] In *Rogerson*, two injured car accident victims identified the defendant as the perpetrator of the accident.[153] "The State charged [the defendant] with four counts of unintentionally causing serious injury by intoxicated use of a motor vehicle."[154] The State filed a motion requesting six total witnesses be allowed to testify remotely: all three victims—so as to allow the case to be resolved quickly—and "three employees of the Division of Criminal Investigation . . . Criminalistics Laboratory" ("DCI"), since their testimony did not depend on the facts of the case.[155] The trial court approved the remote testimony, the defendant filed an interlocutory appeal to the Supreme Court of Iowa, and the Supreme Court of Iowa granted review.[156]

Prior to *Rogerson*, Iowa courts only considered *Craig* in the context of child victims testifying via one-way closed-circuit television so as to prevent trauma.[157] The Supreme Court of Iowa acknowledged the circuit split, noting that the vast majority of courts, both state and federal, applied the *Craig* standard to two-way remote testimony.[158] In the context of technology evolving, the Supreme Court of Iowa ruled that:

> Some day virtual electronic presence in the courtroom may become an adequate constitutional substitute for actual physical presence. But we are not there yet. Because face-to-face confrontation is constitutionally preferable to remote testimony of any kind, we believe *Craig* applies to two-way video testimony, which should be acceptable only upon a showing of necessity to further an important public interest and only when the testimony's reliability can be otherwise assured.[159]

After holding that *Craig* governs two-way remote testimony, the Supreme Court of Iowa addressed whether the State's interests constituted sufficient

---

151. Coy v. Iowa, 487 U.S. 1012, 1014 (1988) (citing IOWA CODE § 910A.14 (1987) (repealed 1998)).

152. State v. Rogerson, 855 N.W.2d 495, 504 (Iowa 2014).

153. *Id.* at 496.

154. *Id.* at 497.

155. *Id.*

156. *Id.* at 497–98.

157. *Id.* at 500–01.

158. *Id.* at 501 ("Other courts, however, have addressed the constitutional significance of one[-way] versus two-way video systems under the Sixth Amendment. The vast majority of those courts have chosen to apply *Craig* to both one- and two-way videoconferencing; only the United States Court of Appeals for the Second Circuit has formulated a standard distinct from *Craig*'s necessity test to govern the constitutionality of two-way video testimony.").

159. *Id.* at 506.

public interests under the *Craig* standard.[160] The Court ruled that regarding the car accident victims, "resid[ing] a significant distance from Iowa and ha[ving] suffered serious injuries," did not constitute sufficient public interests.[161] With respect to the DCI employees, the State argued on appeal that the DCI employees should be allowed to testify remotely to save costs and promote efficiency.[162] The Court ruled that cost saving and efficiency arguments did not constitute an adequate public interest under *Craig*, thus refusing two-way remote testimony in the case.[163]

In reaching the holding, the Supreme Court of Iowa acknowledged that protecting child victims and illness could satisfy *Craig*'s necessity prong, but the Court did not fully articulate the extent to which illness may satisfy *Craig*.[164] However, the Court emphasized that in satisfying *Craig*'s necessity prong, a "court must make a case-specific" finding.[165] *Rogerson* settled the question of whether *Craig* applies to two-way remote testimony in Iowa, but left open the question as to the extent to which illness could satisfy a case-specific finding and what other circumstances might satisfy the "necessary to further an important public interest" prong.[166]

With the recent increase in remote legal proceedings since the beginning of the COVID-19 pandemic, states and federal district courts are not in agreement as to what facts may satisfy *Craig*'s public policy analysis.[167] This disagreement is important because attorneys and their clients have expressed a preference for attending court remotely.[168] This Note will propose

160. *Id.* at 506–07.

161. *Id.* ("The State did not present evidence that the witnesses were beyond the court's subpoena power or that they were unable to travel because of their injuries. . . . The State has not shown that the witnesses cannot appear in person or even that personal appearance would cause severe stress.").

162. *Id.*

163. *Id.*

164. *Id.* at 506–07.

165. *Id.* at 505.

166. *Id.* at 505–08.

167. *Compare* C.A.R.A. v. Jackson Cnty. Juv. Off., 637 S.W.3d 50, 59, 66 (Mo. 2022) (en banc) ("This Court recognizes the devastating toll the COVID-19 pandemic has taken in this country and our state and the substantial impact the pandemic has had on all aspects of society. Nevertheless, generalized concerns about the virus may not override an individual's constitutional right to confront adverse witnesses in a juvenile adjudication proceeding."), *with* Vazquez Diaz v. Commonwealth, 167 N.E.3d 822, 837–38 (Mass. 2021) ("[A] virtual evidentiary hearing on a motion to suppress is not a per se violation of the defendant's right to confrontation . . . in the midst of the COVID-19 pandemic.").

168. *See* Hyde, *supra* note 5; Darren M. Goldman, *Why Remote Depositions Are Likely Here to Stay*, BECKER (Aug. 26, 2020), https://beckerlawyers.com/why-remote-depositions-are-likely-here-to-stay-law360 [https://perma.cc/MBK6-8ZML] ("At the same time, remote depositions save money. Depositions are not cheap. In addition to an attorney's hourly rate, there are a number of expenses associated with a deposition. These include court reporting services, travel expenses such as plane tickets, train tickets, rental cars, gas and hotels, food during the deposition, word

modification to the *Craig* test that would expand the necessity and reliability prongs by including examples while incorporating factors federal and state courts may consider when analyzing illness as a sufficient public policy.[169]

II. THE RECENT SURGE IN REMOTE TESTIMONY AND HOW FEDERAL AND STATE COURTS HAVE HANDLED REMOTE TESTIMONY UNDER *CRAIG*

This Part will address the rise in remote testimony since the beginning of the COVID-19 pandemic and how federal and state courts have addressed health-related concerns and illnesses under the *Craig* standard. This Part will also discuss public policies under *Craig* at the state level prior to the rise in remote testimony and the need for modification to *Craig*.

A. STATE LIMITATIONS AND THE RISE IN VIRTUAL LEGAL PROCEEDINGS

The Confrontation Clause is a federal issue because it is rooted in the Sixth Amendment.[170] In 1965, the Supreme Court extended the Confrontation Clause to the states through the Fourteenth Amendment.[171] As a result, the states cannot act in a way that infringes on the rights granted under the Confrontation Clause.[172] A criminal defendant is entitled to confront adverse witnesses,[173] which means the states cannot find exceptions to the Confrontation Clause without first satisfying *Craig*.[174]

---

processing services like printing and copying, and the use of office space, to name a few. . . . More often than not, these costs are passed through to the client. By conducting the deposition remotely, these savings are likewise passed through. Clients will like the idea of not having to pay for these costs, and may push for remote depositions once the pandemic passes."); Emily Lever, *Lawyers Like Working From Home – Up to a Point*, LAW360 (Dec. 10, 2020, 9:55 PM), https://www.law360.com/articles/1336128/lawyers-like-working-from-home-up-to-a-point [https://perma.cc/AH23-XQHW] ("[Fifty-six percent] of respondents . . . said their ideal post-pandemic work setup would involve spending a few days of the week in the office and a few days working from home.").

169. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593–95 (1993). In analyzing expert witness testimony, courts may consider "[m]any factors [that] will bear on the inquiry." *Id.* at 592–93.

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

171. Pointer v. Texas, 380 U.S. 400, 403 (1965) ("We hold today that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment.").

172. *See id.*; Jason Gordon, *Incorporation Doctrine – Explained*, BUS. PROFESSOR (Sept. 23, 2021), https://thebusinessprofessor.com/en_US/us-legal-system/incorporation-doctrine [https://perma.cc/AV5M-HFQL] ("The 14th Amendments [sic] Due Process clause is an incorporation doctrine. That is, in addition to requiring that states observe principles of due process in the execution of laws, it makes many of the provisions of the Bill of Rights applicable to state governments. That is, state governments cannot act to infringe upon the constitutionally protected rights of its citizens.").

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

174. *See* Gordon, *supra* note 172; Maryland v. Craig, 497 U.S. 836, 859–60 (1990).

Virtual legal proceedings are on the rise since the beginning of the COVID-19 pandemic.[175] Commentators believe that virtual legal proceedings may be here to stay for the long term.[176] The Supreme Court and federal courts rarely addressed remote testimony Confrontation Clause issues in the past[177] arguably, in part, because courts did not widely have or adopt the technology needed for remote testimony, although that trend is changing with the recent increase in virtual legal proceedings.[178] However, federal district courts and state courts are not in agreement as to which facts may pass a necessity finding for the public interest at stake under a *Craig* analysis.[179] Historically, only a few public interests passed *Craig*'s necessity prong,[180] but the COVID-19 pandemic is forcing courts to consider the extent to which illness and other related circumstances may qualify.[181]

B. COVID-19 RELATED REMOTE TESTIMONY AT THE FEDERAL DISTRICT COURT LEVEL

The United States District Court for the Southern District of New York tackled remote testimony under the Confrontation Clause during the COVID-

175. *As Pandemic Lingers, Courts Lean into Virtual Technology*, U.S. CTS. (Feb. 18, 2021), https://www.uscourts.gov/news/2021/02/18/pandemic-lingers-courts-lean-virtual-technology [https://perma.cc/SJ98-JGQV] ("Bench trials are one of the simplest forms of federal trials because they do not require juries. In addition to deciding questions of law and procedure, the judge also determines the verdict. But before Judge Indira Talwani conducted two bench trials in late August, her court in Boston had to use an entirely new technical structure to support trials with witnesses testifying from other continents.").

176. Austin, *supra* note 5 ("As is the case with many other areas of business now being conducted virtually since the onset of the pandemic, virtual court proceedings appear to be here to stay for the foreseeable future[—]at least for many types of court proceedings."); Eva Herscowitz, *Are Virtual Courtrooms Here to Stay?*, CRIME REP. (June 28, 2021), https://thecrimereport.org/2021/06/28/are-virtual-courtrooms-here-to-stay [https://perma.cc/Y5K7-UR4C] ("As courtrooms and law firms reopen, it's likely that courts will embrace a mix of in-person and online proceedings, though most attorneys doubt that courts will ever adopt virtual jury trials for criminal cases.").

177. *See* Shaviro, *supra* note 33, at 384.

178. *See* United States v. Pangelinan, No. 19-10077, 2020 WL 5118550, at *1–2 (D. Kan. Aug. 31, 2020); United States v. Kail, No. 18-cr-00172, 2021 WL 1164787, at *1 (N.D. Cal. Mar. 26, 2021).

179. *Compare* Vazquez Diaz v. Commonwealth, 167 N.E.3d 822, 837–38 (Mass. 2021) (finding the pandemic alone suffices for remote hearings), *with* United States v. Casher, No. 19-cr-65, 2020 WL 3270541, at *2–3 (D. Mont. June 17, 2020) (finding the pandemic's risk does not suffice).

180. State v. Rogerson, 855 N.W.2d 495, 506–07 (Iowa 2014).

181. *See* United States v. Crittenden, No. 20-cr-7, 2020 WL 4917733, at *6 (M.D. Ga. Aug. 21, 2020) ("Here, the mask requirement is necessary to further an important public policy: ensuring the safety of everyone in the courtroom in the midst of a unique global pandemic. Without this procedure, everyone in the courtroom would face the risk of being infected with a lethal virus. The Court's masking requirement is based upon the best available scientific information and advice. . . . The wearing of the mask not only protects the wearer of the mask, but more significantly, protects others who may be in the same room with the person.").

19 pandemic as early as August of 2020.[182] In *United States v. Donziger*, the United States intended to request that a seventy-year-old-plus witness be permitted to testify remotely.[183] The district court held that "[a]t least in some instances, allowing remote testimony may be needed to promote the strong public interest in avoiding exposing at-risk individuals to COVID-19 and minimizing further spread of the virus."[184] The court's "[a]t least in some instances" language[185] suggests that they will remain focused on the case-specific finding of necessity, but the pandemic broadens the scope by which illness may satisfy *Craig*. However, other district courts have ruled differently as to pandemic concerns satisfying *Craig*'s necessity prong.[186]

In fact, several district courts rejected COVID-19 concerns as sufficient public interests under *Craig* since the pandemic began.[187] In *United States v. Pangelinan*, the Government requested that three expert witnesses be allowed to testify via two-way video against the defendant, who was an alleged sex trafficker.[188] The Government cited "the current COVID-19 pandemic, two of the witnesses' health conditions and the health conditions of those two witnesses' family members, and a state requirement that the witnesses quarantine for 14 days after their return from providing testimony" as important public policies under *Craig*.[189] The district court held that despite the pandemic being an important public policy on a general level, the Government failed to make a case-specific showing.[190] The court noted that the witnesses had not contracted the virus and could physically travel to the trial setting if needed.[191] Interestingly, the Government also cited "the prosecution of sex traffickers" as an important public policy, and by agreeing with that argument, the court implicitly acknowledged that prosecuting sex

182. United States v. Donziger, No. 19-cr-561, 2020 WL 4747532, at *3–4 (S.D.N.Y. Aug. 17, 2020).

183. *Id.* at *3.

184. *Id.* (citing Maryland v. Craig, 497 U.S. 836, 850 (1990)).

185. *Id.*

186. *See, e.g.*, United States v. Pangelinan, No. 19-10077, 2020 WL 5118550, at *4 (D. Kan. Aug. 31, 2020) (holding that witness concerns about contracting COVID-19 do not suffice as necessary to further an important public policy under *Craig*); United States v. Kail, No. 18-cr-00172, 2021 WL 1164787, at *1 (N.D. Cal. Mar. 26, 2021) (holding that witness's request to testify remotely because of a medical condition fails to satisfy the "necessary to further an important public policy" prong of the Ninth Circuit's two-part test modeled after *Craig*) (quoting United States v. Carter, 907 F.3d 1199, 1205–06 (9th Cir. 2018)); United States v. Casher, No. CR 19-65, 2020 WL 3270541, at *3 (D. Mont. June 17, 2020) (holding that the possible health risks associated with COVID-19 do not qualify as '"necessary to further an important public policy' under *Craig*") (quoting Maryland v. Craig, 497 U.S. 836, 850 (1990)); *Carter*, 907 F.3d at 1205–06).

187. *Pangelinan*, 2020 WL 5118550, at *4–5; *Kail*, 2021 WL 1164787, at *1; *Casher*, 2020 WL 3270541, at *3–4.

188. *Pangelinan*, 2020 WL 5118550, at *1.

189. *Id.* at *2.

190. *Id.* at *4.

191. *Id.*

traffickers could pass *Craig*'s necessity prong with an adequate case-specific showing.[192]

Similarly to the district court in *Pangelinan*, the United States District Court for the Northern District of California addressed COVID-19 concerns as an important public policy under *Craig*.[193] In *United States v. Kail*, a non-party filed a motion to testify remotely because of medical hardship related to the pandemic.[194] The district court held that the non-party failed to meet the "high bar" imposed by *Craig*'s necessity prong.[195] The district court in *United States v. Casher* also emphasized the high bar *Craig*'s necessity prong placed on a party seeking to testify remotely.[196] There, the Government subpoenaed two witnesses to testify at trial, and the witnesses requested permission to testify remotely.[197] Regarding the first witness, Mr. Sciara, the court noted that:

> He is not comfortable navigating a major airport, traveling via public transit, or staying in a hotel. . . . Nevertheless, he resides in Denver, Colorado, and acknowledges he could travel by car. The Court finds that Mr. Sciara has clear alternatives to limiting his exposure, such as traveling by car and taking precautions recommended by the CDC. His risks do not represent a "necessity" to forego physical confrontation.[198]

The second witness, Mr. Chrystal, expressed similar concerns, and on both accounts, the district court ruled that the witnesses failed to make an adequate case-specific showing of necessity under the high bar of *Craig*'s necessity prong.[199] Underlying the *Pangelinan*, *Kail*, and *Casher* opinions is the acknowledgment that a pandemic could broaden *Craig*'s necessity scope, with the caveat that federal district courts are generally not willing to break new ground under *Craig*.[200] It is noteworthy that state courts are more willing to accept illness as a sufficient public policy.[201]

---

192. *See id.* at *3–4.

193. United States v. Kail, No. 18-cr-00172, 2021 WL 1164787, at *1 (N.D. Cal. Mar. 26, 2021).

194. *Id.*

195. *Id.*

196. United States v. Casher, No. CR 19-65, 2020 WL 3270541, at *2 (D. Mont. June 17, 2020) (citing United States v. Carter, 907 F.3d 1199, 1205–06 (9th Cir. 2018)).

197. *Id.* at *1–2.

198. *Id.* at *3 (citation omitted).

199. *Id.*

200. *See* United States v. Pangelinan, No. 19-10077, 2020 WL 5118550, at *4 (D. Kan. Aug. 31, 2020); *Kail*, 2021 WL 1164787, at *1; *Casher*, 2020 WL 3270541, at *3.

201. *E.g.*, Vazquez Diaz v. Commonwealth, 167 N.E.3d 822, 838 (Mass. 2021) (noting that protecting public health during the COVID-19 pandemic may constitute a sufficient public policy under *Craig*'s necessity prong); State v. Comacho, 960 N.W.2d 739, 755–56 (Neb. 2021) (holding that preventing the spread of COVID-19 is an important public policy); People v. Hernandez, 488 P.3d 1055, 1064–65 (Colo. 2021) (holding that trial court's determination that remote testimony constituted an important public policy of preventing the spread of COVID-19 did not violate defendant's Confrontation Clause rights).

C. STATE COURTS TACKLE THE SCOPE OF ILLNESS AS A PUBLIC POLICY UNDER CRAIG

In addition to federal district courts, state courts also addressed the sufficiency of COVID-19 concerns as an important public policy under *Craig*.[202] State courts are more willing to accept COVID-19 concerns as meeting *Craig*'s standard.[203] Because it precedes other cases, the most important case in the development of this trend is *Vazquez Diaz v. Commonwealth*.[204] In *Vazquez Diaz*, the State "charged [the defendant] with trafficking in 200 or more grams of cocaine."[205] The defendant filed a motion to suppress, and the evidentiary hearing on the defendant's motion took place via the videoconferencing platform Zoom.[206] After the trial court denied the defendant's motion, the defendant appealed directly to the Supreme Judicial Court of Massachusetts on Confrontation Clause grounds.[207] The court acknowledged that *Craig* controlled the Confrontation Clause issue and held that:

> Protecting the public health during this pandemic constitutes an important public policy that may be the basis of a finding of necessity. COVID-19 is a highly contagious disease that spreads from person to person. An in-person hearing, with physical, face-to-face confrontation, must take place in a confined space. Such a hearing increases the risk of transmitting the virus. . . . We conclude that, in some circumstances, a virtual evidentiary hearing on a motion to suppress may be necessary to further the important public policy of protecting the public health from COVID-19.[208]

The court did not address whether the defendant made a case-specific showing of necessity because the court ruled that the trial court abused its discretion.[209] However, the excerpted language above[210] shows a willingness to extend *Craig* to pandemic concerns, an important step to broadening the necessity showing.

Other state courts also held that COVID-19 concerns qualify as an important public policy under *Craig*.[211] In *State v. Comacho*, "the State [of Nebraska] charged [the defendant] with conspiracy to distribute a controlled

202. *Vazquez Diaz*, 167 N.E.3d at 838; *Comacho*, 960 N.W.2d at 755–56; *Hernandez*, 488 P.3d at 1064–65.

203. *Vazquez Diaz*, 167 N.E.3d at 838; *Comacho*, 960 N.W.2d at 755–56; *Hernandez*, 488 P.3d at 1064–65.

204. *Vazquez Diaz*, 167 N.E.3d at 838.

205. *Id.* at 828.

206. *Id.*

207. *Id.*

208. *Id.* at 838 (citation omitted).

209. *Id.*

210. *Id.*

211. State v. Comacho, 960 N.W.2d 739, 755–56 (Neb. 2021); People v. Hernandez, 488 P.3d 1055, 1058, 1064–65 (Colo. 2021).

substance and robbery," and sought to call a police investigator who tested positive for COVID-19 as a witness.[212] The State requested that the witness be permitted to testify via two-way videoconferencing because of the witness's illness, and the trial court granted the State's request.[213] The jury convicted the defendant, and the defendant appealed to the Supreme Court of Nebraska.[214]

The trial court permitted the remote testimony because excluding the witness from the courtroom acted in furtherance of the important public policy of protecting courthouse members from COVID-19.[215] In agreeing with the trial court, the Supreme Court of Nebraska acknowledged that preventing the spread of a dangerous disease sufficed as an important public policy under *Craig*.[216] However, the Nebraska Court "emphasize[d] . . . that it is important to our determination of necessity that in this case, the witness had actually tested positive for COVID-19 and was experiencing symptoms."[217]

In *People v. Hernandez*, the Supreme Court of Colorado shared many of the same concerns the *Comacho* majority expressed in reaching a similar result.[218] There, the defendant "filed a pretrial motion for immunity" and because of the COVID-19 pandemic, the State requested that the prosecuting attorneys and witnesses be allowed to testify remotely.[219] The trial court granted the State's request "because the 'physical appearances of witnesses creates a physical risk due to the rate of contagion and transfer of C[OVID]-19.'"[220] The Supreme Court of Colorado agreed with this reasoning when it concluded that permitting the State's attorneys and witnesses to appear remotely did not violate the defendant's rights under the Confrontation Clause.[221] Despite this shared approach among some state courts in finding an adequate showing of necessity under *Craig* for COVID-19 concerns,[222] not all states agree with this approach.

Decided in July 2021, subsequent to the aforementioned state court decisions, *C.A.R.A. v. Jackson County Juvenile Office* also addressed COVID-19 concerns under *Craig*.[223] In *C.A.R.A.*, because of the COVID-19 pandemic, the Circuit Court of Jackson County permitted "[t]he [v]ictim, [v]ictim's mother,

212. *Comacho*, 960 N.W.2d at 745, 745–47.

213. *Id.* at 747–48.

214. *Id.* at 751.

215. *Id.* at 754–55.

216. *Id.* at 755 (citing Vazquez Diaz v. Commonwealth, 167 N.E.3d 822, 838 (Mass. 2021)).

217. *Id.*

218. People v. Hernandez, 488 P.3d 1055, 1061 (Colo. 2021).

219. *Id.* at 1058–59.

220. *Id.* at 1059.

221. *Id.* at 1062.

222. *Id.* at 1064–65; Vazquez Diaz v. Commonwealth, 167 N.E.3d 822, 838 (Mass. 2021); State v. Comacho, 960 N.W.2d 739, 755–56 (Neb. 2021).

223. C.A.R.A. v. Jackson Cnty. Juv. Off., No. WD 83967, 2021 WL 2793539, at *8 (Mo. Ct. App. July 6, 2021), *vacated by* 637 S.W.3d 50 (2022) (en banc).

and a third-party witness for the Juvenile Officer" to testify remotely during the defendant's adjudication hearing for statutory sodomy charges.[224] Prior to and during the adjudication proceeding, the defendant objected to the remote testimony, and the court overruled the objection.[225] After "[t]he court ordered [the defendant] to be committed to the custody of the Director of Family Court Services for residential placement[,] [the defendant] appeal[ed]" to the Court of Appeals of Missouri.[226] In addressing the defendant's objection, the court noted that federal district courts did not find general COVID-19 concerns to be a sufficient important public policy under *Craig*'s necessity prong.[227] The court concluded that the trial court violated the defendant's Confrontation Clause rights because the Jackson County Juvenile Office failed to make an adequate case-specific showing.[228]

In January 2022, the Missouri Court of Appeals transferred the case to the Missouri Supreme Court to further "address . . . Confrontation Clause arguments."[229] The Missouri Supreme Court held that "generalized concerns about the virus may not override an individual's constitutional right to confront adverse witnesses in a juvenile adjudication proceeding. The circuit court erroneously declared and applied the law in admitting the two-way video testimony in violation of [the defendant's] right to confrontation."[230] When specifically addressing *Craig*, the court noted:

> It is unclear whether the COVID-19 pandemic generally could satisfy the "important public policy" standard under *Craig*. Further, even if we assume the existence of COVID-19 could satisfy the "important public policy" standard, the circuit court would still be required to make witness-specific findings to determine it was necessary for a particular witness to testify via two-way video due to an enhanced risk associated with COVID-19. The existence of multiple viable alternatives in this case, including issuing another continuance or reducing the number of people in the courtroom, suggests even that finding may have been insufficient to support the necessity prong of *Craig*.[231]

The *C.A.R.A.* decision highlights the contrast in state approaches when addressing *Craig*'s necessity prong.[232] Whereas the *Vazquez Diaz* and *Hernandez*

224. *Id.* at *2.

225. *Id.*

226. *Id.* at *1.

227. *Id.* at *8 (citing United States v. Pangelinan, No. 19-10077, 2020 WL 5118550, at *4 (D. Kan. Aug. 31, 2020); United States v. Kail, No. 18-cr-00172, 2021 WL 1164787, at *1 (N.D. Cal. Mar. 26, 2021); and United States v. Casher, No. 19-cr-65, 2020 WL 3270541, at *3 (D. Mont. June 17, 2020)).

228. *See id.* at *10–11.

229. *Id.* at *10.

230. C.A.R.A. v. Jackson Cnty. Juv. Off., 637 S.W.3d 50, 66 (Mo. 2022) (en banc).

231. *Id.* at 65–66.

232. *Id.*; *see* Maryland v. Craig, 497 U.S. 836, 850 (1990).

majorities focused on the possibility that physical testimony may result in the further spread of COVID-19, the Missouri Supreme Court in *C.A.R.A.* emphasized the inadequacy of generalized COVID-19 health concerns as a way to circumvent the Confrontation Clause.[233] With several state courts willing to extend illness to COVID-19 concerns, states are broadening the scope of important public policies under *Craig*'s necessity prong.[234] This distinction may be due in part to the interpretation of "public policy" prior to the rise in remote testimony during the pandemic. Before the pandemic, state courts implicitly defined important public policies under *Craig* as circumstances solely related and partially related to illness.[235]

D. THE BREADTH OF STATE-DETERMINED PUBLIC POLICIES UNDER CRAIG *HIGHLIGHTS THE NEED FOR MODIFICATION TO* CRAIG

With the current uncertainty regarding the extent of illness as an important public policy under *Craig*,[236] it is important to highlight how states have addressed the necessity finding prior to the rise in remote testimony and the COVID-19 pandemic. States implicitly categorized public policies under *Craig* into two broad categories: (1) solely related and (2) partially related to illness.[237] In *People v. Wrotten*, the complainant testified remotely because of old age, a history of heart disease, and an inability to "travel to New York without endangering his health."[238] The Court held that the complainant's health concerns satisfied "*Craig*'s public policy requirement."[239] Similar health concerns governed the court's analysis in *Bush v. State*.[240]

In *Bush*, the trial court granted the State's request to have a witness testify via a video conferencing platform because the witness suffered from severe congestive heart failure, resulting in a "profoundly poor" condition.[241] The

233. Vazquez Diaz v. Commonwealth, 167 N.E.3d 822, 838 (Mass. 2021); People v. Hernandez, 488 P.3d 1055, 1062 (Colo. 2021); *C.A.R.A.*, 637 S.W.3d at 65–66.

234. *See, e.g.*, *Hernandez*, 488 P.3d at 1058; *Vazquez Diaz*, 167 N.E.3d at 838; State v. Comacho, 960 N.W.2d 739, 755–56 (Neb. 2021).

235. *See, e.g.*, Lipsitz v. State, 442 P.3d 138, 144 (Nev. 2019); People v. Wrotten, 923 N.E.2d 1099, 1102–03 (N.Y. 2009); Bush v. State, 193 P.3d 203, 215–16 (Wyo. 2008); White v. State, 116 A.3d 520, 547 (Md. Ct. Spec. App. 2015).

236. *See* United States v. Pangelinan, No. 19-10077, 2020 WL 5118550, at *4 (D. Kan. Aug. 31, 2020); United States v. Kail, No. 18-cr-00172, 2021 WL 1164787, at *1 (N.D. Cal. Mar. 26, 2021); United States v. Casher, No. 19-cr-65, 2020 WL 3270541, at *3 (D. Mont. June 17, 2020); *Vazquez Diaz*, 167 N.E.3d at 838; *Comacho*, 960 N.W.2d at 755–56; *Hernandez*, 488 P.3d at 1061–65; *C.A.R.A.*, 637 S.W.3d at 65–66.

237. *See Wrotten*, 923 N.E.2d at 1103; *Bush*, 193 P.3d at 215–16; *White*, 116 A.3d at 547.

238. *Wrotten*, 923 N.E.2d at 1101.

239. *Id.* at 1103.

240. *See Bush*, 193 P.3d at 215 ("This Court has not previously addressed the issue of whether a defendant's confrontation right was violated by presentation of witness testimony via video teleconference. Other jurisdictions that have applied the *Craig* test have reached varying results depending upon the particular circumstances of the case." (footnote omitted)).

241. *Id.* at 214.

Supreme Court of Wyoming agreed with the trial court when it held that the witness's "testimony via video conference was necessary to further the important public policy of preventing further harm to his already serious medical condition."[242] Both *Wrotten* and *Bush* show that some courts are willing to extend illness as a public policy under *Craig* to circumstances that endanger a witness's serious health condition.[243] However, other states tackled cases dealing with witness concerns only partially related to illness, which helped courts further define the *Craig* standard.[244]

While *Craig* identified protecting child victims against trauma as a sufficient public policy, and numerous other courts identified illness as a sufficient public policy,[245] questions remained as to what other concerns could pass *Craig*'s necessity prong. In *Lipsitz v. State*, the trial court permitted the victim to testify remotely because the victim attended a substance abuse treatment facility.[246] On appeal, the Supreme Court of Nevada acknowledged that a witness attending and receiving treatment at a residential drug treatment facility constituted a sufficient public policy under *Craig*.[247] The Court noted the witness's prolonged unavailability for an extended period "for a number of months."[248] While the court connected unavailability with protecting a witness's well-being, the court did not cite health concerns as the sole sufficient public policy.[249] Similarly, in *White v. State*, the Court of Special Appeals of Maryland addressed a public policy partially related to illness under the *Craig* standard.[250]

In *White v. State*, the State argued that a witness's remote testimony did not violate the defendant's rights under the Confrontation Clause because the testimony furthered the public policy of resolving cold cases and protecting the witness's back condition.[251] The Court of Special Appeals of Maryland agreed with the State's argument.[252] The court held "that the combined public

242. *Id.* at 215–16.

243. *Id.* at 216; *Wrotten*, 923 N.E.2d at 1103.

244. *See, e.g.*, Lipsitz v. State, 442 P.3d 138, 144 (Nev. 2019) (noting that unavailability for an extended period of time can serve as a legitimate basis to permit remote testimony from a medically unavailable witness under *Craig*'s necessity prong); White v. State, 116 A.3d 520, 545–48 (Md. Ct. Spec. App. 2015) (holding that the resolving of cold cases, among other considerations, is a sufficient public policy under *Craig*).

245. *See* Maryland v. Craig, 497 U.S. 836, 852–53 (1990); *see, e.g.*, State v. Rogerson, 855 N.W.2d 495, 502–04 (Iowa 2014).

246. *Lipsitz*, 442 P.3d at 140–41.

247. *Id.* at 144 ("Admission into a treatment center for a prolonged period is a legitimate basis for the district court to find that a witness is medically unavailable to appear at trial.").

248. *Id.* at 144–45 (citation omitted in original).

249. *Id.*

250. *See White*, 116 A.3d at 547 ("The resolution of cold cases inevitably spawns numerous procedural barriers . . . .").

251. *Id.*

252. *See id.*

policy . . . of resolving cold cases and . . . protecting the physical well-being of a significant witness are sufficient under *Craig*."[253] The court paired cold resolution with protection of a witness's health condition, without citing the health condition as the sole sufficient public policy.[254] *Lipsitz* and *White* are important state developments in defining the *Craig* standard.[255]

Despite state developments, commentators have expressed concern about courts deciding what may or may not constitute important public policies under *Craig* moving forward.[256] One commentator acknowledged that the question of sufficient public policies under *Craig*'s necessity prong is unsettled, and courts need guidance with this issue.[257] "It is unsettled. . . . [H]ow do trial courts determine what is an 'important policy?' Once the public policy is identified, what factors should the trial court use in balancing the state's interest against the defendant's 'right' to confrontation?"[258]

Ultimately, federal and state courts are not in agreement when analyzing illness as a sufficient public policy under *Craig*.[259] The disagreement at the federal and state level shows that *Craig*, as it stands, is inadequate. This Note proposes a modification to *Craig* that expands the necessity and reliability prongs and incorporates factors federal and state courts may consider when analyzing illness as a sufficient public policy.

III. PROPOSED MODIFICATION TO *CRAIG* TO HELP COURTS ANALYZE ILLNESS AS A SUFFICIENT PUBLIC POLICY

As it stands, *Craig* is inadequate to analyze illness as a sufficient public policy. *Craig*'s necessity and reliability prongs must be expanded. Similar to the *Daubert* approach,[260] a list of factors courts may consider when determining whether an illness constitutes a sufficient public policy should be incorporated into the standard.

The difference in approaches at the state and federal district court level regarding COVID-19 concerns under *Craig*[261] highlights the need for

253. *Id.* at 547.

254. *Id.*

255. *See id.*; *Lipsitz*, 442 P.3d at 143–44.

256. *See* Carroll, *supra* note 27, at 15 ("As a trial judge applying *Rogerson*, what would I consider important? First, the state did not present any evidence, making only arguments of convenience, efficiency[,] and cost-saving. Based on this record, it is difficult, if not impossible, to predict what our court would consider to be a sufficient and necessary public policy to deny face-to-face confrontation.").

257. *Id.* at 16.

258. *Id.*

259. *Compare* Vazquez Diaz v. Commonwealth, 167 N.E.3d 822, 837–38 (Mass. 2021) (finding remote hearings should be allowed for the pandemic), *with* United States v. Casher, No. 19-cr-65, 2020 WL 3270541, at *2–3 (D. Mont. June 17, 2020) (holding the pandemic is not a sufficient reason under the Confrontation Clause to permit remote testimony).

260. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593–95 (1993).

261. *See Vazquez Diaz*, 167 N.E.3d at 837–38; *Casher*, 2020 WL 3270541, at *2–3.

modification. Federal courts emphasize the case-specific finding when analyzing illness under *Craig*'s necessity prong,[262] and this approach better represents the majority holding, as the case-specific language also appeared in the *Craig* opinion.[263] The necessity and reliability prongs must be expanded to include examples, which will help courts focus less on the public policy, and more on the case-specific finding. In addition, as the *Daubert* factors provided clarity to courts assessing the validity of scientific methodology underlying expert witness testimony,[264] so too can a list of factors provide clarity for courts analyzing illness as a sufficient public policy under *Craig*. Based on *Rogerson* and other relevant case law, factors include: (1) whether in-person testimony adversely affects the witness, (2) whether the witness can travel despite the adverse effect, and (3) whether the court has an alternative to remote testimony.[265]

A. EXPANDING CRAIG*'S NECESSITY AND RELIABILITY PRONGS*

The Supreme Court has not revisited *Craig* since 1990.[266] With the world around criminal law constantly changing,[267] *Craig* is inadequate to determine sufficient public policies, including illness. Modifying *Craig* to include examples of sufficient public policies and indications of reliability will aid federal and state courts in assessing remote testimony under the Confrontation Clause. The necessity prong could be modified to include examples of prior sufficient public policies in relevant case law.[268] For example, the necessity

262. *See* United States v. Pangelinan, No. 19-10077, 2020 WL 5118550, at *4 (D. Kan. Aug. 31, 2020); United States v. Kail, No. 18-cr-00172, 2021 WL 11647787, at *1 (N.D. Cal. Mar. 26, 2021); *Casher*, 2020 WL 3270541, at *2–3.

263. Maryland v. Craig, 497 U.S. 836, 855 (1990).

264. *The Five Daubert Factors in Expert Witness Testimony*, HGEXPERTS, https://www.hgexperts.com/expert-witness-articles/the-five-daubert-factors-in-expert-witness-testimony-46030 [https://perma.cc/8WGH-UDCW] ("The Daubert factors are important for expert witness testimony . . . .").

265. *See* State v. Rogerson 855 N.W.2d 495, 504–07 (Iowa 2014); Bush v. State, 193 P.3d 203, 215–16 (Wyo. 2008); C.A.R.A. v. Jackson Cnty. Juv. Off., 637 S.W.3d 50, 59, 66 (Mo. 2022) (en banc); *Pangelinan*, 2020 WL 5118550, at *3–4; *Casher*, 2020 WL 3270541, at *2–3.

266. *See* Carroll, *supra* note 27, at 16.

267. *See, e.g.*, *Task Force Urged to Curb Over-Federalization of Criminal Law*, U.S. CTS. (July 11, 2014), https://www.uscourts.gov/news/2014/07/11/task-force-urged-curb-over-federalization-criminal-law [https://perma.cc/7ACV-TU6L] (reporting on a federal judge's "testimony before the House Judiciary Committee's Over-Criminalization Task Force . . . [where she] urged Congress to review existing federal criminal statutes with the goal of eliminating provisions that no longer serve an essential federal purpose, and to use 'sunset' provisions to require periodic reevaluation of laws").

268. *See, e.g.*, *Craig*, 497 U.S. at 853 (holding "the physical and psychological well-being of child abuse victims" as "sufficiently important to outweigh . . . a defendant's right to face his or her accusers in court"); *Bush*, 193 P.3d at 216 (holding that preventing harm to a witness's already serious medical condition is a sufficient public policy under *Craig*); *Rogerson*, 855 N.W.2d at 507 (holding that travel distance and non-serious injuries do not qualify as sufficient public policies under *Craig*); *Pangelinan*, 2020 WL 5118550, at *4 (holding "that [the] prosecution of

prong could be reworked as "necessary to further an important public policy including but not limited to child sexual assault, illness, injury, and sex trafficking." Regarding the reliability prong, the factors the *Comacho* majority relied on can be added as examples.[269] The reliability prong could be reworked as "only where the reliability of the testimony is otherwise assured by aspects including but not limited to two-way interactive video and the ability to cross-examine the witness." By including examples, the reworked necessity and reliability prongs will help courts focus less on the nature of the public policy, and more on the case-specific finding, or the individualized witness concerns. In addition, the reworked prongs will better reflect the legal system's current preference for remote testimony.[270]

B. THE DAUBERT *APPROACH—FACTORS COURTS MAY CONSIDER IN ANALYZING ILLNESS UNDER* CRAIG

While expanding *Craig*'s necessity and reliability prongs is important, federal and state courts may still struggle with analyzing illness as a sufficient public policy. In *Daubert*, the Supreme Court outlined a list of factors to assist courts when assessing the validity of the scientific methodology underlying expert witness testimony,[271] and the Supreme Court's approach helped provide clarity to a confusing issue.[272] Given the disagreement between federal and state courts regarding illness under *Craig*,[273] an approach similar to *Daubert* would be useful. *Rogerson* and other relevant case law highlight three distinct factors courts should take into consideration when analyzing illness under *Craig*'s sufficient public policy prong: (1) whether in-person testimony will adversely affect the witness, (2) whether the witness can travel despite the adverse effect, and (3) whether the court has an alternative to remote testimony.[274]

---

sex traffickers and limiting the spread of [COVID-19] are important public polic[ies]," but the Government failed to make the required showing under *Craig*'s necessity prong).

269. State v. Comacho, 960 N.W.2d 739, 755–56 (Neb. 2021).

270. *See* Hyde, *supra* note 5.

271. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593–95 (1993).

272. G. Michael Fenner, *The* Daubert *Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 CREIGHTON L. REV. 939, 948 (1996) ("The general point of *Daubert*[—]that when expert testimony is proffered and resisted, the trial court should hold a hearing to determine whether the evidence is reliable and relevant[—]applies to all expert evidence. All expert evidence is, after all, governed by the same handful of federal rules of evidence; that is, the same statutory sections apply whether the evidence is scientific knowledge or any other kind of specialized knowledge.").

273. *See* Vazquez Diaz v. Commonwealth, 167 N.E.3d 822, 837–38 (Mass. 2021); United States v. Casher, No. CR 19-65, 2020 WL 3270541, at *2–3 (D. Mont. June 17, 2020).

274. *See* State v. Rogerson, 855 N.W.2d 495, 504–07 (Iowa 2014); Bush v. State, 193 P.3d 203, 215–16 (Wyo. 2008); C.A.R.A. v. Jackson Cnty. Juv. Off., 637 S.W.3d 50, 59, 66 (Mo. 2022) (en banc); United States v. Pangelinan, No. 19-10077, 2020 WL 5118550, at *3–4 (D. Kan. Aug. 31, 2020); *Casher*, 2020 WL 3270541, at *2–3.

1. Whether In-person Testimony Will Adversely Affect the Witness

The sticking point in many cases at the federal and state level is whether in-person testimony adversely affects the witness.[275] As the *Rogerson* majority acknowledged, the adverse effect must be substantial,[276] and because the adverse effect is substantial, it can outweigh the defendant's rights under the Confrontation Clause. Alternatively, a minimal adverse effect does not suffice as a public policy under *Craig*.[277] Courts asking whether in-person testimony adversely affects the witness seeking remote testimony is an important factor to consider because it is a way for courts to differentiate between illnesses. Under this factor, a witness who suffers from an illness with symptoms will be treated differently than a witness suffering from an illness without symptoms. Additionally, whether in-person testimony adversely affects the witness will help courts differentiate on the symptom level as well, with illnesses with serious symptoms more likely to be viewed as sufficient public policies. This factor is not the end of the analysis; it is simply one factor for courts to consider in a list that is not exhaustive.

2. Whether the Witness Can Travel Despite the Adverse Effect

In-person testimony requires that witnesses travel to the courthouse where the trial court is located. Courts often focus on whether a witness that is adversely affected by providing in-person testimony can nevertheless travel to provide the testimony in question.[278] The travel inquiry can help courts analyze illness because an illness that renders a witness unable to travel can translate to the illness adversely affecting the witness. Furthermore, a witness's ability to travel is connected to whether the adverse effect is substantial. Courts may equate an ability to travel with a less severe adverse effect, thus providing courts with guidance in determining whether an illness constitutes a sufficient public policy under *Craig*.

275. *See C.A.R.A.*, 637 S.W.3d at 66 ("In this case, no evidence whatsoever was presented to the circuit court concerning the particular risks facing [the victim], [the victim's] mother, or the other witnesses who testified on behalf of the juvenile officer. And the circuit court made no finding that anything about the health or circumstances of these witnesses required they be permitted to testify remotely."); State v. Comacho, 960 N.W.2d 739, 755–56 (Neb. 2021); People v. Hernandez, 488 P.3d 1055, 1061 (Colo. 2021); *Casher*, 2020 WL 3270541, at *2–3.

276. *See Rogerson*, 855 N.W.2d at 507.

277. *Id.*

278. *See, e.g.*, *id.*; *Pangelinan*, 2020 WL 5118550, at *4 (noting that despite health concerns, witnesses could nevertheless physically travel to provide testimony at trial).

3. Whether the Court Has an Alternative to Remote Testimony

The Supreme Court prefers face-to-face confrontation to remote testimony, and because of this preference,[279] some courts consider whether an alternative to remote testimony is available when deciding a case under *Craig*'s two-prong test.[280] A court asking about alternatives to remote testimony is arguably a factor more pertinent to federal courts because (1) federal courts are more interested in Supreme Court preferences and (2) language inquiring about alternatives to remote testimony is notably absent from state decisions. Nevertheless, this factor is included because an alternative such as a continuance provides a way for trial courts to uphold a defendant's rights under the Confrontation Clause without permitting remote testimony and risking the decision being overturned on appeal. Furthermore, a court inquiring about alternatives is connected to the witness being adversely affected because the adverse effect may be a reason as to why alternatives such as continuances and depositions are impractical. The factors outlined above are important because they connect to one another, apply equally to illnesses, and provide further clarity when analyzing illness as a sufficient public policy under *Craig*.

CONCLUSION

Remote testimony is on the rise[281] and will most likely remain a part of legal proceedings moving forward.[282] With an increase in remote testimony, generally, comes an increase in remote testimony in criminal cases. Remote testimony implicates the Confrontation Clause, and thus challenges to the Confrontation Clause under *Craig* will continue. Federal and state courts are divided when analyzing illness as a sufficient public policy under the *Craig* standard.[283] The expanded necessity and reliability prongs as well as the list of

279. Maryland v. Craig, 497 U.S. 836, 846 (1990) ("We have recognized, for example, that face-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person.").

280. *See Casher*, 2020 WL 3270541, at *2–3; *Pangelinan*, 2020 WL 5118550, at *3–4; Lipsitz v. State, 442 P.3d 138, 143–44 (Nev. 2019) ("Additionally, Lipsitz's insistence on a speedy trial and his refusal to continue the trial until the victim was released from the treatment facility contributed to the district court's decision to grant the State's motion to allow the victim to testify remotely at trial. The district court explained that because Lipsitz had invoked 'his right to go to trial next week, then it seem[ed] . . . that [the victim] is essentially unavailable, which would allow for either a deposition to be taken of the witness or use in this case of the audiovisual technology.' Thus, absent this form of technology, the victim could not have appeared for the trial scheduled the following week. As a result, we conclude that use of the technology under these circumstances furthered the important public policy of protecting the victim's well-being while also protecting the defendant's right to a speedy trial while ensuring that criminal cases are resolved promptly." (citation omitted in original)).

281. *See* Austin, *supra* note 5.

282. *Id.*

283. *See supra* note 23 and accompanying text.

factors proposed by this Note will provide guidance to federal and state courts moving forward as they analyze illness under *Craig*.