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Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Technology

INDEX

- I. There is a Compelling Need to Reduce the Trauma Experienced by Adult Sexual Assault Victims
- II. The Common Objection to Testimony Via Video Technology: Defendant's Right to Confrontation

Practice Pointers

Access to justice should not require any victim to suffer needless additional trauma. One option that should be available to adult sexual assault victims¹ is the use of live closed circuit television (CCTV) or videoconference technology (collectively, “video technology”) to allow them to testify at trial outside the physical presence of the defendant. Currently, there is no evidence to suggest that prosecutors are offering adult sexual assault victims the option of testifying via live video technology or that prosecutors are advocating that courts allow the use of such procedures unless the victims are young enough to fit within the scope of a jurisdiction’s child testimony statute² or the victims are mentally or developmentally disabled.³ Case law and public policy support allowing adult sexual assault victims to testify via live video technology if the evidence establishes that testifying in defendant’s physical presence would cause the victims to suffer serious emotional distress or other trauma and testifying from another room would mitigate that trauma.⁴

I. There is a Compelling Need to Reduce the Trauma Experienced by Adult Sexual Assault Victims

Sexual assault is a “significant social and health problem”⁵ in this country, and rape alone⁶ affects hundreds of thousands of new victims each year.⁷ Less than 20 percent of rapes committed against adults are reported to law enforcement,⁸ and less than 40 percent of reported rapes result in criminal prosecution;⁹ in other words, less than 8 percent of rapes committed against adults are criminally prosecuted.¹⁰

A growing body of research documents the trauma suffered by adult sexual assault victims. Post Traumatic Stress Disorder (PTSD) is a common consequence of sexual assault,¹¹ especially for rape victims.¹² Rape victims may also experience depression, substance abuse, and suicidal thoughts or behavior,¹³ along with a number of physical problems such as chronic pelvic pain, gastrointestinal disorders and hypertension.¹⁴

Testifying in court can be particularly traumatic for rape victims.¹⁵ Facing the perpetrator in court and recalling horrifying and personal details of the rape forces the victims to “relive the [crime] mentally and emotionally,”¹⁶ leading

some to feel “as though the sexual assault [is] recurring”¹⁷ and to re-experience “a lack of control and terror.”¹⁸

In recent decades, courts and lawmakers have recognized the existence of an important state interest in reducing the trauma experienced by child sexual abuse victims, leading courts to reject constitutional challenges to the use of live video testimony at trial.¹⁹ Some states that have codified this practice also protect mentally or developmentally impaired adult victims.²⁰

Courts and lawmakers have been largely silent²¹ about the importance of protecting *all* sexual assault victims who testify at trial.²² The dearth of reported cases that address this subject raises a few questions, including whether prosecutors and victims’ attorneys are failing to seek such accommodations, or if many of the victims who would suffer serious harm from testifying in the courtroom are either failing to report their victimization or are refusing to participate in the trial. Further examination of this issue is “overdue because of the revolutionary change that has taken place in our society, including changes with respect to the credibility and dignity we extend to adult[s] . . . and children who are the victims of sexual assault.”²³

II. The Common Objection to Testimony via Video Technology: Defendant’s Right to Confrontation

The Confrontation Clause of the Sixth Amendment provides all criminal defendants with the “right . . . to be confronted with the witnesses against him,”²⁴ and it applies to all state prosecutions by way of the Fourteenth Amendment.²⁵ But as recognized by the Supreme Court two decades ago in *Maryland v. Craig*, the right to a physical “face-to-face” meeting is “not absolute”²⁶ and “must occasionally give way to considerations of public policy and the necessities of the case.”²⁷

A. The *Maryland v. Craig* Framework

An overwhelming majority of courts that have addressed the constitutionality of allowing adult non-sexual assault witnesses to testify at trial via live video technology have applied the test first established by *Maryland v. Craig*.²⁸ A small minority of courts have adopted a less-stringent “exceptional circumstances” approach used by the Second Circuit in *United States v. Gigante*.²⁹ Because meeting the stricter *Craig* standard should necessarily satisfy the *Gigante* standard,³⁰ this paper focuses on the *Craig* standard.

In *Craig*, the Supreme Court upheld a state procedure that permitted child sexual abuse victims to testify from another room via one-way CCTV. During a hearing, an expert testified that if the victims were required to testify in the presence of the defendant, then one victim “‘wouldn’t be able to communicate effectively’” due to anxiety, another “‘would probably stop talking and . . . withdraw and curl up,’” and a third would either refuse to talk or would talk but not respond to the subject of the questions.³¹ The trial court found that the victims would suffer serious emotional distress that would render them unable to reasonably communicate if they were forced to testify in defendant’s physical presence.³² The one-way CCTV procedure allowed the defendant, jury and judge to see each witness, but the witness could not see the defendant; defense counsel was present with the witness and could contemporaneously communicate electronically with defendant.³³

In rejecting defendant’s Sixth Amendment challenge, the Court stated that the “central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”³⁴ It concluded that “a defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where the denial of such confrontation is *necessary*

to further an important public policy and only where the reliability of the testimony is otherwise assured.”³⁵ Applying this standard, the Court held that the Confrontation Clause did not prohibit the one-way CCTV procedure if a proper case-specific finding of necessity has been made.³⁶

In *Craig*, the Court found it “significant” that the CCTV procedure at issue “preserv[ed] all of the other elements of the confrontation right,” namely: (1) testimony under oath; (2) the opportunity for contemporaneous cross-examination; and (3) the ability for the judge, jury and defendant to view the demeanor of the witness.³⁷ The presence of these elements “adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony.”³⁸ The Court also found that the state’s interest in protecting child abuse victims from the trauma that would be caused by testifying in the physical presence of the defendant is sufficiently important to outweigh a defendant’s right to physically face his or her accusers in court.³⁹

The Court cautioned, however, that a trial court must conduct an evidentiary hearing and make case-specific findings of necessity.⁴⁰ Where the state interest at issue concerns the protection of a child witness’s well-being, the Court explained that a trial court must find the witness would be traumatized by the presence of the defendant (as opposed to trauma caused generally from testifying in open court), and such trauma must be “more than *de minimis*.”⁴¹

Nothing in *Craig* limits its application to cases involving child-victims or one-way CCTV,⁴² and courts have extended the *Craig* rule to allow *adult* victims or witnesses of other crimes to testify by either one- or two-way video technology where the government has shown that the use of such technology was necessary to further an important state interest or public policy.⁴³ Those interests and policies that have been identified by courts as sufficient to warrant

the use of live video testimony have included national security, the just resolution of criminal cases, and the physical or mental welfare of ill or mentally challenged witnesses.^{44, 45}

B. With the Proper Showing, Allowing Sexual Assault Victims to Testify Via Live Video Technology is Consistent With Craig

1. Important Public Policies Support Providing Adult Sexual Assault Victims with this Option

At least two important public policies would be served if adult sexual assault victims were given the option of testifying at trial by means of live video technology: (1) encouraging effective prosecution of sexual assault crimes; and (2) protecting all victims from additional trauma.⁴⁶ With regard to encouraging prosecution, courts have long recognized the existence of a strong public policy in effective law enforcement and proper administration of justice.⁴⁷ Under circumstances where, for example, requiring the victim to testify in defendant’s physical presence would impair the victim’s ability to communicate or prevent the victim from testifying altogether, allowing the procedure furthers the state’s interest in the effective prosecution of the crime as well as the Confrontation Clause’s truth-seeking purpose.⁴⁸

With regard to protecting adult sexual assault victims from additional trauma, the rationale that the *Craig* court found persuasive for child-victims is equally applicable to adult victims. In reaching its conclusion that protecting child witnesses from additional trauma is a sufficiently important state interest, the Court relied on several factors: (1) the “growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court”; (2) a task force that reported the seriousness of the child abuse problem in the state; (3) the existence of state statutes aimed at protecting the welfare of child abuse victims; and (4) the First Amendment

line of cases in which the Court had previously found a compelling state interest in protecting child sexual abuse victims from “further trauma and embarrassment.”⁴⁹ Similar factors support the existence of an important public policy to protect adult sexual assault victims from the trauma that would be caused by testifying in defendants’ physical presence.

First, sexual assault is a significant social problem in the United States. A growing body of literature documents the health problems suffered by adult victims, including the heightened trauma that some experience as a result of testifying in the defendants’ physical presence.⁵⁰

Second, the increasing numbers of sexual assault victim-oriented programs and task forces that have been created in recent years demonstrate the widespread public support for minimizing the emotional and physical suffering of sexual assault victims while improving the effective prosecution of sexual assault crimes.⁵¹

Third, the enactment of rape shield laws by every state and the federal government reflects a national consensus to protect sexual assault victims who participate in the criminal justice system.⁵² In this context, the Supreme Court has found that a state’s rape shield statute serves the “legitimate state interests” in affording rape victims “heightened protection against surprise, harassment, and unnecessary invasions of privacy.”⁵³

Lastly, the growing crime victims’ rights movement in this country has brought dramatic changes to victims’ rights in the criminal justice system, and the public policy in favor of these

changes also supports a case-specific procedure that would advance victims’ access to justice without compromising “the essence of effective confrontation.”⁵⁴ All states and the federal government now have constitutional or statutory provisions that grant crime victims participatory rights,⁵⁵ and most provisions include the right to be treated with fairness, sensitivity, and/or with respect for the victim’s dignity.⁵⁶ The exercise of a victim’s participatory rights should not include an assumption of additional trauma when reasonable procedures exist to minimize such injury. Moreover, the existence of these rights

supports the use of a procedure that affords criminal defendants a right to confront their accusers but also protects the victims’ well-being. Many jurisdictions also grant crime victims a right to reasonable protection⁵⁷ that arguably includes protection from harm that would be caused by testifying in defendant’s physical presence.

2. Courts Would Be Required to Make a Case-Specific Finding of Necessity

To satisfy *Craig*’s necessity requirement, a trial court must conduct an evidentiary hearing and find that the trauma that the victim will suffer if she were to testify in the physical

presence of the defendant “is more than *de minimis*, i.e., more than ‘mere nervousness or excitement or some reluctance to testify.’”⁵⁸ What constitutes a minimum showing of trauma to meet this standard is unsettled.⁵⁹ Until courts rule otherwise, expert testimony that establishes the victim will suffer “‘serious emotional distress’ or other trauma that would render her unable to “‘reasonably communicate’” or “‘impair [her] ability to communicate” should be sufficient to satisfy the *Craig* test.⁶⁰

CAUTION! Evaluate whether having the victim’s primary treating counselor/professional or the victim’s advocate testify in support of your motion could cause a waiver of certain confidential or privileged information that the victim would want to remain protected. You may want to obtain the testimony of expert witnesses who are involved in the case only for the purpose of supporting this motion.

3. Courts Would Ensure the Procedure is Reliable

Two decades ago, the Supreme Court concluded that testimony via one-way CCTV technology sufficiently preserved all of the other elements of the confrontation right—oath, cross-examination, and observation of the witness’s demeanor—to ensure that the testimony was “both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony.”⁶¹ With today’s advancements in live video technology, there should be little doubt that these other traditional safeguards of live in-court testimony can continue to be preserved during live video testimony. Common elements of procedures used in video testimony cases that have survived a Sixth Amendment challenge include the following: (1) the witness, prosecutor, and defense counsel are situated in a remote location, while the defendant, the judge and the jury remain in the courtroom;⁶² (2) those present in the courtroom can see and hear the witness via a live video and audio feed transmitted to a courtroom monitor with speakers;⁶³ (3) the defendant has contemporaneous and continuous access to defense counsel via electronic means;⁶⁴ and (4) objections may be raised and ruled upon as if the witness were physically present in the courtroom.⁶⁵ Even in cases involving two-way video technology, some courts have interpreted *Craig* to require only that the camera or monitor is situated to ensure the defendant has a direct view of the witness; the witness need not be forced to have a direct view of the defendant.⁶⁶

Practice Pointers

If you are confronted with a situation in which an adult sexual assault victim’s mental or physical health could suffer if the victim were required to testify in the physical presence of the defendant, obtain expert assessment as soon as possible *before* trial so you will be prepared to file a motion for live video testimony before the pretrial motion cutoff date. Other issues to consider:

- If you are the victim’s attorney, don’t wait for the prosecutor to act on this issue. Talk to the victim, discuss the pros and cons of seeking courtroom accommodations, and allow the victim to make an informed decision as to whether to proceed with a motion seeking this procedure.
- To help make the strongest claim of “necessity” possible, support the motion with expert testimony.
- Given the absence of cases directly on point, you must thoroughly support your argument that there are strong public policies in favor of protecting the well-being of adult sexual assault victims.
- If you lose the pretrial motion, renew the motion during trial if the victim begins to experience serious emotional distress or other trauma as a direct result of testifying in defendant’s physical presence.

- Even if you did not file a pretrial motion for the procedure, file a motion during trial as soon as the victim begins to experience serious emotional distress or other trauma as a result of testifying in defendant's physical presence.⁶⁷
- Consider requesting additional safeguards such as: (1) having a dedicated video/camera technician who will operate the equipment and remain available throughout the testimony to troubleshoot if transmission problems occur; and (2) proposing a jury instruction that cautions: the mere fact the victim is testifying via video technology should not, in and of itself, cause the jury to draw any conclusions as to either the victim's credibility or the defendant's guilt.
- If bad case law is created in your state, work on a statutory amendment that would explicitly allow all sexual assault victims to make a case-specific showing of need for live video testimony at trial.

NCVLI is committed to securing proper accommodations for all victims to minimize the trauma that may be caused by a victim's participation in the criminal justice system.

For additional resources or ideas on how to best protect victims in your jurisdiction, please contact NCVLI.

¹ Although this paper addresses sexual assault victims, much of the analysis and argument advanced here should be applicable to cases involving other crime victims who would suffer serious emotional distress or other trauma as a result of testifying in the physical presence of the defendant.

² See, e.g., 18 U.S.C.A. § 3509 (allowing a child witness to testify via CCTV if there is "a substantial likelihood . . . that the child would suffer emotional trauma"); Fl. Stat. Ann. § 92.54 (allowing use of CCTV for witnesses under 16 if "there is a substantial likelihood that the child . . . will suffer at least moderate emotional or mental harm due to the presence of the defendant if the child . . . is required to testify in open court"); 725 Ill. Comp. Stat. Ann. 5/106B-5(a)(2) (allowing a child-victim to testify via CCTV if testifying in the courtroom will result in the child "suffering serious emotional distress such that the child . . . cannot reasonably communicate or that the child . . . will suffer severe emotional distress that is likely to cause the child . . . to suffer severe adverse effects"); Ind. Code Ann. § 35-37-4-8(e) (allowing a child-victim who is under 14 to testify via CCTV if "testifying in the physical presence of the defendant would cause the protected person to suffer serious emotional harm and the court finds that the protected person could not reasonably communicate in the physical presence of the defendant to the trier of fact" or "it is more likely than not that the protected person's testifying in the physical presence of the defendant creates a substantial likelihood of emotional or mental harm to the protect person"); see also Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 Hous. L. Rev. 1003, 1020-1024 (2003) (identifying, in Table 1, statutes that permit child-victims or witnesses to testify at trial by way of live video technology). It is troubling to see child testimony statutes make seemingly arbitrary age cut-offs so as to exclude from the statutory protection child sexual abuse victims who may be as young as 11 years old. See, e.g., Ga. Code Ann. § 17-8-55 (allowing a child-victim who is "ten years of age or younger" to testify via CCTV if "testimony by the child-victim in the courtroom will result in the child's

suffering serious emotional distress such that the child cannot reasonably communicate”). The fact that a victim may not fit precisely within the scope of an existing statutory protection should not foreclose the use of live video testimony at trial. *See, e.g., People v. Burton*, 556 N.W.2d 201, 204, 205-06 (Mich. App. 1996) (holding that the trial court erred in relying on a state statute that protects adult witnesses with a “developmental disability” because the victim was not developmentally disabled within the meaning of the statute, but affirming the use of one-way CCTV procedure on the alternative ground that it satisfied the standard set forth in *Maryland v. Craig*); *but see Arizona v. Superior Court (Harris)*, 909 P.2d 418, 420 (Ariz. App. 1995) (finding the trial court did not abuse its discretion in denying the state’s motion to allow a 17-year old mentally-impaired sex crime victim to testify via live video technology because the plain language of the statute that allows such accommodations applies only to minors who are chronologically under 15 years old). Much of the analysis discussed in this paper also applies to child-victims who are under 18 but above a state’s statutory cut-off age.

³ *See, e.g.,* Fl. Stat. Ann. § 92.54(1) (allowing a “person with mental retardation” to testify via CCTV if “there is a substantial likelihood that the . . . person . . . will suffer at least moderate emotional or mental harm due to the presence of the defendant if the . . . person . . . is required to testify in open court”); 725 Ill. Comp. Stat. Ann. 5/106B-5(a)(2) (allowing a “moderately, severely, or profoundly mentally retarded person or a person affected by a developmental disability” who is a victim of a sex crime to testify via CCTV if testifying in the courtroom will result in the person “suffering serious emotional distress such that the . . . person . . . cannot reasonably communicate or that the . . . person . . . will suffer severe emotional distress that is likely to cause the . . . person . . . to suffer severe adverse effects”); Iowa Code Ann. § 915.38(1) (allowing a “victim or witness with a mental illness, mental retardation, or other developmental disability . . . regardless of age” to testify via CCTV if such a procedure is “necessary” to protect the person “from trauma caused by testifying in the physical presence

of the defendant where it would impair the [person’s] ability to communicate”); *see also* Carol A. Chase, *supra* note 2, at 1020-24 (Table 1).

⁴ This paper is not positing that all sexual assault victims could make such a showing or that all victims who could make this showing should elect this procedure. Testifying from a distance, even where constitutionally permitted, might not be in the victim’s best interest. For example, jurors might view the need for the procedure with skepticism and might not find the victim to be as credible as one who is willing and able to testify in the courtroom. Viewing a victim through the lens of a video monitor might diminish the empathy that jurors might otherwise feel for the victim during his or her testimony. Victims and their counsel must carefully evaluate these potential drawbacks when considering whether to seek use of live video testimony. In addition, other less protective trial accommodations may be available depending upon the jurisdiction. For victims who either cannot establish that testifying in defendant’s physical presence would cause them to suffer serious emotional harm or cannot convince a court to allow the use of live video testimony, another accommodation that may be available is the presence of a support person in the courtroom (*see, e.g.,* Cal. Penal Code § 868.5). A more detailed discussion of such additional trial accommodations is beyond the scope of this paper.

⁵ Patricia Tjaden & Nancy Thoennes, U.S. Dep’t of Justice, Office of Justice Programs, Nat’l Inst. of Justice, *Extent, Nature, and Consequences of Rape Victimization: Findings From the National Violence Against Women Survey* 1 (Jan. 2006), available at <http://www.ncjrs.gov/pdffiles1/nij/210346.pdf>; accord *Violence Against Women: The Increase Of Rape In America 1990: Hearing before the S. Judiciary Comm.*, 102d Cong. 1 (1991) (documenting “an epidemic of rape” in this country).

⁶ Rape is one of many types of sexual assault. *See* U.S. Dep’t of Justice, Office of Justice Programs, Nat’l Inst. of Justice, *Rape and Sexual Violence*, <http://www.nij.gov/nij/topics/crime/rape-sexual-violence/welcome.htm> (last visited June 8, 2011).

⁷ The statistical data on the number of sexual assault crimes varies depending on the methodology of the study, the way the crimes are defined, the time period studied, and the population studied. Compare Dean Kilpatrick and Jenna McCauley, Nat'l Online Resource Ctr. on Violence Against Women, *Understanding National Rape Statistics, passim* (Sept. 2009), available at http://new.vawnet.org/Assoc_Files_VAWnet/AR_RapeStatistics.pdf. Compare Tjaden & Thoennes, *supra* note 5, at 1 (summarizing a 1995-96 study that found over 300,000 women were raped the previous year), and *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing before the S. Comm. on the Judiciary Subcomm. on Crime and Drugs*, 6 (Sept. 14, 2010), available at <http://judiciary.senate.gov/pdf/10-09-14KilpatrickTestimony.pdf> (statement of Dean G. Kilpatrick) (explaining that data from a 2005 study indicates an “estimated . . . over 800,000 adult women in the U.S. were forcibly raped in the [previous] year”), with Jennifer L. Truman and Michael R. Rand, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *National Crime Victimization Survey, Criminal Victimization 2009* 1, 11 (Oct. 2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv09.pdf> (surveying “rape/sexual assault” victims ages 12 and over, describing over 200,000 victims in 2008 and over 125,000 victims in 2009, and noting in its Methodology section that “care should be taken care should be taken in interpreting” the significant change in the 2009 rape/sexual assault rate “because the estimates of rape/sexual assault are based on a small number of cases reported to the survey” and “small absolute changes and fluctuations in the rates of victimization can result in large year-to-year percent change estimates”).

⁸ See, e.g., *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases*, *supra* note 7, at 11 (observing that “[m]ost rape cases (over 80%) are still not reported to police, indicating that this remains a chronic problem that we must address”); Tjaden & Thoennes, *supra* note 5, at 33 (finding “only 19.1 percent of the women and 12.9 percent of the men who were raped since their 18th

birthday said their rape was reported to the police”).

⁹ Tjaden & Thoennes, *supra* note 5, at 33.

¹⁰ *Id.*

¹¹ See, e.g., Melissa A. Polusny & Paul A. Arbisi, *Assessment of Psychological Distress and Disability After Sexual Assault in Adults*, in *Psychological Knowledge in Court* 97, 98 (Gerald Young et al. eds., 2006).

¹² See Sarah E. Ullman and Henrietta H. Filipas, *Predictors of PTSD Symptom Severity and Social Reactions in Sexual Assault Victims*, 14 J. of Traumatic Stress, 369, 369-70 (2011); see also Polusny & Arbisi, *supra* note 11 at 98 (observing that one study shows “[s]exual assault is a particularly potent predictor of PTSD” while another indicates adult female rape victims have “[l]ifetime prevalence rates of PTSD . . . [that] range from approximately 32% to 80%”); Erica Sharkansky, *Sexual Trauma: Information for Women's Medical Providers*, U.S. Dep't of Veteran Affairs, Nat'l Ctr. for PTSD, <http://www.ptsd.va.gov/professional/pages/ptsd-womens-providers.asp> (last visited June 16, 2011).

¹³ See, e.g., Polusny & Arbisi, *supra* note 11 at 98-99.

¹⁴ *Id.*; Sharkansky, *supra* note 12.

¹⁵ See, e.g., Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. of Traumatic Stress 182, 183-184 (2010); see also Mary P. Koss, *Blame, Shame, and Community: Justice Responses to Violence Against Women*, *American Psychologist* 3, 6 (Nov. 2000) (observing that “[t]estifying is one of four significant predictors of [PTSD] symptoms among adult survivors of child rape”).

¹⁶ Jack A. Panella, *Pennsylvania Sexual Violence Benchbook for Magisterial District Court Judges* 31 (Pa. Coal. Against Rape, 1st ed., 2011).

¹⁷ Amanda Konradi, “*I Don't Have to be Afraid of You*”: *Rape Survivors' Emotion Management in*

Court, 22 *Symbolic Interaction* 45, 52 (1999).

¹⁸ *Id.*

¹⁹ See, e.g., *Maryland v. Craig*, 497 U.S. 836, 853, 857 (1990) (concluding that “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” and holding the Confrontation Clause does not prohibit use of one-way CCTV at trial where a case-specific finding has been made that such procedure is necessary to protect the child witness from trauma caused by testifying in the physical presence of the defendant); *Hicks-Bey v. United States*, 649 A.2d 569, 573-75 (D.C. 1994) (concluding that the trial court has inherent authority to allow the child witness to testify via CCTV in the absence of an authorizing statute, and finding the procedure used in this case satisfied the *Craig* standard); *People v. Van Brocklin*, 687 N.E.2d 1119, 1127 (Ill. App. Ct. 1997) (holding the Illinois Child Shield Act “comports with those principles enunciated by the *Craig* Court and thereby satisfies the confrontation clause of the sixth amendment to the United States Constitution”); see also 18 U.S.C.A. § 3509 (allowing a child witness to testify via CCTV under certain circumstances); Fl. Stat. Ann. § 92.54 (same); 725 Ill. Comp. Stat. Ann. 5/106B-5(a)(2) (same); Ind. Code Ann. § 35-37-4-8(e) (same).

²⁰ See, e.g., 725 Ill. Comp. Stat. Ann. 5/106B-5(a)(2) (protecting adults who are “moderately, severely, or profoundly mentally retarded” or “affected by a developmental disability”); Iowa Code Ann. § 915.38(1) (protecting any “victim or witness with a mental illness, mental retardation, or other developmental disability . . . regardless of age”).

²¹ One exception is Hawaii, which has a broadly worded statute that should allow any adult victim to testify at trial via two-way CCTV. See Haw. Rev. Stat. § 801D-7 (providing that “[v]ictims and witnesses shall have the right to testify at trial by televised two-way closed circuit video to be viewed by the court, the accused, and the trier of fact”). No reported cases have addressed this statute.

²² The few reported cases that have referenced this subject do not resolve this issue. See, e.g., *People v. Murphy*, 132 Cal. Rptr.2d 688, 693-94 (Cal. Ct. App. 2003) (noting that “in an appropriate case, the court might allow a testifying adult victim, who would otherwise be traumatized, to use a one-way screen to avoid seeing a defendant without violating the right of confrontation,” but holding that use of one-way glass during the adult sexual assault victim’s testimony violated defendant’s confrontation right in this case because the trial court’s ruling was expressly not predicated on an interest in protecting adult sexual assault victims but rather “on the state’s interest in ascertaining the truth” and the trial court had failed to conduct an evidentiary hearing “to determine whether, and to what degree, the testifying victim’s apparent anxiety was due to the defendant’s presence” as required by *Maryland v. Craig*). Cf. *People v. Green*, No. C057064, 2009 WL 97814, at *6 n.8 (Cal. Ct. App. Jan. 15, 2009) (noting, in a case concerning use of a support person at trial, that “[t]here is no agreement whether the state has a compelling interest in protecting an adult victim of sexual assault while testifying”). One case in which the court recognized an important state interest in protecting an adult sexual assault victim involved a victim who was mentally and psychologically impaired. See *Burton*, 556 N.W.2d at 206 (concluding that “the physical and psychological well-being of the victim may be [a] sufficiently important” state interest to allow one-way CCTV where the witness was “mentally and psychologically challenged” and expert testimony indicated that forcing her to continue to testify in defendant’s presence would risk the complete loss of her testimony and cause severe damage to her mental and emotional health).

²³ *People v. Luna*, 250 Cal. Rptr. 878, 890 (Cal. Ct. App. 1988), *disapproved of on other grounds by People v. Jones*, 792 P.2d 643, 659 (Cal. 1990).

²⁴ U.S. Const. amend. VI. Most state constitutions have a similar confrontation clause. See, e.g., Ala. Const. art. I, § 6 (providing that “in all criminal prosecutions, the accused has a right . . . to be confronted by the witnesses against him”); Cal. Const. art. I, § 15 (providing that “[t]he defendant in a criminal cause has the right . . . to be confronted with the witnesses against the defendant”); Fl.

Const. art. 1 § 16 (providing that “[i]n all criminal prosecutions the accused . . . shall have the right . . . to confront at trial adverse witnesses”). A number of state constitutions have a confrontation clause that explicitly mentions the phrase “face to face.” See, e.g., Ind. Const. art. 1, § 13(a) (providing that “[i]n all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face”); Kan. Const. Bill of Rts. § 10 (providing that “[i]n all prosecutions, the accused shall be allowed . . . to meet the witness face to face”).

²⁵ *Melendez-Diaz v. Massachusetts*, --- U.S. ---, 129 S.Ct. 2527, 2531 (2009).

²⁶ 497 U.S. at 850.

²⁷ *Id.* at 849 (quoting *Mattox v. United States*, 174 U.S. 47, 243 (1895)). Where the state constitution includes the phrase “face to face” in its confrontation clause, a few state courts have concluded that criminal defendants have an absolute right to in-person face-to-face confrontation *under state law* and that such right guarantees defendants the right to meet accusers in the same room without the use of a video monitor. See, e.g., *People v. Fitzpatrick*, 633 N.E.2d 685, 688-89 (Ill. 1994) (concluding the state Child Shield Act violates Illinois’ state confrontation clause because a child’s testimony via CCTV fails to provide defendant with the required “face to face” confrontation), *called into doubt by constitutional amendment as stated in People v. Dean*, 677 N.E.2d 947, 950-53 (Ill. 1997) (observing that that post-*Fitzpatrick*, a constitutional amendment replaced the language from the right “to meet the witnesses face to face” with the right “to be confronted with the witnesses against him or her” and the Child Shield Act was re-enacted); *Commonwealth v. Ludwig*, 594 A.2d 281, 283-84 (Pa. 1991) (concluding the child’s testimony via CCTV violated the Pennsylvania constitution’s unambiguous right to “face to face” confrontation), *called into doubt by constitutional amendment as noted in Commonwealth v. Atkinson*, 987 A.2d 743, 745 n.2 (Pa. Super. Ct. 2009), *appeal denied*, 8 A.3d 340 (Pa. 2010) (noting that post-*Ludwig*, the Pennsylvania constitution was amended to remove the “face to face” language); *but see Brady v. State*, 575 N.E.2d 981, 988-89 (Ind. 1991) (concluding that allowing a child witness to give

videotaped testimony via one-way CCTV satisfies *Craig* but violates defendant’s state constitutional right to meet the witness “face to face,” but observing that testimony via *two-way* CCTV—where the witness would also be able to see the accused and “no person or body [would be] interposed between the witness and the accused”—would satisfy the “face-to-face meeting as contemplated by the [Indiana] Constitution”); *State v. Foster*, 957 P.2d 712, 721, 725 (Wash. 1998) (concluding that, “[f]or purposes of determining whether [the state child testimony statute] comports with the confrontation clause, . . . Defendant’s state right to confrontation and his Sixth Amendment right to confrontation . . . [is] identical,” even though Washington’s confrontation clause includes the phrase “face to face”); *State v. Blanchette*, 134 P.3d 19, 30 (Kan. App. 2006) (observing that the Kansas Supreme Court had previously upheld the constitutionality of the state statute authorizing one-way CCTV testimony by child witnesses “despite the ‘face to face’ language contained in . . . the Kansas Constitution”).

²⁸ Except for the Second Circuit Court of Appeals, every federal circuit that has addressed this issue has concluded that *Craig* supplies the applicable standard. See, e.g., *United States v. Yates*, 438 F.3d 1307, 1313 (11th Cir. 2006) (noting that the Sixth, Eighth, Ninth, and Tenth Circuits agree with the Eleventh Circuit, which applies the *Craig* test to determine the admissibility of two-way video testimony at trial); *Horn v. Quarterman*, 508 F.3d 306, 319 (5th Cir. 2007) (concluding, on a habeas petition, that it was “not unreasonable” for the state trial and appellate courts to extend the *Craig* analysis to protect the welfare of an ill adult witness). Cf. *United States v. Abu Ali*, 528 F.3d 210, 240-42 (4th Cir. 2008) (applying *Craig* in the context of a Rule 15 deposition testimony taken for the purpose of using at trial). A majority of state courts that have addressed this issue have reached a similar conclusion. See, e.g., *People v. Buie*, 775 N.W.2d 817, 825 (Mich. App. 2009); *People v. Wrotten*, 923 N.E.2d 1099, 1103 (N.Y. 2009); *Bush v. State*, 193 P.3d 203, 215-16 (Wyo. 2008); *Harrell v. Florida*, 709 So.2d 1364, 1368-69 (Fl. 1998).

²⁹ In *Gigante*, 166 F.3d 75 (2d Cir. 1999), the

court upheld the use of live two-way CCTV in a racketeering case after applying a less stringent “exceptional circumstances” test instead of the “stricter standard” articulated in *Craig*. The court distinguished *Craig* on the ground that two-way CCTV, unlike the one-way CCTV in *Craig*, served as the functional equivalent of in-person face-to-face confrontation because the witness can also view and hear defendant and the others in the courtroom. *Id.* at 81-82. The court concluded the trial court did not abuse its discretion because the facts here – a material witness’s ill health and secret location (under federal witness protection program) coupled with defendant’s own ill health and inability to participate in a distant deposition in advance of trial – met the exceptional circumstances requirement. *Id.* Few courts have followed *Gigante*. See, e.g., *Stevens v. State*, 234 S.W.3d 748, 78 (Tex. App. 2007) (following *Gigante*’s “exceptional circumstance” test).

³⁰ Cf. *Gigante*, 166 F.3d at 81.

³¹ 497 U.S. at 842.

³² *Id.* at 842-43.

³³ *Id.* at 841-42.

³⁴ *Id.* at 845.

³⁵ *Id.* at 850 (emphasis added).

³⁶ *Id.* at 855.

³⁷ *Id.* at 850.

³⁸ *Id.* at 851.

³⁹ *Id.* at 853.

⁴⁰ *Id.* at 855.

⁴¹ *Id.* at 856.

⁴² Cf. 207 F.R.D. 89, 93 (2002) (Justice Scalia’s statement in support of the Supreme Court’s decision not to recommend the adoption of proposed 2002 amendment to Federal Rules of Criminal Procedure

26(b), which would have essentially codified the *Gigante* “exceptional circumstances” standard for live two-way video testimony for any witness who is unavailable within the meaning of the rules) (stating that the proposed amendment “is unquestionably contrary to the rule enunciated in *Craig*” because it “does not limit the use of testimony via video transmission to instances where there has been a ‘case-specific finding’ that it is ‘necessary to further an important public policy,’” thereby suggesting that the *Craig* standard should apply to any case involving use of live video testimony at trial).

⁴³ See, e.g., *Burton*, 556 N.W.2d at 205-06 (finding use of one-way CCTV necessary to further an important interest in “the physical and psychological well-being” of the mentally and psychologically impaired sexual assault victim and in “the proper administration of justice” because “defendant would [have lost] his ability to recross-examine the victim” if she could not continue and the state had to read her preliminary examination testimony to the jury); *Wrotten*, 923 N.E.2d at 1103 (stating that “the public policy of justly resolving criminal cases while at the same time protecting the well-being of a[n] [ill] witness can require live two-way video testimony” and noting that “[n]owhere does *Craig* suggest that it is limited to child witnesses or that a ‘public policy’ basis for finding necessity must be codified”); *Horn*, 508 F.3d at 320 (observing that “*Craig*’s references to ‘an important public policy’ and ‘an important state interest’ are reasonably read to suggest a general rule not limited to protecting child-victims of sexual offenses from trauma” for “it is possible to view *Craig* as allowing a necessity-based exception for face-to-face, in-courtroom confrontation where the witness’s inability to testify invokes the state’s interest in protecting the witness . . . from physical danger or suffering”); *Yates*, 438 F.3d at 1313 (finding “*Craig* supplies the proper test for admissibility of two-way video conference testimony” in an Internet fraud case with adult witnesses).

⁴⁴ See *id.* Cf. *Abu Ali*, 528 F.3d at 240 (concluding, in a terrorism case, that use of live two-way videoconference to allow defendant to participate in a Rule 15 deposition of witnesses in Saudi Arabia taken

to preserve the witnesses' testimony for trial was necessary to further the compelling public interest in national security).

⁴⁵ The landmark case of *Crawford v. Washington*, 541 U.S. 36 (2004), should not abrogate *Craig*. *Crawford* involved the admissibility of a tape-recorded statement in which the defendant's wife, who did not testify at trial because of the state marital privilege, had described the stabbing to the police. The Court held that out-of-court "testimonial" statements by a witness, such as the one made by defendant's wife, are barred under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. 541 U.S. at 68. In reaching this holding, the Court overruled the *Ohio v. Roberts*' "reliability" test for admissibility of hearsay, whereby an unavailable witness's statement against a criminal defendant is admissible if the statement "bears adequate indicia of reliability" by either falling "within a firmly rooted hearsay exception" or bearing "particularized guarantees of trustworthiness." *Id.* at 40 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)) (internal quotations omitted). The Court observed that "the *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability" and this framework results in the admission of "core testimonial statements that the Confrontation Clause plainly meant to exclude." *Id.* at 62, 63. Post-*Crawford*, courts have rejected the argument that the *Craig* holding is in doubt due to *Craig*'s partial reliance on *Ohio v. Roberts*. See, e.g., *United States v. Kappell*, 418 F.3d 550, 555 (6th Cir. 2005) (rejecting defendant's argument that the child witnesses' testimony via live CCTV violated his confrontation right under *Crawford* and distinguishing *Crawford* on the ground that "the present case, in sharp contrast [to *Crawford*], [involves] two witnesses (the children) [who] did testify and were cross-examined"); *Yates*, 438 F.3d at 1313-14 & n.4 (concluding *Craig* is the applicable test for determining admissibility of trial testimony via two-way video technology and rejecting the dissent's argument that *Crawford* dictates a different standard: "No doubt the Government pass[ed] on this argument because it recognize[d] that *Crawford* applies only to testimonial statements made prior to

trial, and the live two-way video testimony at issue in this case was presented at trial"); *Blanchette*, 134 P.3d at 28-29 (concluding *Crawford* does not apply to a case involving live CCTV testimony by a child because "[t]he holding in *Crawford* is limited to testimonial hearsay where the defendant is denied an opportunity to cross-examine the witness").

⁴⁶ A third important state interest or public policy may be asserted by a state that counts heavily upon tourism for its economy: the interest in prosecuting crimes where a significant number of victims or witnesses are out-of-state or foreign visitors. See 1997 Haw. Sess. Laws, Act 320, H.B. 112 (enacting Hawaii Revised Statute section 801D-7 and making a number of legislative findings to support granting all victims and witnesses the right to testify at trial via two-way video technology, including the following: "The legislature finds that there is a compelling state interest in protecting our citizens by ensuring that the State has the ability to prosecute those crimes wherein the witness is unable to attend court[;]. . . [a]s a popular tourist destination, large numbers of visitors, including a significant number of foreign visitors visit Hawaii each year[;]. . . [t]he criminals who victimize visitors do so in part because they know that crimes against visitors are less likely to result in a trial [as] [m]any visitors are not willing or able to take the time and effort to return for a trial[;]. . . the inability to prosecute crimes against visitors endangers the public safety because criminal offenders do not restrict their activities to visitors alone[;]. . . [i]n addition, the quality of life for Hawaii's residents is diminished when crimes against visitors negatively affect tourism, because tourism is a significant economic factor to the State's economy and job market").

⁴⁷ See *Ohio v. Roberts*, 448 U.S. 56, 64 (1980), overruled on other grounds by *Crawford v. Washington*, 541 U.S. 36 (2004) (stating "every jurisdiction has a strong interest in effective law enforcement"); *Martinez v. Court of Appeal*, 528 U.S. 152, 163 (2000) (finding "the overriding state interest in the fair and efficient administration of justice" is significant enough to "outweigh an invasion of the appellant's interest in self-representation").

⁴⁸ See *Craig*, 497 U.S. at 857 (observing that

“where face-to-face confrontation causes significant emotional distress in a . . . witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause’s truth-seeking goal”) (emphasis in original).

⁴⁹ *Id.* at 852-55.

⁵⁰ See *supra* text accompanying notes 5-18.

⁵¹ See, e.g., Sexual Assault Services Program, U.S. Dep’t of Justice, Office of Violence Against Women, <http://www.ovw.usdoj.gov/sasp.htm> (last visited Jun. 9, 2011) (recognizing that “[t]here is a pressing need to address the national prevalence of sexual assault . . . and the unique aspects of sexual assault trauma from which victims must heal” and stating that this federally funded program provides “advocacy, accompaniment, support services, and related assistance” for all sexual assault victims and “supports efforts to help survivors heal from sexual assault trauma”); Oregon Attorney General’s Sexual Assault Task Force, <http://oregonsatf.org/about-2/> (last visited Jun. 9, 2011) (stating its mission is to “support a collaborative, victim-centered approach to the prevention of and response to adolescent and adult sexual violence” and it believes “[a]ll victims of sexual violence deserve equal access to justice” and “a response that is respectful, supportive and victim-driven”); see also Joye Frost, Op-Ed., *Innovative Partnerships Improve Services for Crime Victims*, PR Newswire, May 23, 2011, available at http://news.yahoo.com/s/usnw/20110523/pl_usnw/DC07374_1 (observing that “federal funding and resources, coupled with local, tribal and state innovation, are reshaping our Nation’s response to victims of sexual assault” and noting that the creation of rape crisis centers, trained Sexual Assault Nurse Examiners, and multi-disciplinary Sexual Assault Response Teams across the country all “make victims’ needs a priority, . . . enhance the quality of victim health care, improve the quality of forensic evidence, and ultimately lead to increased prosecution rates”).

⁵² See generally Marah deMeule, Note, *Privacy Protections for the Rape Complainant: Half a Fig Leaf*, 80 N.D. L. Rev. 145, 148 (2004).

⁵³ *Michigan v. Lucas*, 500 U.S. 145, 149-50 (1991) (holding preclusion of evidence may be a sanction for the defendant’s failure to meet the state rape shield statute’s “notice-and-hearing” requirement); accord *State v. Clarke*, 343 N.W.2d 158, 161 (Iowa 1984) (finding the “[i]mportant policy reasons [that] underlie rape shield laws” include protecting victims’ privacy and encouraging the reporting of sex crimes); *Harris v. State*, 362 S.E.2d 211, 212-13 (Ga. 1987) (finding Georgia’s rape shield statute serves the “important” or “compelling” state interests in furthering “the truth-finding process by preventing the jury from becoming inflamed or impassioned and deciding the case on irrelevant and prejudicial evidence” and “encourage[ing] the victims to bring the perpetrators of the crimes to justice”).

⁵⁴ *Craig*, 497 U.S. at 857.

⁵⁵ See generally Jon Kyl, Steven J. Twist & Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act*, 9 Lewis & Clark L. Rev. 581, 587-88, 591-614 (2005) (observing that, as of 2005, 33 states have amended their constitutions to provide for victims’ rights and every state has enacted some statutory rights for victims; and discussing the participatory and substantive rights that are guaranteed by the federal Crime Victims Rights Act of 2004).

⁵⁶ See, e.g., Alaska Const. art. I, § 24 (granting victims “the right to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile justice process”); Ariz. Const. art. II, § 2.1(A)(1) (granting victims the “right . . . [t]o be treated with fairness, respect, and dignity . . . throughout the criminal justice process”); Cal. Const. art. I, § 28(b)(1) (granting victims the “right . . . [t]o be treated with fairness and respect for his or her privacy and dignity . . . throughout the criminal or juvenile justice process”); Conn. Const. art. I, § 8(b)(1) (granting victims “the right to be treated with fairness and respect throughout the criminal justice process”); Idaho Const. art. I, § 22(1) (granting victims “the right . . . to be treated with fairness, respect, dignity and privacy throughout the criminal justice process”); Ill. Const. art. I, § 8.1(a)(1)

(granting victims “[t]he right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process”); Ind. Const. art. I, § 13(b) (granting victims “the right to be treated with fairness, dignity, and respect throughout the criminal justice process”); La. Const. art. I, § 25 (providing that victims “shall be treated with fairness, dignity, and respect”); Md. Const. Decl. of Rights, art. 47(a) (providing that victims “shall be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process”); Mich. Const. art. I, § 24(1) (granting victims “[t]he right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process”); Miss. Const. art. III, § 26A(1) (granting victims “the right to be treated with fairness, dignity and respect throughout the criminal justice process”); N.J. Const. art. I, ¶ 22 (providing that victims “shall be treated with fairness, compassion and respect by the criminal justice system”); N.M. Const. art. II, § 24(A)(1) (granting victims “the right to be treated with fairness and respect for the victim[s]’ dignity and privacy throughout the criminal justice process”); Ohio Const. art. I, § 10a (providing that victims “shall be accorded fairness, dignity, and respect in the criminal justice process”); Okla. Const. art. II, § 34 (stating that “[t]o preserve and protect the rights of victims to justice and due process, and ensure that victims are treated with fairness, respect and dignity . . . throughout the criminal justice process, any victim . . . has the right”); Or. Const. art. I, § 42(1) (stating that “to accord crime victims due dignity and respect . . . the following rights are hereby granted”); R.I. Const. art. I, § 23 (granting victims the “right[] be treated by agents of the state with dignity, respect and sensitivity during all phases of the criminal justice process”); S.C. Const. art. I, § 24(A)(1) (granting victims “the right to . . . be treated with fairness, respect, and dignity . . . throughout the criminal and juvenile justice process”); Tex. Const. art. I, § 30(a)(1) (granting victims “the right to be treated with fairness and with respect for the victim[s]’ dignity and privacy throughout the criminal justice process”); Utah Const. art. I, § 28(1)(a) (granting victims the “right[] . . . to be treated with fairness, respect, and dignity . . . throughout the criminal justice process”); Va. Const. art. I, § 8-A (providing that victims “shall be accorded fairness, dignity and respect by the officers, employees and agents of the Commonwealth . . . and officers of the courts”); Wis. Const. art. I, § 9m (providing that “[t]his state shall treat crime victims . . . with fairness, dignity and respect

for their privacy”). *Cf. People v. Cogswell*, 227 P.3d 409, 414-15 (Cal. 2010) (observing that the “California Legislature in 1984 amended Code of Civil Procedure section 1219. . . [to] prohibit[] a trial court from *jailing for contempt* a sexual assault victim who refuses to testify against the attacker . . . to protect victims of sexual assault from further victimization . . . [and] also to begin to create a supportive environment in which more victims might come forward to report and prosecute [perpetrators of] sexual assault”) (emphasis in original).

⁵⁷ *See, e.g.,* Ariz. Const. art. II, § 2.1(A)(1) (granting victims the “right . . . to be free from intimidation, harassment, or abuse, throughout the criminal justice process”); Mo. Const. art. I, § 32(1)(6) (granting victims the “right to reasonable protection from the defendant or any person acting on behalf of the defendant”); S.C. Const. art. I, § 24 (A)(1) (granting victims “the right to . . . be free from intimidation, harassment, or abuse, throughout the criminal and juvenile justice process”) and (A)(6) (granting victims “the right to . . . be reasonably protected from the accused or persons acting on his behalf throughout the criminal justice process”); Tenn. Const. art. I, § 35(2) (granting victims “the . . . right to be free from intimidation, harassment and abuse”).

⁵⁸ *Craig*, 497 U.S. at 856.

⁵⁹ *Id.* (declining to reach this question).

⁶⁰ *Id.* *Craig* does not require a trial court to personally observe the witness’s behavior on the witness stand in the physical presence of the defendant; nor does it require a trial court to consider any other alternatives to the use of CCTV to minimize trauma. *See id.* (rejecting the Maryland Court of Appeals’ suggestion that those steps were constitutionally required) (*dictum*).

⁶¹ *Id.* at 851.

⁶² *See, e.g., id.* at 841; *Blanchette*, 134 P.3d at 26. However, in cases where the witness was deemed too ill to travel, the prosecutor and defense attorney generally remained inside the courtroom. *See, e.g., Wrotten*, 923 N.E.2d at 1101 (noting that the witness testified live from a California courtroom while the prosecutor and defense counsel remained in the New York courtroom); *Bush*, 193 P.3d at 216 (noting that the witness testified live from a Colorado district attorney’s office while the prosecutor and

defense counsel remained in the Wyoming courtroom).

⁶³ See, e.g., *Craig*, 497 U.S. at 841, 851; *Blanchette*, 134 P.3d at 26.

⁶⁴ See, e.g., *Craig*, 497 U.S. at 841 (noting the “defendant remains in electronic communication with defense counsel” without identifying form of electronics used); *U.S. v. Etimani*, 328 F.3d 493, 497 (9th Cir. 2003) (noting that defense counsel and defendant each wore a headset with a microphone); *Ruetter v. State*, 886 P.2d 1298 (Alaska Ct. App. 1994) (noting that the defendant “had continuous access to his attorney by a telephone” and “[t]he trial court indicated that it would declare a recess any time [defendant] wished to confer with his attorney”).

⁶⁵ See, e.g., *Craig*, 497 U.S. at 841; *Blanchette*, 124 P.3d at 26 (noting the trial court “was able to contemporaneously rule on any objections”).

⁶⁶ See, e.g., *Etimani*, 328 F.3d at 497-98, 499-501 (finding that “if *Craig* upheld the constitutionality of *one-way* television testimony in an appropriate case, then *two-way* television testimony, a procedure that even more closely simulates in-court testimony, also passes constitutional muster” and rejecting defendant’s argument that the placement of the monitor in the witness room—located slightly behind and to the left of the witness—violated 18 U.S.C. § 3509’s requirement that the CCTV “transmission shall relay into the room in which the child is testifying the defendant’s image” on the grounds that (1) the monitor was called to the witness’s attention, (2) the witness could easily turn and view the 27 inch monitor, so “[i]t was there for her to look at, or to avoid looking at, throughout her entire testimony – just as a witness in a courtroom can choose to look at a defendant in the eye or studiously avoid doing so,” and (3) the jury could observe whether the witness was looking at the defendant) (emphasis in original); *Roadcap v. Com.*, 653 S.E.2d 620, 625 (Va. Ct. App. 2007) (rejecting defendant’s argument that his federal and state confrontation rights were violated by the trial court’s refusal to require the courtroom camera be trained on him during the child witness’s testimony, and concluding that since *Craig* allowed one-way CCTV where the witness could not see anyone in the courtroom, “[i]t necessarily follows that the two-way closed-circuit method used in [this] case, despite the witnesses’ inability to see [the defendant], does not violate his confrontation rights”).

⁶⁷ See *Burton*, 556 N.W.2d at 204 (involving a prosecution motion for testimony via CCTV *after* the mentally and emotionally challenged sexual assault victim started testifying and began experiencing communication difficulties and the granting of the motion after an evidentiary hearing conducted outside the jury’s presence).

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