



Remote Testimony and Related Procedures Impacting a Criminal Defendant's Confrontation Rights

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Introduction

Since the United States Supreme Court's decision in *Crawford v. Washington*,¹ and even more so after its ruling in *Melendez-Diaz v. Massachusetts*,² interest has been growing in the use of remote testimony as a method to satisfy the Confrontation Clause when a witness cannot be present at trial. *Crawford* held that under the Sixth Amendment's Confrontation Clause,³ testimonial statements by witnesses who do not appear at trial cannot be admitted unless the State establishes unavailability and a prior opportunity to cross-examine. The Court's subsequent decision in *Melendez-Diaz* held that a certificate of analysis showing the results of forensic testing are testimonial and thus subject to the new *Crawford* rule. The effect of *Melendez-Diaz* is that absent an exception⁴ to the *Crawford* rule or a waiver⁵ or forfeiture⁶ of Confrontation Clause rights by a defendant, the prosecution must, as a general rule, produce a forensic analyst at trial in order to overcome a confrontation clause objection to the admissibility of forensic reports.⁷ The types of forensic reports affected include, among other things, blood

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1. 541 U.S. 36 (2004).

2. 557 U.S. 305 (2009).

3. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

4. *State v. Bodden*, 190 N.C. App. 505, 515 (2008) (dying declarations are an exception to the *Crawford* rule); *State v. Calhoun*, 189 N.C. App. 166, 171–72 (2008) (same); *see also* *Michigan v. Bryant*, 131 S. Ct. 1143, 1177 (Ginsburg, J., dissenting) (noting that the common law inherited from England by the United States included an exception to the confrontation requirement for dying declarations).

5. *Melendez-Diaz*, 557 U.S. at 314 n.3 ("The right to confrontation may, of course, be waived.").

6. *Giles v. California*, 554 U.S. 353 (2008) (when a defendant engages in wrongdoing with an intent to make a witness unavailable at trial, the defendant forfeits his or her confrontation rights).

7. For a more detailed discussion of *Crawford* and *Melendez-Diaz*, see Jessica Smith, *Understanding the New Confrontation Clause Analysis: Crawford, Davis, and Melendez-Diaz*, ADMIN. OF JUST. BULL.

tests establishing a person's alcohol concentration, chemical analysts' affidavits, DNA reports, autopsy reports, lab reports determining that a substance is a controlled substance, and ballistic reports.

While *Melendez-Diaz* took from the prosecution with one hand, it gave with the other. Writing for the Court, Justice Scalia explained that although the certificate of analysis at issue was testimonial and subject to *Crawford*, the defendant always bears the burden of raising the confrontation objection.⁸ He further noted that states are free to adopt procedural rules regarding the timing for raising such objections.⁹ In fact, he explained, some states already do this with notice and demand statutes. In their simplest form these statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he or she may object to the admission of the evidence absent the analyst's appearance live at trial.¹⁰ If the defendant fails to make a timely objection, the confrontation issue is deemed to have been waived; if the defendant objects, the witness must be produced at trial. Significantly, the Court opined that such statutes are constitutional.¹¹ Not surprisingly, this language attracted attention. In the aftermath of *Melendez-Diaz*, the North Carolina General Assembly took up the issue of notice and demand statutes, enacting new ones and amending existing ones to bring them into compliance with this dicta in *Melendez-Diaz*. North Carolina now has seven notice and demand statutes. Like the statutes endorsed in *Melendez-Diaz*, North Carolina's statutes require the State to give notice to the defendant of its intent to use an analyst's report or a chain of custody record as evidence at trial without the presence of the analyst or custodian. If the defendant does not object to use of the report at trial within a specified time, the defendant is deemed to have waived his or her confrontation clause objection to the evidence. If the defendant makes a timely objection, the analyst or custodian must be produced at trial.¹²

Apparently, no formal data collection has been done on how often North Carolina prosecutors use the notice and demand statutes or how often the defendant objects and requires the State to produce the analyst in court. Nevertheless, given that a defendant may have little to lose and much to gain by objecting under the notice and demand statutes, it is unlikely that these procedures will obviate completely the need for analysts to be present in court. Thus, while the notice and demand statutes may have somewhat alleviated the problem, some argue that without additional procedures, analysts will be required to spend extensive amounts of time out of the laboratory traveling to and testifying in court and thereby exacerbating existing backlogs at state forensic laboratories.¹³ If this happens, state forensic laboratories are likely to need more

No. 2010/02 (UNC School of Government, Apr. 2010, available online at <http://sogpubs.unc.edu/electronicversions/pdfs/aojb1002.pdf> (hereinafter *Understanding the New Confrontation Clause Analysis*).

8. *Melendez-Diaz*, 557 U.S. at 327.

9. *Id.*

10. *Id.* at 326.

11. *Id.* at 327 n.12.

12. For a detailed discussion of North Carolina's notice and demand statutes, see Smith, *Understanding the New Confrontation Clause Analysis*, *supra* n. 7, at 21–25.

13. See Mandy Locke and Joseph Neff, *SBI Looking to Private Crime Lab*, NEWS AND OBSERVER, OCT. 13, 2010, available at www.newsobserver.com/2010/10/01/712960/sbi-looking-to-private-crime-lab.html (last visited Jan. 27, 2013) (noting backlog of rape kit tests and potential contract with private company); Bob Wilson, *SBI Backlog: Let State Take Care of Its Own Mess*, DURHAM NEWS, Jan. 26, 2013, available at www.thedurhamnews.com/2013/01/26/214448/sbi-backlog-let-state-take-care.html (last visited Jan. 27, 2013) (stating that it takes the SBI an average of 172 days to complete routine drug tests).

resources. In part this has led to a renewed interest, at least by prosecutors and other government officials, in remote testimony as a tool to satisfy *Crawford*. Almost all recent proposals for implementation of remote testimony have called for remote two-way testimony. This memorandum discusses the viability of such a technique and alternatives to it.

The Right to Face-To-Face Confrontation

The United States Supreme Court has decided two cases dealing with a criminal defendant's constitutional right to confront his or her accusers face-to-face. First, in *Coy v. Iowa*,¹⁴ the Court held that a criminal defendant's confrontation rights were violated when two minor sexual assault victims testified behind a screen. The screen allowed the defendant "dimly to perceive the witnesses," but the witnesses could not see the defendant at all.¹⁵ The defendant was convicted of two counts of lascivious acts with a child. He appealed, arguing that his constitutional right to confront the witnesses against him was violated by use of the screen. The Court agreed with the defendant, finding it "difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter."¹⁶ In this way, *Coy* established a general rule that the Confrontation Clause protects the right to face-to-face confrontation.¹⁷ This is understood to mean that the witness testifies live at trial, in a setting in which the defendant and the witness can see and hear each other. In the Court's second case, it carved out an exception to this general rule.

Maryland v. Craig: An Exception to the Right to Face-to-Face Confrontation

In 1990—just two years after *Coy*—the United States Supreme Court carved out an exception to the general rule that the Confrontation Clause protects face-to-face confrontation. In *Maryland v. Craig*,¹⁸ the Court upheld a Maryland statute that allowed a judge to receive, through a one-way closed-circuit television system, the testimony of an alleged child abuse victim. Under the one-way system, the child witness, prosecutor, and defense counsel went to a separate room while the judge, jury, and defendant remained in the courtroom. The child witness was examined and cross-examined in the separate room, while a video monitor recorded and displayed the child's testimony to those in the courtroom.¹⁹ The procedure prevented the child witness from seeing the defendant as he or she testified against the defendant at trial.²⁰ However, the child witness had to be competent to testify and to testify under oath; the defendant retained full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant were able to view by video monitor the demeanor of the witness as he or she

14. 487 U.S. 1012, 1016–22 (1988).

15. *Id.* at 1015.

16. *Id.* at 1020.

17. *See id.* at 1016 ("We have never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.")

18. 497 U.S. 836 (1990).

19. *Id.* at 841–42.

20. *Id.* at 841–42 & 851.

testified.²¹ Throughout the procedure, the defendant remained in electronic communication with defense counsel, and objections were made and ruled on as if the witness were testifying in the courtroom.²²

Upholding the Maryland procedure, the *Craig* Court reaffirmed the importance of face-to-face confrontation of witnesses appearing at trial but concluded that such confrontation was not an indispensable element of the right to confront one's accusers. It held that while "the Confrontation Clause reflects a *preference* for face-to-face confrontation . . . , . . . that [preference] must occasionally give way to considerations of public policy and the necessities of the case."²³ It went on to explain that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial *only where* denial of such confrontation is necessary to further an important public policy and *only where* the reliability of the testimony is otherwise assured."²⁴ (See Figure 1.1.)

Figure 1.1

<i>Craig's Requirements</i>
(1) denial of confrontation is necessary to further an important public policy interest <i>and</i>
(2) the reliability of the testimony is otherwise assured

As to the important public policy, the Court stated: "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court."²⁵ However, the Court made clear that the State must make a case-specific showing of necessity. Specifically, the trial court must (1) "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"; (2) "find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant"; and (3) "find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than mere nervousness or excitement or some reluctance to testify."²⁶

The Court went on to note that in the case before it, the reliability of the testimony was otherwise assured. Although the Maryland procedure prevented a child witness from seeing the defendant as he or she testified at trial, the procedure required that (1) the child be competent to testify and testify under oath; (2) the defendant had full opportunity for contemporaneous

21. *Id.* at 851.

22. *Id.* at 842.

23. *Id.* at 849 (citations and internal quotation marks omitted).

24. *Id.* at 850 (emphasis added).

25. *Id.* at 853.

26. *Id.* at 855–56 (citations and internal quotation marks omitted).

cross-examination; and (3) the judge, jury, and defendant were able to view the witness's demeanor while he or she testified.²⁷

*In re Stradford*²⁸ is the first published North Carolina case to address this issue after *Craig*. In that case a juvenile was adjudicated delinquent on two counts of first-degree rape, committed on child victims. After an evidentiary hearing, the trial court granted the State's motion to allow the victims to testify by way of closed-circuit television due to their "inability to communicate if forced to testify in [the] defendant's presence."²⁹ On appeal, the defendant argued that this procedure violated his Confrontation Clause rights. The court of appeals disagreed, concluding that the trial judge properly allowed the use of closed-circuit television. The court noted that the children testified under oath, were subject to full-cross examination, and were able to be observed by the judge and the defendant as they testified. The court also rejected the defendant's argument that the trial court's findings were insufficient to justify the procedure. It noted that at the adjudicatory hearing, the children's clinical therapist testified that it would be "further traumatizing" if the children had to confront the defendant face-to-face.

The United States Supreme Court has not ruled on whether one-way video testimony under a "*Craig* standard" is constitutional with respect to adult witnesses or to witnesses who suffered no sexual abuse. Additionally, both *Craig* and *Stradford* were decided before the United States Supreme Court issued its groundbreaking decision in *Crawford*, expanding criminal defendants' confrontation rights. Although the United States Supreme Court has not yet considered whether the one-way procedure sanctioned in *Craig* for child victims survives *Crawford*, the North Carolina Court of Appeals has held that it does.³⁰

The Constitutionality of Two-Way Remote Video Testimony

Guidance from the United States Supreme Court

As noted above, *Craig* involved testimony by means of a one-way closed-circuit television system that allowed the defendant, judge, and jury to view a child sexual assault victim while the child testified from a separate room but prevented the child from seeing the defendant. A two-way system, by contrast, would allow the defendant, judge, and jury to view the witness and also would allow the witness to view the defendant and others in the courtroom.

The question of whether remote two-way testimony satisfies the Confrontation Clause and by what standard that determination is made has not been resolved by the United States Supreme Court.³¹ Although the high Court has had the opportunity to address this issue post-*Crawford*,

27. *Id.* at 851.

28. 119 N.C. App. 654 (1995).

29. *Id.* at 656.

30. *State v. Jackson*, ___ N.C. App. ___, 717 S.E.2d. 35, 39–40 (2011) (in a child sexual assault case, the defendant's Confrontation Clause rights were not violated when the trial court permitted the child victim to testify by way of a one-way closed-circuit television system; *Craig* survived *Crawford*, and the procedure here satisfied *Craig's* requirements and the North Carolina statute on point, Section 15A-1225.1 of the North Carolina General Statutes (hereinafter G.S.)); *State v. Lanford*, ___ N.C. App. ___, 736 S.E.2d 619 (2013) (following *Jackson*).

31. *Horn v. Quarterman*, 508 F.3d 306, 315 (5th Cir. 2007) ("the United States Supreme Court has not specifically addressed the use of two-way closed-circuit television"); *Commonwealth v. Musser*, 82 Va. Cir. 265 (2011) ("The Supreme Court has not expressly addressed the question of when, or to what extent,

it has declined to do so.³² However, even before the Court adopted its stricter Confrontation Clause analysis in *Crawford*, it expressed concern that the use of two-way video testimony outside of the *Craig* context would violate the Confrontation Clause. In 2002, the Judicial Conference of the United States submitted to the United States Supreme Court a proposed change to Rule 26 of the Federal Rules of Criminal Procedure that would have allowed for the use of remote testimony in federal criminal trials. The Supreme Court typically serves as a conduit for proposed rule changes from the Conference—which has a lengthy rulemaking process—to Congress.³³ In this instance, however, the Court declined to pass on the proposed change pertaining to remote testimony. The Court’s rejection of the proposed change to Rule 26 is a significant cautionary note as to the constitutionality of remote testimony outside of the *Craig* context.

The proposal submitted by the Conference would have amended Rule 26 as follows:

Rule 26. Taking Testimony

- (a) In General. In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§ 2072-2077.
- (b) Transmitting Testimony from a Different Location. In the interest of justice, the court may authorize contemporaneous, two-way video presentation in open court of testimony from a witness who is at a different location if:
 - (1) the requesting party establishes exceptional circumstances for such transmission;
 - (2) appropriate safeguards for the transmission are used; and
 - (3) the witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)-(5).³⁴

The Supreme Court submitted to Congress the language of part (a) of this proposal—which was merely a clarifying amendment of the current Rule—but declined to submit part (b), the provision for remote testimony.³⁵

In a statement accompanying the transmittal to Congress, Justice Scalia—who later authored the opinions in *Crawford* and *Melendez-Diaz*—expressed concern that the proposed amendment violated the Confrontation Clause.³⁶ As Justice Scalia put it, the issue is whether a criminal defendant “can be compelled to hazard his life, liberty, or property in a criminal teletrial.”³⁷ He

two-way videoconference testimony of a prosecution witness in a criminal case might comport with the Confrontation Clause . . .”).

32. *Wrotten v. New York*, 130 S. Ct. 2520 (2010).

33. See Richard Friedman, *Remote Testimony*, 35 U. MICH. J.L. REFORM 695, 695–96 (2002) (hereinafter *Remote Testimony*).

34. *Id.* at 699–700.

35. See *id.* at 700; Letters from The Honorable William H. Rehnquist, Chief Justice of the United States Supreme Court, to the Honorable Dennis Hastert, Speaker of the House of Representatives, and the Honorable Dick Cheney, President of the United States Senate (both dated Apr. 29, 2002) (on file with the author).

36. See Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, Statement of Scalia, J., at 1 (Apr. 29, 2002), www.uscourts.gov/uscourts/RulesAndPolicies/rules/CR-26b.pdf (“I share the majority’s view that [proposed Rule 26(b)] is of dubious validity under the Confrontation Clause”).

37. *Id.* at 3 (emphasis omitted).

answered this question in the negative, concluding as follows: "Virtual confrontation might be sufficient to protect virtual confrontation rights; I doubt whether it is sufficient to protect real ones."³⁸ As to the distinction between one-way testimony (used in *Craig*) and the two-way testimony included in the proposed rule change, Scalia stated:

I cannot comprehend how one-way transmission (which *Craig* says does not ordinarily satisfy confrontation requirements) becomes transformed into full-fledged confrontation when reciprocal transmission is added. As we made clear in *Craig*, a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations *in the defendant's presence*—which is not equivalent to making them in a room that contains a television set beaming electrons that portray a defendant's image.³⁹

Two other justices—Breyer and O'Connor—dissented from the Court's decision not to pass the proposed amendment on to Congress, arguing that it was constitutional under *Craig*.⁴⁰

Additionally, signals from the high Court suggest that *Craig's* analysis for one-way testimony may not be the relevant analysis for assessing two-way testimony in other contexts. As noted above, the Supreme Court denied certiorari in a case that presented an opportunity for it to rule on the constitutionality of two-way systems under *Crawford*. In *Wrotten v. New York*,⁴¹ the defendant was convicted of assault after a trial in which the victim, because he was elderly, in poor health, and unable to travel to New York to attend court, was allowed to testify by way of live, two-way video. The Court of Appeals of New York (the highest court in the state) held that in the absence of a statute authorizing the procedure, the trial judge had inherent authority to allow the victim to testify using live, two-way video. Also, citing *Craig*, the New York high court held that the exercise of this inherent authority after a finding of necessity is permissible under the Confrontation Clause. The defendant sought review by the United States Supreme Court, but the Court declined to review the case. Justice Sotomayor filed a statement agreeing with the denial of certiorari but noting that the issue was "an important one . . . not obviously answered" by *Craig*.⁴² Justice Sotomayor clarified that "[b]ecause the use of video testimony in this case arose in a strikingly different context than in *Craig*, it is not clear that the latter is controlling."⁴³ She went on to agree with the Court's action because of the procedural posture of the case but expressly emphasized that it did not constitute a ruling on the merits or an expression of an opinion regarding the importance of the question presented.⁴⁴

In sum, the United States Supreme Court has not yet decided whether *Craig* survives *Crawford* and if it does, whether it is the appropriate analysis to apply to two-way remote testimony by child or other witnesses. Furthermore, indications by individual justices in connection with the proposed change to Rule 26 and with the denial of certiorari in *Wrotten* suggest no obvious answer on either issue.

38. *Id.* at 2.

39. *Id.* at 2 (citations omitted).

40. *Id.* at 4–5 (Dissenting Statement of Breyer, J.).

41. 130 S. Ct. 2520 (2010).

42. *Id.* at 2520.

43. *Id.*

44. *Id.* at 2521.

North Carolina Cases on Point

No North Carolina decisions address the constitutionality of two-way testimony.⁴⁵

The Majority Rule: *Craig* Applies to Two-Way Testimony

Although one federal circuit court has ruled otherwise pre-*Crawford*, several federal circuit courts and a number of lower federal courts and state courts have held that *Craig* applies to two-way video testimony.⁴⁶

The one federal circuit court to hold that *Craig* does not apply to such testimony is the Second Circuit. In *United States v. Gigante*,⁴⁷ a pre-*Crawford* case, the Second Circuit rejected application of *Craig* to two-way remote testimony. In *Gigante*, the defendant, alleged to be a New York Mafia family boss, was charged with, among other things, RICO violations and conspiracy to commit murder. Peter Savino, a key government witness, was in the federal witness protection program and, at the time of trial, in the final stages of a fatal cancer. When the Government moved to allow Savino to testify by way of closed-circuit television, the trial court held a hearing, determined that Savino was medically unable to travel, and granted the Government's motion. On appeal, the defendant argued that by allowing Savino to testify by way of two-way closed-circuit television from a remote location, his confrontation rights were violated. Although the Second Circuit concluded that the use of remote testimony "must be carefully circumscribed,"⁴⁸ it found that no constitutional violation occurred. The court concluded that the closed-circuit television procedure adequately preserved the key elements of confrontation: the witness was sworn; he was subject to full cross-examination; he testified in full view of the jury, court, and defense counsel; and he gave this testimony under the defendant's eye. The court determined that *Craig* did not apply because the testimony was given via a two-way system, not a one-way system. Rejecting *Craig*'s requirement of an important public policy interest, the

45. In *State v. Lanford*, ___ N.C. App. ___, 736 S.E.2d 619 (2013) (the trial court did not err by allowing a child victim to testify out of the defendant's presence by way of closed-circuit television), the trial court noted in its findings that technology exists to allow two-way testimony. However, that case involved a one-way system in which the child witness was unable to see the defendant.

46. *Fourth Circuit*: *United States v. Abu Ali*, 528 F.3d 210, 238–43 (4th Cir. 2008).

Eighth Circuit: *United States v. Bordeaux*, 400 F.3d 548, 554–55 (8th Cir. 2005).

Ninth Circuit: *United States v. Etimani*, 328 F.3d 493, 499–500 (9th Cir. 2003) (pre-*Crawford* case); see also *United States v. Sapse*, ___ F. Supp. 2d ___, No. 2: 10-CR-00370-KJD, 2012 WL 5334630 (D. Nev. Oct. 26, 2012); *United States v. Rosenau*, 870 F. Supp. 2d 1109, 1113–14 (W.D. Wash. 2012).

Tenth Circuit: *United States v. Carrier*, 9 F.3d 867, 870 (10th Cir. 1993) (pre-*Crawford* case).

Eleventh Circuit: *United States v. Yates*, 438 F.3d 1307, 1313 (11th Cir. 2006); *United States v. Fee*, No. 11-15356, 2012 WL 4711607 (11th Cir. Oct. 4, 2012) (unpublished); *United States v. Fee*, 425 F. App'x 847, 850 (11th Cir. 2011) (unpublished).

Sample state cases: *State v. Stock*, 256 P.3d 899, 903–04 (Mont. 2011); *Michigan v. Buie*, 775 N.W.2d 817, 825 (Mich. 2009); *Utah v. Henriod*, 131 P.3d 232, 234 (Utah 2006) (analyzing UTAH R. CRIM. P. 15.5(b)(1)(D), which authorizes testimony of any child abuse victim who is less than fourteen years old via two-way closed-circuit television); *People v. Lujan*, 150 Cal. Rptr. 3d 727, 729 (Ct. App. 2012); *Commonwealth v. Musser*, 82 Va. Cir. 265 (2011) (*Craig* applied and was not satisfied).

47. 166 F.3d 75 (2d Cir. 1999).

48. *Id.* at 80.

court determined that only a finding of “exceptional circumstances” is necessary to support use of two-way video testimony.⁴⁹ According to the court, the witness’s illness and participation in the witness protection program, along with the defendant’s inability to participate in a distant deposition under the federal rules, satisfied this standard.⁵⁰

On the other side of the issue in the majority camp is *United States v. Yates*,⁵¹ a post-*Crawford* Eleventh Circuit case often cited for its holding that *Craig* applies to two-way testimony. On the particular facts presented, the Eleventh Circuit held that the use of two-way testimony was unconstitutional. In *Yates*, the defendants were tried in Alabama federal court for mail fraud and related offenses arising out of their involvement with an Internet pharmacy. Before trial, the Government moved to introduce testimony from two witnesses in Australia by means of a live, two-way videoconference. The Government asserted that both were “essential witnesses to the government’s case-in-chief,”⁵² unwilling to travel to the United States, and beyond the Government’s subpoena powers. The defendants opposed the motion, arguing that such a procedure would violate their right to face-to-face confrontation. The trial court allowed the remote testimony, finding no Confrontation Clause violation because the defendants and the witnesses would be able to see each other when the testimony was given. The trial court also found that the Government had asserted an “important public policy of providing the fact-finder with crucial evidence” and had an interest “in expeditiously and justly resolving the case.”⁵³ An *en banc* Eleventh Circuit held that the use of remote testimony violated the defendants’ Confrontation Clause rights. The court began by rejecting the Government’s argument that it should follow *Gigante* and hold that *Craig* does not apply to two-way testimony.⁵⁴ Instead, the court concluded that because such testimony impairs the defendant’s confrontation rights, *Craig* applies. The court determined that “[t]he Government’s interest in presenting the fact-finder with crucial evidence is . . . an important public policy.”⁵⁵ However, it concluded that under the circumstances, which included the fact that a pretrial deposition could have been taken in the defendant’s presence, “the 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’ right to confront their accusers face-to-face.”⁵⁶ The court continued, noting that the trial judge made no case-specific finding to support a conclusion that the case was different from any other criminal prosecution in which it would be more convenient to use two-way video than to produce the witness in court.⁵⁷

The state cases are in line with *Yates* and the majority rule that *Craig* applies to two-way testimony.⁵⁸

49. *Id.* at 81.

50. Note that as discussed above, Justice Scalia later rejected the exceptional circumstances standard in his statement concerning the proposed amendment to Federal Rule of Criminal Procedure 26. See Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, Statement of Scalia, J., at 1–2 (Apr. 29, 2002), www.uscourts.gov/uscourts/RulesAndPolicies/rules/CR-26b.pdf (“This is unquestionably contrary to the Rule announced in *Craig*.”). And as has been twice noted, *Gigante* was a pre-*Crawford* case.

51. 438 F.3d 1307 (11th Cir. 2006) (en banc).

52. *Id.* at 1310 (citation and internal quotation marks omitted).

53. *Id.*

54. *Id.* at 1312–13.

55. *Id.* at 1316.

56. *Id.*

57. *Id.*

58. See cases collected under the heading “Sample state cases,” note 46, above.

If *Craig* Applies An Important Public Policy Is Required

As noted above, although the United States Supreme Court has not yet addressed the issue, a majority of lower courts hold that *Craig* survives *Crawford* and applies to assessing the constitutionality of two-way remote testimony. *Craig* of course requires that the prosecution advance an important public policy to support the use of remote testimony. This suggests that to be *Craig*-compliant, two-way testimony would be permissible only when such an interest exists.⁵⁹ Cases have held that the following public policy interests satisfy the Confrontation Clause:

- protecting child sexual assault victims from trauma,⁶⁰
- national security in terrorism cases,⁶¹
- combating international drug smuggling,⁶²
- protecting a seriously ill witness's health,⁶³ and

59. See, e.g., ALASKA R. CRIM. P. 38.3(b)(1) (absent an agreement by the parties, the requesting party must establish that testimony by two-way video conference is necessary to further an important public policy).

60. *Maryland v. Craig*, 497 U.S. 836, 855 (1990); *United States v. Fee*, No. 11-15356, 2012 WL 4711607 (11th Cir. Oct. 4, 2012) (unpublished) (in a child pornography case, the government established that the child witness would suffer trauma if forced to testify in the defendant's presence; the child's counselor testified that she was scared to go to court and exhibited this fear through engaging in self-mutilation, panicking at the sound of the defendant's voice, and obsessing about her proximity to the defendant in the courtroom; the counselor also testified that the child's distress and anxiety exceeded that of any other child that the counselor had worked with); *United States v. Fee*, 425 F. App'x 847, 851 (11th Cir. 2011) (unpublished) (companion case to *Fee* decided similarly); *State v. Stock*, 256 P.3d 899, 903 (Mont. 2011) (six-year-old incest victim).

At least one case has extended this rule to a child witness. *People v. Lujan*, 150 Cal. Rptr. 3d 727, 730 (Ct. App. 2012). In that case, the child witness was the sibling of the child murder victim and witnessed the defendant's abuse of her deceased brother. She was five at the time of the victim's death and seven at the time of trial. After hearing evidence, the judge found that remote testimony was "necessary for the protection of [the child] because she . . . would suffer emotional trauma from testifying in open court." See also *State v. Collins*, 65 So. 3d 271, 282 (La. Ct. App. 2011) (applying the rule to a child who witnessed a murder but not discussing the distinction between child victims and child witnesses).

61. *United States v. Abu Ali*, 528 F.3d 210, 240–41 (4th Cir. 2008) (terrorism case involving an al-Qaeda cell).

62. *United States v. Rosenau*, 870 F. Supp. 2d 1109, 1113 (W.D. Wash. 2012) ("the public policy interest in allowing the Government to effectively try cases regarding the breach of international boundaries by smuggling of narcotics by air into the United States is sufficiently important to justify permitting live video testimony.").

63. *Bush v. State*, 193 P.3d 203, 215, 214 (Wyo. 2008) (two way-testimony allowed when the witness suffered from a medical condition that was "serious and severe and not temporary"; the witness suffered from congestive heart failure and was hospitalized and in "profoundly poor" condition; his physician was adamant that traveling to testify would be detrimental to his health); *Kramer v. State*, 277 P.3d 88, 94 (Wyo. 2012) (two-way testimony allowed where the witness suffered a mental ailment; after a "rather severe suicide attempt," a court committed the witness to the state hospital, finding that he posed a substantial risk to himself and others; his condition was so severe that hospital staff checked on him every fifteen minutes and his psychiatrist reevaluated his medication on an ongoing basis; a psychiatrist expressly advised against having the witness travel to testify); *People v. Wrotten*, 923 N.E.2d 1099, 1102 (N.Y. 2009) (elderly and infirm adult victim); *State v. Sewell*, 595 N.W.2d 207, 211–13 (Minn. Ct. App. 1999) (approving live video testimony of a witness who risked paralysis if he traveled to court); *Stevens v. State*, 234 S.W.3d 748, 781 (Tex. Crim. App. 2007) (witness had been evaluated and hospitalized multiple times

- protecting witnesses who have been intimidated.⁶⁴

Courts have either held or suggested that the following rationales are insufficient to justify abridging a defendant's confrontation rights:

- convenience,⁶⁵
- mere unavailability,⁶⁶

for decompensated congestive heart failure, gastrointestinal bleeding, atrial fibrillation, and vascular disease; a doctor stated that the witness's health status was "quite tenuous," that he had a history of coronary artery disease, that he had undergone bypass surgery, and that he was at high risk due to his atrial fibrillation and other comorbidities; the doctor opined that the witness would suffer from a health standpoint if required to testify at trial); *Paul v. State*, No. 12-10-00280-CR, 2012 WL 3101743 (Tex. Crim. App. July 31, 2012) (witness had stage IV ovarian cancer; following *Stevens*, 234 S.W.3d 748); *United States v. Sapse*, ___ F. Supp. 2d ___, No. 2: 10-CR-00370-KJD, 2012 WL 5334630 (D. Nev. Oct. 26, 2012) (allowing two-way video testimony by six government witnesses; important public policy is allowing the government to pursue wire and mail fraud cases where the victims are infirm due to age or disability and where they were targeted for those reasons; witnesses suffered from extreme, not day-to-day or ordinary, health problems). *See also* *Horn v. Quarterman*, 508 F.3d 306, 313–20 (5th Cir. 2007) (not an unreasonable application of federal law to allow remote two-way testimony by witness who was terminally ill, hospitalized for liver cancer, and not expected to improve; his doctor stated that it would be medically unsafe for him to travel to testify).

64. *State v. Johnson*, 958 N.E.2d 977, 989 (Ohio Ct. App. 2011) (a large number of the defendant's friends and family had been intimidating witnesses).

65. *United States v. Yates*, 438 F.3d 1307, 1316 (11th Cir. 2006) (en banc) ("[t]he district court made no case-specific findings of fact that would support a conclusion that this case is different from any other criminal prosecution in which the Government would find it convenient to present testimony by two-way video conference."); *Commonwealth v. Musser*, 82 Va. Cir. 265 (2011) (with regard to medical doctor who performed autopsy in Virginia but moved to Florida); *see also Sapse*, 2012 WL 5334630, at *2 (allowing video testimony because of witness's extreme health situation and noting "It is not mere convenience driving the need for live video testimony."); *Rosenau*, 870 F. Supp. 2d at 1113 (distinguishing the public policy interest in the case at hand—combatting international drug smuggling—from those at issue in *Yates*; noting that *Yates* requires more than convenience and unavailability and reasoning that in the case at hand there was real necessity where the witness was prevented from entering the United States as a result of a court order).

As the United States Supreme Court stated in *Melendez-Diaz v. Massachusetts*:

[R]espondent asks us to relax the requirements of the Confrontation Clause to accommodate the "necessities of trial and the adversary process." . . . It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.

557 U.S. 305, 325 (2009) (citation omitted).

66. *Rosenau*, 870 F. Supp. 2d at 1113 (distinguishing the public policy interest in the case at hand—combatting international drug smuggling—from those at issue in *Yates*; noting that *Yates* requires more than convenience and unavailability and reasoning that in the case at hand there was real necessity where the witness was prevented from entering the United States as a result of a court order).

- cost savings,⁶⁷ and
- general law enforcement.⁶⁸

This suggests that a blanket procedure allowing for two-way testimony to ease the State's administrative burden or lessen the cost of a trial will not survive constitutional muster under a *Craig* analysis.

If *Craig* Applies Reliability Must Be Otherwise Assured

In addition to requiring an important public policy interest, *Craig* requires that the reliability of the witness's testimony is otherwise assured.⁶⁹ Specifically, *Craig* noted that the Maryland procedure required that (1) the child be competent to testify and testify under oath; (2) the defendant had full opportunity for contemporaneous cross-examination; and (3) the judge, jury, and defendant were able to view the witness's demeanor while he or she testified. Assuming that *Craig* applies to two-way testimony, any procedure allowing for such testimony would need to satisfy these standards or demonstrate in some other constitutionally sufficient way that reliability is otherwise assured. The subsections below explore this issue.

Competent and Under Oath

In the context of two-way testimony by state laboratory analysts, the requirement that the analyst be competent and give testimony under oath presents no special issues. If remote testimony is extended to other contexts, however, issues may arise. For example, if the two-way testimony is by an individual in a foreign country—a fact pattern that already presents in the case law⁷⁰—courts may need to consider whether a foreign nation's oath is sufficient⁷¹ and whether the witness would be susceptible to a prosecution for perjury.⁷² Likewise, any statutory procedure on remote testimony should address these issues.

67. *Musser*, 82 Va. Cir. 265 (in a homicide case the prosecution based its request to present the medical examiner's testimony by two-way videoconference on a cost savings of \$5,000 or more; rejecting this rationale, the court noted that while frugality is an important public policy, "the cost of protecting a constitutional right cannot justify its total denial." (quoting *Bounds v. Smith*, 430 U.S. 817, 825 (1977))).

68. *United States v. Abu Ali*, 528 F.3d 210, 241 (4th Cir. 2010) (distinguishing the government's interest in prosecuting terrorists from a generalized interest in law enforcement; "*Craig* plainly requires a public interest more substantial than convicting someone of a criminal offense"). *But see* *Rivera v. State*, 381 S.W.3d 710, 712 (Tex. Crim. App. 2012) (allowing two-way testimony of crime scene investigator who was serving active duty in Iraq; rejecting the defendant's argument that no important public policy warranted the procedure but not articulating such a policy supporting the procedure).

69. See Figure 1.1, above; *Abu Ali*, 528 F.3d at 241 (allowing two-way deposition testimony where reliability was otherwise assured under *Craig*); *Kramer v. State*, 277 P.3d 88, 94 (Wyo. 2012) (allowing two-way testimony where *Craig* reliability was otherwise assured); *State v. Stock*, 256 P.3d 899, 903–04 (Mont. 2011) (same); *Johnson*, 958 N.E.2d at 989 (same); *Sapse*, 2012 WL 5334630 (same); *see also* *Horn v. Quarterman*, 508 F.3d 306, 318 (5th Cir. 2007) (not an unreasonable application of federal law where two-way testimony was allowed but reliability was reasonably assured).

70. See, e.g., *Abu Ali*, 528 F.3d 210.

71. *Id.* at 241 (Saudi Arabian oath was sufficient).

72. *United States v. Rosenau*, 870 F. Supp. 2d 1109, 1114 (W.D. Wash. 2012) (allowing two-way testimony of a witness in Canada where the proceedings would be governed by United States law and the witness would take the United States oath; if the witness perjured himself he could be extradited to the United States and prosecuted).

Full Opportunity for Contemporaneous Examination

Under a *Craig* one-way transmission procedure, the lawyers typically are in the room with the witness. This of course can be done with two-way testimony.⁷³ If it is not, some special accommodations may be required, for example, to deal with showing exhibits to the witness.⁷⁴

If the defendant cannot be present in the remote location,⁷⁵ he or she must have an effective means to communicate with counsel during the cross-examination.⁷⁶ At a minimum, this will require breaks during testimony during which the defendant is able to communicate with counsel.⁷⁷ Some courts find it advisable to appoint counsel to sit with the defendant in the courtroom to facilitate communication with counsel in the remote location.⁷⁸

If counsel is not present with the witness, some safeguards should be in place to ensure that no interference with the witness occurs in the remote location. Those safeguards may include having a court official present in the remote location to monitor the proceedings and requiring the witness to certify, under penalty of perjury, that he or she did not engage in any off-camera communications with any person during his or her testimony.

Finally, while technology has improved since *Craig*, technological issues, such as delay in audio transmissions, can impact the defendant's opportunity for contemporaneous examination and should be addressed in advance and immediately rectified if they occur during transmission.⁷⁹

Demeanor

Technological issues also can impact the fact-finder's ability to assess the witnesses' demeanor. For example, if an audio transmission is delayed, the lawyer and jurors may not be able to connect the witness's body language and facial expressions as shown on the video to the audio of the testimony.⁸⁰ This could impact assessments of credibility. Other issues such as camera angle, how much of the witness's body is projected, and lighting also can impact the fact-finder's ability

73. See, e.g., *Quarterman*, 508 F.3d at 313 (counsel was present with witness at offsite hospital location); *Rosenau*, 870 F. Supp. 2d at 1114 (allowing two-way testimony where counsel was present with the witness in the remote location).

74. *Johnson*, 958 N.E.2d at 990 (after a witness testifying remotely indicated that he could not see the aerial view of the crime scene that defense counsel was showing him, some adjustments were made so that he could see the exhibit).

75. See, e.g., *Rosenau*, 870 F. Supp. 2d at 1114 (the defendant would not have been permitted to enter the foreign country where the witness was located).

76. *Abu Ali*, 528 F.3d at 242 (in a remote deposition case, the district court took frequent breaks during the testimony, at which time the defendant was free to talk with his counsel via cellular telephone; also, the court was willing to allow defense counsel to stop their cross-examination in order to conference with their client in private).

77. *Id.* (breaks taken).

78. *Rosenau*, 870 F. Supp. 2d at 1113 (allowing two-way testimony of a witness in Canada; lawyers were present in a Canadian courtroom with the witness and the court appointed a second lawyer to remain with the defendant, facilitating his participation).

79. Technological problems have occurred in two-way testimony cases. See, e.g., *Harrell v. State*, 709 So. 2d 1364, 1367 (Fla. 1998) (the visual transmission of the victims' testimony was not simultaneous with the audio, causing a split-second delay between what was said and what was seen).

80. See, e.g., *id.*

to assess demeanor.⁸¹ At least one court has indicated that having personal video monitors for all jurors ensures an experience that is “close” to live testimony.⁸²

Additional Considerations

Several versions of a remote testimony procedure have been discussed in North Carolina. In one version, the proposal would have allowed for remote testimony only by State Bureau of Investigation Crime Laboratory witnesses. Such witnesses typically are called by the State, for example, in an impaired driving case, to testify to the defendant’s blood alcohol level, or in a drug case to establish that the substance at issue was in fact a controlled substance. Such a statute may be criticized as unfairly providing litigation advantages to the State not provided to the defendant. This concern seems amplified by the fact that such defense evidence raises no Confrontation Clause issues; because the Confrontation Clause protects a criminal defendant’s right to confront his or her accusers, it affords the State no protections. Thus, in addition to Confrontation Clause issues, the proposed statute may raise due process issues and, possibly, issues regarding infringing on a defendant’s constitutional right to present a defense.⁸³ At least one state that has adopted a remote testimony statute provides for remote testimony by both prosecution and defense witnesses.⁸⁴

Other Options to a “Blanket” Two-Way Testimony Statute

As discussed above, questions remain about what standard applies to assessing the constitutionality of two-way testimony. If the *Craig* standard applies, it appears that such testimony would be permitted only where the State can advance a sufficiently important public policy interest and reliability is otherwise assured. As a result, there is considerable litigation risk inherent in a procedure that would broadly allow for remote testimony by all State laboratory analysts in all cases. Thus, policy makers may wish to consider other approaches.

Procuring a Waiver of Live Testimony Through Notice and Demand

Confrontation rights, like all constitutional rights, may be waived, provided that the waiver is knowing, voluntary, and intelligent.⁸⁵ North Carolina already has notice and demand statutes in place that allow the State to procure a waiver of confrontation rights from the defendant with

81. *See id.* (while the witness was testifying, she repeatedly looked at an individual off the screen; the individual off the screen was the manager of the broadcast studio; initially, the cameras focused only on the manager and not the witness; this problem eventually was corrected and the camera focused on both individuals).

82. *Rosenau*, 870 F. Supp. 2d at 1113 (“arrangements proposed in this Court—including personal video monitors for each juror—make the experience close to that of watching a live witness testify in person”).

83. *Holmes v. South Carolina*, 547 U.S. 319, 330–31 (2006) (a defendant’s federal constitutional right to present a defense was violated by a state evidence rule providing that a defendant may not introduce proof of third-party guilt if the prosecution has introduced strong forensic evidence supportive of a guilty verdict; the state evidence rule was determined to be arbitrary).

84. N.H. REV. STAT. ANN. § 516:38.

85. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 314 n.3 (2009) (“The right to confrontation may, of course, be waived.”).

respect to testimonial forensic reports and chain of custody records.⁸⁶ If the waiver is obtained, the State may introduce these records and reports into evidence without the presence of the preparer. In a nutshell, the notice and demand statutes require the State to notify the defendant within a prescribed period of time that it intends to introduce such a report or record into evidence without the presence of the preparer. The defendant then has a period of time in which to file an objection. If the defendant objects, all of the usual rules regarding admissibility apply. If the defendant fails to object, however, this failure is deemed to be a waiver of confrontation rights. These types of statutes were endorsed by *Melendez-Diaz*, and at least one of them has been held constitutional in North Carolina.⁸⁷ Building on these procedures, North Carolina could enact a notice and demand statute that allows for a constitutional waiver of confrontation rights—to the extent they exist—with respect to two-way video testimony. In fact several states have done just that.⁸⁸

While some defendants may refuse to waive the right, others may be willing to do so. In the context of waiver under existing notice and demand statutes, there are at least two primary motivations for a defendant to refuse to waive his or her confrontation rights: (1) a desire to cross-examine the preparer of the report to bring out exculpatory evidence; and (2) a strategic plan to make prosecution of the case as inconvenient as possible. With a waiver of the right to physical presence in connection with remote testimony (as opposed to the waiver of the right to confront the preparer at all with respect to the notice and demand statutes), the ability to cross-examine is preserved, and thus one roadblock to waiving confrontation rights may be removed. Of course, motivation (2) still may be present, and thus it is unlikely that this procedure would completely eliminate the need for face-to-face testimony. However, if the defense feels that it can adequately cross-examine through remote testimony and if the defendant is willing to waive the right to physical presence, analysts can offer testimony remotely with no confrontation issue.

Pretrial Depositions

Under *Crawford*, testimonial statements by witnesses who do not testify at trial may not be admitted unless the State establishes unavailability and a prior opportunity to cross-examine. If a pretrial deposition procedure can be developed to meet the constitutional standard for a prior opportunity to cross-examine, pretrial deposition testimony of witnesses would be admissible under *Crawford* when the witness is unavailable. In fact, several courts have so held.⁸⁹

86. See the discussion on page 2, above.

87. *State v. Steele*, 201 N.C. App. 689, 696 (2010) (G.S. 90-95(g) is constitutional).

88. VA. CODE ANN. § 19.2-187.1; N.H. REV. STAT. ANN. § 516:38; IDAHO CRIM. R. 43.3 (allowing forensic testimony by video teleconference); ALASKA R. CRIM. P. 38.3.

89. *United States v. McGowan*, 590 F.3d 446, 456 (7th Cir. 2009) (admission of videotaped pretrial testimony preservation depositions conducted pursuant to Federal Rule of Criminal Procedure 15(a) did not violate defendant's confrontation rights where witness was unavailable due to failing health and defendant had the opportunity to, and did in fact, fully cross-examine the witness at the depositions); *United States v. Smith*, 213 F. App'x 774, 776 (11th Cir. 2006) (unpublished) (no error to admit videotaped deposition of an unavailable witness where deposition "took place under 'trial-type circumstances'" in the presence of the district court judge, a court reporter, the defendant, and her attorney and the witness was unavailable because she had been deported); *State v. Griffin*, 202 S.W.3d 670, 677 (Mo. Ct. App. 2006) (pretrial deposition of child witness admissible under *Crawford*).

While North Carolina does not have a statutory procedure that would allow for pretrial depositions by the prosecution in criminal cases,⁹⁰ procedures for doing so exist in other jurisdictions.⁹¹ Additionally, the procedure is not unheard of in North Carolina; in extreme situations, such as when a key witness is ill and cannot travel to trial or is not expected to survive until trial, North Carolina trial judges have exercised their inherent authority and ordered pretrial depositions.

One procedural question is whether the defendant must be afforded a right to be present at the pretrial deposition in order for the deposition to pass constitutional muster in lieu of live testimony. Some case law suggests that if the defendant is not present, the deposition must be subjected to a *Craig* inquiry (important public policy at issue; reliability otherwise assured).⁹² Allowing for the defendant's presence would give a pretrial deposition procedure a significant advantage—from a constitutional standpoint—over remote testimony: the defendant would be present when the deposition is taken and thus would have the opportunity for face-to-face confrontation. When the defendant is on pretrial release, ensuring the defendant's presence should present no significant problem in the ordinary case.⁹³ However, if the defendant is in custody, providing for the defendant's presence at the pretrial deposition will present logistical and financial issues.

In order to ensure that a pretrial deposition procedure affords a criminal defendant a constitutionally adequate opportunity for cross-examination, the following additional features should be considered:

- Defense counsel, or the defendant if he or she is pro se, should be permitted to pose questions to the witness.⁹⁴
- The defendant should be afforded discovery far enough in advance of the deposition so that there will be a meaningful opportunity for cross-examination at the deposition.⁹⁵
- If the deposition is recorded using audio and visual equipment, the fact-finder will be able to observe the witness's demeanor, an observation that is not possible with a mere written transcript.
- Any recording of the deposition should be of sufficient quality for in-court presentation.
- The witness should be required to answer all questions.

90. G.S. 8-74 allows the defendant to take depositions in certain circumstances.

91. See, e.g., FED. R. CRIM. P. 15 (authorizing pre-trial depositions in "exceptional circumstances").

92. *United States v. Abu Ali*, 528 F.3d 210, 240 (4th Cir. 2008); *Griffin*, 202 S.W.3d at 677–81 (applying *Craig* analysis to pretrial deposition testimony of a child witness where the defendant was not present for the deposition).

93. A problem might arise, however, when the witness is across the country or abroad and when the defendant is too ill or infirm to travel.

94. See *United States v. Csolkovits*, 794 F. Supp. 2d 764, 766 n.1, 772 (E.D. Mich. 2011) (holding that the Government's proposed international deposition procedures, whereby defense counsel would be limited to submitting written questions to be posed by the presiding magistrate, were insufficient to protect the defendant's confrontation rights; "[defendant's] confrontation rights would be severely undermined if he did not have the opportunity to cross examine these witnesses through counsel specifically representing his own interests"); see also *Coronado v. State*, 351 S.W.3d 315, 329 (Tex. Crim. App. 2011) (cross-examination by written interrogatories is insufficient).

95. Some courts have rejected the notion that "discovery depositions" satisfy the Confrontation Clause. *Corona v. State*, 64 So. 3d 1232, 1235 (Fla. 2011) (the pretrial deposition of an unavailable witness was improperly admitted because the Florida Rules of Criminal Procedure regarding discovery

Although such a procedure appears promising, it is not without limitation. As noted above, under the *Crawford* rule, testimonial statements by witnesses who do not testify at trial may not be admitted unless the State can establish unavailability and a prior opportunity to cross-examine. Even if the pretrial deposition satisfies the prior opportunity to cross-examine, the State still must establish unavailability of the witness in order for the witness's testimonial statements to be admissible under *Crawford*.⁹⁶ The fact that a witness has died, for example, will satisfy this requirement. However, it is unlikely that mere inconvenience or cost to the State will satisfy the constitutional requirement of unavailability.

Administrative Options

A myriad of administrative options may address the problem, such as regional laboratories⁹⁷ that will cut down on travel time for analysts and assigning cases to analysts based on judicial districts. A full exploration of these options is outside the scope of this bulletin, however.

Final Words: A Shifting Landscape

In the area of *Crawford* and the Confrontation Clause, many open questions remain. As cases are decided, the rules may change or be modified. This point is amplified by the fact that since *Crawford* was decided in 2004, the composition of the high Court has changed. Justices Roberts, Kagan, and Sotomayor replaced Justices Rehnquist, Stevens, and Souter, respectively. As a result, Justice Scalia—who authored the ground-breaking *Crawford* decision and important follow-up

depositions are not designed to, nor do they in practice, provide “an opportunity to engage in adversarial testing” as required by *Crawford* but, rather, are designed to allow an opportunity to find out what the testimony will be; conviction vacated); *see also* *State v. Lopez*, 974 So. 2d 340, 347 (Fla. 2008); *Blanton v. State*, 978 So. 2d 149, 155 (Fla. 2008); *State v. Contreras*, 979 So. 2d 896, 910–11 (Fla. 2008). *But see* *Howard v. State*, 853 N.E.2d 461, 468–70 (Ind. 2006) (if witness is found to be unavailable, testimony from a pretrial discovery deposition may be admitted). By contrast, “preservation depositions”—depositions noticed to preserve testimony for trial—have found greater favor with the courts. *See, e.g., Rice v. State*, 635 S.E.2d 707, 708–09 (Ga. 2006) (admission of videotaped pretrial testimony preservation deposition conducted pursuant to Georgia law did not violate defendant's confrontation rights despite the fact that defendant did not actually cross-examine the witness (but planned to at a future date) because defendant had an opportunity to cross-examine the witness on the date of the direct examination deposition but waived that opportunity by not cross-examining on the date of direct examination; witness was unavailable due to failing health).

96. *See, e.g., United States v. Tirado-Tirado*, 563 F.3d 117, 123–25 (5th Cir. 2009) (Mexican witness's videotaped pretrial deposition was improperly admitted where the Government did not establish that the witness was unavailable); *State v. Tribble*, ___ A.3d ___, No. 2010-021, 2012 WL 6634000 (Vt. Dec. 21, 2012) (given the post-*Crawford* preference for live in-person testimony, videotaped “preservation deposition” testimony may not be admitted unless the witness is unavailable or the defendant has waived confrontation rights; where the State's Chief Medical Examiner was going to be out of the country at the time of trial, the court held that the medical examiner was not “unavailable” despite the inconvenience and expense of international travel).

97. *See, e.g., S.B. 3*, N.C. Gen. Assemb., Reg. Sess. (2013) (a bill that would create a crime laboratory in Western North Carolina), *available online at* www.ncga.state.nc.us/Sessions/2013/Bills/Senate/PDF/S3v1.pdf.

cases⁹⁸—has found himself in the dissent more than once in cases involving confrontation rights.⁹⁹ The changed composition of the Court makes it difficult to predict how the open issues will be resolved.

98. *Davis v. Washington*, 547 U.S. 813 (2006) (testimonial statement case).

99. *See e.g.*, *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (substitute analyst case); *Michigan v. Bryant*, 131 S. Ct. 1143 (2011) (testimonial statement case).

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