

IS WITNESS CREDIBILITY ON VIRTUAL COURTROOM PROCEDURES IMPAIRED OR ENHANCED FOR ADULTS OR CHILDREN?

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I. INTRODUCTION

Consider the following two scenarios. First, imagine that a prosecutor's witness in a criminal case is a perfectly healthy adult and lives in the same city where the trial will be held. The prosecutor wants the witness to testify on Zoom for the sake of two public interests: convenience and efficiency. The defense attorney, recognizing that there is a traditional preference for face-to-face confrontation of witnesses,¹ argues to the trial judge that "convenience and efficiency" are no excuses to avoid in-person testimony and therefore the Zoom testimony violates the Confrontation Clause of the Sixth Amendment. Should the witness be allowed to testify on Zoom? What if the witness was seriously ill or lived out-of-state? Should the witness be allowed to testify on Zoom if that were the case?

Now, imagine a child who is scheduled to testify against her alleged sexual abuser in a criminal sex-abuse case. The child is scared of being in the same room as her alleged sexual abuser, so the prosecutor requests that the child be able to testify outside the courtroom. The defense attorney, recognizing that the defendant has confrontation rights, argues to the trial judge that the child's fear of the defendant does not outweigh the defendant's right to in-person confrontation. Should the child be able to testify in another room in the courthouse through closed-circuit television or outside the courthouse entirely on Zoom? What if the child was scared of the idea of testifying during trial? Should she be allowed to use her pre-recorded deposition testimony in place of live testimony?

These two scenarios illustrate the use of Virtual Courtroom Procedures ("VCPs") and the debate over what circumstances, if any, should allow for their use. This debate has been going for decades, since the first uses of VCPs by courts.² One of the earliest known uses of VCPs was by an Illinois state court that conducted a bail hearing by videophone in 1972.³ Today, VCPs include phone calls, "two-way video conference technology," and "one-way closed-circuit telecommunication."⁴ VCPs have been applied in a variety of court proceedings, including arraignments, bail arguments, pretrial

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¹ *Maryland v. Craig*, 497 U.S. 836, 849 (1990).

² Jenia I. Turner, *Remote Criminal Justice*, 53 TEX. TECH. L. REV. 197, 201 (2021).

³ *Id.*

⁴ Akua F. Abu, *Remote Justice: Confronting the Use of Video Teleconference Testimony in Massachusetts Criminal Trials*, 34 HARV. J.L. & TECH. 307, 310 (2020).

proceedings, and post-trial proceedings.⁵ VCP platforms that courts use include Microsoft Teams, Webex, and Zoom. However, as a result of the COVID-19 pandemic, the use of VCPs is more prominent than ever.⁶

Due to health and safety concerns from the pandemic, many courts responded by suspending in-person court proceedings and turning to VCPs by encouraging or requiring their use.⁷ For example, the United States Supreme Court started conducting oral arguments by conference call.⁸ Florida's Supreme Court responded by suspending all court rules that limited the use of VCPs⁹ while Texas became the first state to conduct a civil bench and civil jury trial on Zoom.¹⁰ The frequency of VCP use by courts during the pandemic was unprecedented. Michigan alone conducted 50,000 hearings on Zoom, which took over 350,000 hours between April 2020 and June 2020.¹¹

The increase in the use of VCPs has brought new challenges to courts.¹² Given that VCPs involve the use of cameras, microphones, phones, and computers, many of these challenges have been related to technology. For example, VCPs can inhibit communication between attorneys and their clients, which makes it difficult for them to hear, observe, and understand proceedings.¹³ Further, VCPs can also hinder parties from "effectively confronting witnesses and presenting evidence" and prejudice a judge's perceptions of the parties and witnesses.¹⁴ However, the challenges that VCPs bring relate to more than technology; these challenges also relate to the Constitution.¹⁵

Due Process, which requires that "proceedings shall be fair . . . with reference to particular conditions or particular results,"¹⁶ is implicated by the use of VCPs because it is unclear whether the virtual courtroom "presence" by a courtroom participant can adequately substitute for a physical courtroom presence.¹⁷ Several constitutional rights are also implicated by the use of VCPs.¹⁸ These rights include the "right to be present at critical stages of the proceeding and to participate in one's defense, the right to effective representation, . . . the right to a public trial, and the right to a fair and impartial jury trial."¹⁹

Another right implicated by the use of VCPs is the right to confront witnesses.²⁰ This right can be found in the Confrontation Clause, which states that "in all criminal prosecutions, the accused shall enjoy the right . . . to be

⁵ *Id.* at 311.

⁶ Dubin Rsch. & Consulting, *COVID-19's Next Victim? The Rights of the Accused*, 44 CHAMPION 22, 24 (2020).

⁷ *Id.*

⁸ *Id.*

⁹ Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 NW. UNIV. L. REV. 1875, 1880 (2021).

¹⁰ Dubin Rsch. & Consulting, *supra* note 6, at 24.

¹¹ Bannon & Keith, *supra* note 9, at 1884.

¹² Turner, *supra* note 2, at 199.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 203.

¹⁶ *Snyder v. Massachusetts*, 291 U.S. 97, 116 (1934).

¹⁷ Turner, *supra* note 2, at 204.

¹⁸ *Id.* at 203.

¹⁹ *Id.*

²⁰ *Id.*

confronted with the witnesses against him.”²¹ Given that VCPs limit how one can interact with and observe a witness, compared to in-person courtroom proceedings, it would seem natural to conclude that the use of VCPs always impairs witness credibility and implicates the Confrontation Clause.²² Likewise, Justice Antonin Scalia seemed to disagree with a proposal to allow video testimony when a witness cannot appear in-person in exceptional circumstances: “Virtual confrontation might be sufficient to protect virtual rights; I doubt whether it is sufficient to protect real ones.”²³ However, VCPs may be constitutional under certain circumstances²⁴ and may enhance witness credibility in some aspects.²⁵

In *Maryland v. Craig*, the Supreme Court identified a limit on the right to confront witnesses and found a scenario where VCP use, such as one-way circuit television testimony by a child, can be constitutional.²⁶ The Court held that “in certain narrow circumstances, competing interests, if closely examined, may warrant dispensing with confrontation at trial.”²⁷ In *Craig*, the Court identified one such interest as “the State’s interest in the physical and psychological well-being of child abuse victims.”²⁸ Further, VCPs may also enhance witness credibility in some regards.²⁹ One way VCPs can enhance witness credibility is by allowing people to see a witness’s face more clearly.³⁰ One federal district court judge said that it is easier for judges to assess witness credibility over VCPs because “they can see the witness’s full faces rather than ‘someone’s left ear’ peering from the bench.”³¹

With disagreement on whether VCPs impair credibility to the extent to render them unconstitutional under the Confrontation Clause, this Note attempts to argue two points. First, VCPs impair witness credibility enough to render them unconstitutional for adults under the Confrontation Clause absent compelling interests. Second, VCPs impair witness credibility for children, but not to the extent necessary to render them unconstitutional under the Confrontation Clause for children whose well-being is in need of protection. Part I of this Note provides a discussion on the advantages and disadvantages of VCPs. Part II answers the question of whether *Craig* is still good law and provides the legal standard by which VCPs are evaluated. Part III discusses how VCPs affect the credibility of adult witnesses and the constitutionality of VCPs for adults. Part IV discusses how to evaluate the credibility of children and how VCPs affect the credibility of children. Part V discusses how VCPs impair the credibility of children and the constitutionality of VCPs for children. Part VI discusses the constitutionality of modern VCPs such as Zoom courtroom proceedings.

²¹ U.S. CONST. amend. VI.

²² Turner, *supra* note 2, at 199.

²³ Bannon & Keith, *supra* note 9, at 1903.

²⁴ *Maryland v. Craig*, 497 U.S. 836, 848 (1990).

²⁵ Bannon & Keith, *supra* note 9, at 1896.

²⁶ *Craig*, 497 U.S. at 848.

²⁷ *Id.*

²⁸ *Id.* at 853.

²⁹ Bannon & Keith, *supra* note 9, at 1896.

³⁰ *Id.*

³¹ *Id.*

II. ADVANTAGES AND DISADVANTAGES OF VIRTUAL COURTROOM PROCEDURES

A. ADVANTAGES

VCPs do have some advantages when compared to in-person courtroom proceedings. These advantages can be divided into three categories: accessibility-related, auditory, and visual. Accessibility-related advantages include saving court participants time and money on travel, allowing parties to hire attorneys anywhere in a state, and making it easier for the public to see what happens in court. Further accessibility-related advantages include allowing injured or ill participants to attend court.³²

Auditory advantages include allowing judges to mute unwanted speakers and allowing courtroom participants to adjust the speaking volume of other participants. Visual advantages include allowing parties to better see a witness's face, allowing participants to easily see exhibits and evidence, and allowing participants to decide which courtroom participants they want to focus on with their devices. For example, judges from Tennessee state courts say that the ability to share exhibits with everyone at once helps proceedings move faster and that the ability to see witnesses face-to-face instead of from the side gives judges a better perspective of witness demeanor.³³ However, the advantages of VCPs are outweighed by the disadvantages.

B. DISADVANTAGES

VCPs have many disadvantages when compared to in-person courtroom proceedings. The disadvantages can be divided into three categories: visual, auditory, and procedural. Visual disadvantages include the inability to see the full body language of a person, issues with video quality, and issues with video freezing. Visual disadvantages also include variability with regard to camera angles, lighting, and location. Such factors may affect the perception of a person.³⁴ For example, poor lighting, camera angles, and the setting from which a person appears on video may lead to negative perceptions of that person.³⁵ Another visual disadvantage includes the higher cognitive load required to follow events on video, which may make following virtual courtroom proceedings more difficult than following in-person courtroom proceedings.³⁶ Further, participants can easily turn off their video during a proceeding, which presents the risks of participants not paying attention to the proceeding or witnesses being coached while having their video off.

Auditory disadvantages involve voices being distorted through microphones, internet connection issues cutting off voices, and microphones picking up distracting background noises. Auditory disadvantages also involve variability in terms of how loud a speaker may sound to people given

³² Grace Monzel, *Zooming into the Courtroom*, UNIV. CIN. L. REV. (May 17, 2021), <https://uclawreview.org/2021/05/17/zooming-into-the-courtroom/> [<https://perma.cc/6DB2-HZZX>].

³³ *Judges Discuss Pros and Cons of Virtual Litigation*, TENN. STATE COURTS (Jan. 19, 2021), <https://www.tncourts.gov/news/2021/01/19/judges-discuss-pros-and-cons-virtual-litigation> [<https://perma.cc/7X8L-GPFG>].

³⁴ Turner, *supra* note 2, at 218.

³⁵ *Id.*

³⁶ *Id.* at 219.

different volume settings on devices, having unmuted people interrupt proceedings, and the risk of people muting the proceedings and not paying attention.

Procedural disadvantages include the fact that not everyone may have access to the necessary technology or know how to use the necessary technology. Procedural disadvantages also include issues with confidentiality and security.³⁷ An uninvited person can listen in on a court hearing that would otherwise be confidential in person by being in the same room as an invited participant or listen to an illegal recording of the hearing.³⁸ Worse, uninvited persons can even hack their way into a hearing and proceed to take control of the virtual courtroom procedure platform.³⁹ For example, a federal court hearing on Zoom was interrupted by an uninvited individual who proceeded to broadcast disruptive audio and images.⁴⁰ Procedural issues also involve the risks to trial integrity because attorneys may not be able to see whether witnesses are using notes, being coached, or testifying in an unsafe environment. In another instance, an assault suspect was caught attending a Zoom hearing in the same house as his victim.⁴¹ Additionally, compared with in-person proceedings where it would be obvious if a witness was reading off of notes, attorneys cannot see if a witness is receiving and reading private messages while testifying.

III. BY WHAT LEGAL STANDARD ARE VIRTUAL COURTROOM PROCEDURES EVALUATED?

A. TWO KEY CASES: MARYLAND V. CRAIG AND CRAWFORD V. WASHINGTON

In determining the appropriate legal standard by which to evaluate VCPs, an analysis of two Supreme Court cases is necessary: *Maryland v. Craig* and *Crawford v. Washington*.⁴² In 1990, the Supreme Court decided *Maryland v. Craig*.⁴³ *Craig* involved a Maryland law that allowed a child to testify via one-way closed-circuit television if a trial judge determined that “testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.”⁴⁴ Under the Maryland law, once the judge makes such a determination, the child is then examined and cross-examined in a separate room with the prosecutor and defense counsel while a video monitor

³⁷ Shalini Nangia, Julia A. Perkins & Erika L. Salerno, *The Pros and Cons of Zoom Court Hearings*, 10 NAT'L L. REV. (May 20, 2020), <https://www.natlawreview.com/article/pros-and-cons-zoom-court-hearings> [<https://perma.cc/FW7C-8VSY>].

³⁸ *Id.*

³⁹ Connor Perrett, *A Federal Court Hearing in Georgia Was Zoom-Bombed with Photos of the 9/11 Attacks, ISIS, and Porn*, INSIDER (Sep. 15, 2020), <https://www.insider.com/federal-hearing-zoom-bombed-photos-of-911-2020-9> [<https://perma.cc/78LQ-K2LP>].

⁴⁰ *Id.*

⁴¹ David K. Li, *Virtual Court Hearing Takes Turn After Prosecutor Spots Assault Suspect in Victim's Home*, NBC NEWS (Mar. 11, 2021), <https://www.nbcnews.com/news/us-news/virtual-court-hearing-takes-turn-after-prosecutor-spots-assault-suspect-n1260698> [<https://perma.cc/X8YS-63L9>].

⁴² *Maryland v. Craig*, 497 U.S. 836 (1990); *Crawford v. Washington*, 541 U.S. 36 (2004).

⁴³ *Craig*, 497 U.S. at 836.

⁴⁴ *Id.* at 841.

records.⁴⁵ Meanwhile, the judge, jury, and defendant watch the child's testimony from a video monitor in the courtroom.⁴⁶

Writing for the majority, Justice O'Connor notes that the Court has never held that the "Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial."⁴⁷ Justice O'Connor then notes that "a literal reading of the Confrontation Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme"⁴⁸ and accordingly holds that "in certain narrow circumstances, 'competing interests, if closely examined' may warrant dispensing with confrontation at trial."⁴⁹ Justice O'Connor then identifies one such set of circumstances and interests by holding that

if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify . . . a child witness . . . testify[ing] at trial against a defendant in the absence of face-to-face confrontation with the defendant.⁵⁰

Fourteen years after *Craig*, the Court decided *Crawford v. Washington*.⁵¹ In *Crawford*, the Court held that "testimonial" statements by witnesses at trial are inadmissible unless the witness is unavailable at trial and the defendant had an opportunity to cross-examine the witness prior to trial.⁵² The holding in *Crawford* had a direct impact on children because it meant that "more children had to testify in court facing the defendant" since their statements to "therapists, forensic interviewers, [and] police" were no longer admissible evidence.⁵³ However, in *Ohio v. Clark*, the Court cut back on the extent to which child testimony is inadmissible under the Confrontation Clause by clarifying that "statements to persons other than law enforcement officers are . . . much less likely to be testimonial than statements to law enforcement officers."⁵⁴

B. CRAIG IS STILL GOOD LAW

In light of *Crawford*, courts have debated over whether *Crawford* overruled *Craig*. For example, in *State v. Thomas*, the New Mexico Supreme Court noted that "*Crawford* may call into question the prior holding in *Craig* to the extent that *Craig* relied on the reliability of video testimony."⁵⁵ In *People v. Jemison*, the Michigan Supreme Court said that *Crawford* "took

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 844.

⁴⁸ *Id.* at 848.

⁴⁹ *Id.*

⁵⁰ *Id.* at 855.

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

⁵² *Id.* at 59.

⁵³ Kelsey M. Till, *Empowering Voices: Working Toward a Children's Right to Participatory Agency in Their Courtroom Experience*, 64 *BUFF. L. REV.* 609, 623 (2016).

⁵⁴ *Ohio v. Clark*, 576 U.S. 237, 238 (2015).

⁵⁵ *State v. Thomas*, 376 P.3d 184, 193 (N.M. 2016).

out [*Craig's*] legs” and put *Craig's* “reliability-focused rule into doubt.”⁵⁶ The Ninth Circuit also expressed a similar sentiment in *United States v. Carter* by noting that “[t]he vitality of *Craig* itself is questionable in light of . . . *Crawford*, which abrogated *Roberts*, a case relied upon heavily in *Craig* that permitted ‘open-ended exceptions from the confrontation requirement’ based on ‘judicial determination[s] of reliability.’”⁵⁷ However, the courts in the aforementioned cases each agreed that *Craig* is still good law. The New Mexico Supreme Court said that “*Crawford* did not overrule *Craig*.”⁵⁸ The Michigan Supreme Court also pointed out that the “Supreme Court did not specifically overrule *Craig*” and left “the prerogative of overruling . . . decisions” to the Court.⁵⁹ The Ninth Circuit echoed a similar sentiment, saying that it was “bound by *Craig*” until the Court reconsidered the decision.⁶⁰

Academia has also debated whether *Crawford* overruled *Craig*. Like the Ninth Circuit in *Carter*, a law review article and student comment both note that the Court in *Craig* relied on *Ohio v. Roberts* for a framework of Confrontation Clause analysis while the Court in *Crawford* rejected *Ohio v. Roberts*.⁶¹ Another law review article notes that *Crawford* contains dicta found in Justice Scalia’s opinion that may be incompatible with *Craig*: “[W]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”⁶² However, despite the arguments above, *Craig* is still good law for three reasons.

First, *Craig* is still good law because *Crawford* did not explicitly overrule *Craig*. *Craig* is not mentioned anywhere in Justice Scalia’s majority opinion in *Crawford*. *Crawford* also does not explicitly overrule the holdings of *Craig* because the holdings in the two cases are different. The holding in *Crawford* concerns testimonial statements⁶³ while the holding in *Craig* addresses scenarios where the Confrontation Clause can be met without face-to-face confrontation.⁶⁴ Multiple state supreme courts agree that *Crawford* does not overrule *Craig*. For example, in *State v. Mercier*, the Montana Supreme Court said that “*Crawford* did not even address *Craig*, let alone overrule it, nor was the face-to-face aspect of confrontation specifically at issue in *Crawford*.”⁶⁵ Also, in *State v. Henriod*, the Utah Supreme Court said that “the *Crawford* majority opinion not only failed to explicitly overrule *Craig*, but also failed to even mention it. Moreover, we do not believe

⁵⁶ *People v. Jemison*, 952 N.W.2d 394, 396, 399 (Mich. 2020).

⁵⁷ *United States v. Carter*, 907 F.3d 1199, 1211 n.3 (9th Cir. 2018) (quoting *Crawford*, 541 U.S. at 54, 62).

⁵⁸ *Thomas*, 376 P.3d at 193.

⁵⁹ *Jemison*, 952 N.W.2d at 400.

⁶⁰ *Carter*, 907 F.3d at 1211 n.3.

⁶¹ J. Benjamin Aguinaga, Comment, *Confronting Confrontation in a FaceTime Generation: A Substantial Public Policy Standard to Determine the Constitutionality of Two-Way Live Video Testimony in Criminal Trials*, 75 LA. L. REV. 175, 188 (2014); Mary Fan, *Adversarial Justice's Casualties: Defending Victim-Witness Protection*, 55 B.C. L. REV. 775, 806 (2014).

⁶² Brandon Marc Draper, *Revenge of the Sixth: The Constitutional Reckoning of Pandemic Justice*, 105 MARQ. L. REV. 205, 220 n.73 (2021); *Crawford v. Washington*, 451 U.S. 36, 68–69 (2004).

⁶³ *Crawford*, 541 U.S. at 59.

⁶⁴ *Maryland v. Craig*, 497 U.S. 836, 848 (1990).

⁶⁵ *State v. Mercier*, 479 P.3d 967, 976 (Mont. 2021).

Crawford implicitly overruled *Craig* because neither the majority nor the concurrence even discussed out-of-court testimony by child witnesses.”⁶⁶

Second, *Craig* is still good law because *Crawford* and *Craig* address different issues. For example, *Crawford* addresses “the question of when confrontation is required” while *Craig* addresses the question of what procedures confrontation requires.⁶⁷ Further, the facts in *Crawford* involve a complete inability to cross-examine witnesses⁶⁸ while the facts in *Craig* involve the ability to cross-examine by camera.⁶⁹ Moreover, *Crawford* addresses how hearsay is received⁷⁰ while *Craig* addresses how live testimony is received.⁷¹

Third, until and unless the Supreme Court reconsiders *Craig*, *Craig* is still good law. *Craig*’s validity is evident after *Crawford* because a majority of federal circuit courts and states agree with *Craig*. For example, the First,⁷² Fourth,⁷³ Fifth,⁷⁴ Ninth,⁷⁵ Tenth,⁷⁶ and Eleventh Circuits⁷⁷ have applied *Craig* post-*Crawford*. Further, twenty-four state supreme courts have agreed with *Craig* post-*Crawford* while forty-eight states currently have statutes allowing children to testify via closed-circuit television in certain circumstances.⁷⁸ The twenty-four State Supreme Courts that agreed are:

⁶⁶ State v. Henriod, 131 P.3d 232, 237 (Utah 2006).

⁶⁷ WAYNE LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE 1364 (West Acad. Publ’g, 6th ed. 2016).

⁶⁸ *Crawford*, 541 U.S. at 38.

⁶⁹ Maryland v. Craig, 497 U.S. 836, 840 (1990).

⁷⁰ *Crawford*, 541 U.S. at 67.

⁷¹ *Craig*, 497 U.S. at 852.

⁷² United States v. Cotto-Flores, 970 F.3d 17, 43 (1st Cir. 2020).

⁷³ United States v. Abu Ali, 528 F.3d 210, 242 (4th Cir. 2008).

⁷⁴ Horn v. Quarterman, 508 F.3d 306, 320 (5th Cir. 2007).

⁷⁵ United States v. Carter, 707 F.3d 1199, 1206 (9th Cir. 2018).

⁷⁶ United States v. Kaufman, 546 F.3d 1242, 1254 (10th Cir. 2008).

⁷⁷ United States v. Yates, 438 F.3d 1307, 1312 (11th Cir. 2006).

⁷⁸ ALA. CODE § 15-25-3 (2021); ALASKA STAT. § 12.45.046 (2021); ARIZ. REV. STAT. § 13-4253 (LexisNexis 2021); ARK. CODE ANN. § 16-43-1001 (2021); CAL. PENAL CODE § 1347 (Deering 2021); COLO. REV. STAT. § 16-10-402 (2021); CONN. GEN. STAT. § 54-86 (2021); DEL. CODE ANN. tit. 11, § 3514 (2021); FLA. STAT. § 92.54 (2021); GA. CODE ANN. § 17-8-55 (2021); HAW. REV. STAT. ANN. § 626-1, HAW. R. EVID. 616 (LexisNexis 2021); IDAHO CODE § 9-1804 (2021); 725 ILL. COMP. STAT. ANN. 5/106B-5 (LexisNexis 2021); IND. CODE ANN. § 35-37-4-6 (LexisNexis 2021); IOWA CODE § 915.38 (2021); KAN. STAT. ANN. § 22-3434 (2021); KY. REV. STAT. ANN. § 421.350 (LexisNexis 2021); LA. STAT. ANN. § 15:283 (2021); ME. REV. STAT. ANN. tit. 15, § 1321 (West 2021); MD. CODE ANN., CRIM. PROC. § 11-303 (LexisNexis 2021); MASS. ANN. LAWS ch. 278, § 16D (LexisNexis 2021); MICH. COMP. LAWS SERV. § 712A.17b (LexisNexis 2021); MINN. STAT. ANN. § 595.02 (West 2021); MISS. CODE ANN. § 13-1-405 (2021); MO. ANN. STAT. § 491.680 (West 2021); MONT. CODE ANN. § 46-16-227 (West 2021); NEV. REV. STAT. ANN. § 50.570 (LexisNexis 2021); N.H. REV. STAT. ANN. § 517:13-a (LexisNexis 2021); N.J. REV. STAT. § 2A:84A-32.4 (West 2021); N.M. STAT. ANN. § 38-6A-4 (LexisNexis 2021); N.Y. C.P.L.R. LAW § 65.10 (Consol. 2021); N.C. GEN. STAT. ANN. § 15A-1225.1 (2021); N.D. CENT. CODE ANN. § 31-04.04.2 (2021); OHIO REV. CODE ANN. § 2152.81 (LexisNexis 2021); OKLA. STAT. ANN. tit. 12, § 2611.7 (West 2021); OR. REV. STAT. ANN. § 419C.025 (West 2021); 42 PA. STAT. AND CONS. STAT. § 5985 (West 2021); 11 R.I. GEN. LAWS § 37.13.2 (2021); S.C. CODE ANN. § 19-1-180 (2021); S.D. CODIFIED LAWS § 26-8A-30 (2021); TENN. CODE ANN. § 24-7-117 (2021); TEX. CODE CRIM. PROC. ANN. art. 38.071 (West 2021); UTAH R. CRIM. P. 15.5 (LexisNexis 2021); VT. R. EVID. 807 (LexisNexis 2021); VA. CODE ANN. § 18.2-67.9 (2021); WASH. REV. CODE ANN. § 9A.44.150 (LexisNexis 2021); W. VA. CODE ANN. § 62-6B-4 (LexisNexis 2021); WIS. STAT. ANN. § 972.11 (West 2021).

California,⁷⁹ Colorado,⁸⁰ Connecticut,⁸¹ Idaho,⁸² Illinois,⁸³ Iowa,⁸⁴ Kansas,⁸⁵ Louisiana,⁸⁶ Massachusetts,⁸⁷ Michigan,⁸⁸ Mississippi,⁸⁹ Montana,⁹⁰ Nebraska,⁹¹ Nevada,⁹² New Hampshire,⁹³ New Mexico,⁹⁴ New York,⁹⁵ Pennsylvania,⁹⁶ Utah,⁹⁷ Vermont,⁹⁸ West Virginia,⁹⁹ Washington,¹⁰⁰ Wisconsin,¹⁰¹ and Wyoming.¹⁰² The only states not to have CCTV statutes are Nebraska and Wisconsin.

Thus, for the reasons above, the rule set out by Justice O'Connor in *Craig* (“in certain narrow circumstances, ‘competing interests, if closely examined’ may warrant dispensing with confrontation at trial”)¹⁰³ is the legal standard by which we should evaluate VCPs.

IV. THE CONSTITUTIONALITY OF VIRTUAL COURTROOM PROCEDURES FOR ADULTS

A. HOW DO WE EVALUATE THE CREDIBILITY OF ADULT WITNESSES?

According to the Wex Legal Dictionary, “a credible witness is a witness who comes across as competent and worthy of belief.”¹⁰⁴ We can determine if witnesses are credible based on their “experience, knowledge, training, and sense of honesty.”¹⁰⁵ We can also determine if a witness is not credible based on “inconsistent statements, reputation for untruthfulness, defects in perception, prior convictions that show dishonesty or untruthfulness, and bias.”¹⁰⁶

⁷⁹ *People v. Arredondo*, 454 P.3d 949, 960 (Cal. 2019).

⁸⁰ *People v. Hernandez*, 488 P.3d 1055, 1060 (Colo. 2021).

⁸¹ *State v. Arroyo*, 935 A.2d 975, 991 (Conn. 2007).

⁸² *State v. Folk*, 256 P.3d 735, 746 (Idaho 2011).

⁸³ *People v. Cuadrado*, 824 N.E.2d 214, 220 (Ill. 2005).

⁸⁴ *State v. Rogerson*, 855 N.W.2d 495, 506 (Iowa 2014).

⁸⁵ *State v. Boyd*, 127 P.3d 998, 1009 (Kan. 2006).

⁸⁶ *State v. Cox*, 48 So. 3d 275 (La. 2010).

⁸⁷ *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 837–38 (Mass. 2021).

⁸⁸ *People v. Jemison*, 952 N.W.2d 394, 400 (Mich. 2020).

⁸⁹ *Rollins v. State*, 970 So. 2d 716, 721–22 (Miss. 2007).

⁹⁰ *State v. Mercier*, 479 P.3d 967, 977 (Mont. 2021).

⁹¹ *State v. Comacho*, 960 N.W.2d 739, 755–56 (Neb. 2021).

⁹² *Lipsitz v. State*, 442 P.3d 138, 144 (Nev. 2019).

⁹³ *State v. Hernandez*, 986 A.2d 480, 487–88 (N.H. 2009).

⁹⁴ *State v. Thomas*, 376 P.3d 184, 194–95 (N.M. 2016).

⁹⁵ *People v. Wrotten*, 923 N.E.2d 1099, 1102–03 (N.Y. 2009).

⁹⁶ *Commonwealth v. Williams*, 84 A.3d 680, 686–87 (Pa. 2014).

⁹⁷ *State v. Henriod*, 131 P.3d 232, 237 (Utah 2006).

⁹⁸ *State v. Bergquist*, 211 A.3d 946, 968 (Vt. 2019).

⁹⁹ *State v. David K.*, 792 S.E.2d 44, 50–51 (W. Va. 2016).

¹⁰⁰ *State v. Dye*, 309 P.3d 1192, 1198 (Wash. 2013).

¹⁰¹ *State v. Rhodes*, 799 N.W.2d 850, 858 (Wis. 2011).

¹⁰² *Kramer v. State*, 277 P.3d 88, 94 (Wyo. 2012).

¹⁰³ *Maryland v. Craig*, 497 U.S. 836, 848 (1990).

¹⁰⁴ WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/credible_witness#:~:text=A%20credible%20witness%20is%20a,training%20C%20and%20sense%20of%20honesty [https://perma.cc/BK64-PBDG].

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

B. HOW DO VCPs AFFECT THE CREDIBILITY OF ADULT WITNESSES?

During in-person courtroom proceedings, judges, attorneys, and jurors can see and hear witnesses under very controlled conditions. Each witness is subject to the same lighting, seating position, microphone, and general dress code. There is also a guarantee that witnesses will not be coached during testimony and will not be reading off a document unless otherwise permitted.

However, with VCPs, witnesses become subject to many factors not present in the courtroom that may decrease audio quality, video quality, and ultimately testimony quality. These factors can be divided into two categories: setting-based and technological. Unlike inside a courtroom, judges do not have much control over these factors and it is the variability of these factors that can negatively influence the credibility of witnesses.

Setting-based factors include the background of the witness's video, lighting, camera angles, and background noise. Each of these factors can negatively affect a witness's credibility. The background of a witness's video can prove to be distracting or harmful. For example, if a defendant appears from a jail cell without the family and friends the defendant normally would have in a courtroom, a judge may perceive that defendant as "less credible or more dangerous."¹⁰⁷ Further, if a witness appears virtually from a living room with people, pets, or objects moving in the background, a juror, judge, or attorney could end up being distracted by what is in the background.

Poor lighting and certain camera angles can also negatively affect one's perception of a witness. If a witness appears poorly lit on video, viewers may not be able to read the witness's facial expressions or body language well. Further, if a witness uses a camera angle that makes the witness appear unflattering, the witness's credibility may also be hurt.¹⁰⁸

Technological factors are rooted in the equipment and communication platforms that VCPs use. Whether it is Zoom or closed-circuit television, each communication platform that VCPs use is subject to the same general technological factors. These include camera quality, microphone quality, and internet connection. Depending on the equipment used and strength of internet connection, a witness can look bad and sound bad on a VCP due to problems with video and audio quality. For example, a witness's audio may suddenly become inaudible or the witness's video may become blurry or frozen while the witness is testifying. Such problems may cause observers to lose track of the testimony. In some instances, the internet connection, video quality, or audio quality may become so bad the witness may not be able to appear on video, be heard during a VCP, or even connect to a VCP. A higher cognitive load is also required to follow events on video as opposed to in-person courtroom proceedings, so attorneys, jurors, and judges may find it difficult to concentrate on witness testimony.¹⁰⁹

Taken together, these setting-based and technological factors present in VCPs can negatively affect the credibility of witnesses. For example, in a 2020 survey of nearly 600 Texas state attorneys and judges, a large majority of judges, prosecutors, and defense attorneys agreed that VCPs used during

¹⁰⁷ Turner, *supra* note 2, at 218.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 219.

the pandemic made it “difficult for the parties to assess and challenge witness accounts or credibility.”¹¹⁰ One defense attorney in the study who cross-examined a witness over a VCP expressed his frustration: “You cannot see who else is in the room, nor can you see what the witness is reviewing while testifying.”¹¹¹

Judges have also expressed concerns on how VCPs affect witness credibility. For instance, a federal district court judge in Connecticut who continued a civil trial during the pandemic said: “[T]he credibility of a witness is best assessed when the witness’s face is fully visible and the witness appears in person or is recorded being examined in person.”¹¹² In a 2017 study on immigration courts, an immigration judge also expressed a similar sentiment.¹¹³ The judge reported “being unable to identify a respondent’s cognitive disability over [video teleconference], but that the disability was clearly evident when the respondent appeared in person at a subsequent hearing, which affected the judge’s interpretation of the respondent’s credibility.”¹¹⁴ That judge is not alone, as the 2017 study reported that “judges in three of the six surveyed [immigration] courts identified instances where they had changed credibility assessments made during a video hearing after holding a subsequent in-person hearing.”¹¹⁵

Studies also indicate that VCPs negatively affect witness credibility. For example, a study by Landström, Granhag, and Hartwig involving mock jurors indicated that jurors perceived adult witnesses as more credible when they testified live in-person as opposed to when they testified on video.¹¹⁶ The study also showed that mock jurors viewed live witnesses as being “more eloquent and more pleasant” than witnesses who testified through video.¹¹⁷

C. VCPs MAY IMPAIR WITNESS CREDIBILITY ENOUGH TO MAKE VCPs UNCONSTITUTIONAL ABSENT COMPELLING INTERESTS

VCPs impair witness credibility through setting-based and technological factors. These factors limit the abilities of attorneys, jurors, and judges to accurately assess the credibility of an adult witness.¹¹⁸ Setting-based factors such as camera angle, lighting, and video background may cause a witness to look less credible than the witness would be in a courtroom.¹¹⁹ On the other hand, technological factors may cause a witness to sound inaudible or appear blurry to attorneys, judges, and jurors.

¹¹⁰ *Id.* at 251.

¹¹¹ *Id.*

¹¹² Bannon & Keith, *supra* note 9, at 1896.

¹¹³ *Id.* at 1895.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Sara Landström, Pär Anders Granhag & Maria Hartwig, *Witnesses Appearing Live Versus on Video: Effects on Observers’ Perception, Veracity Assessments and Memory*, 19 *APPLIED COGNITIVE PSYCH*, 913, 925–26 (2005).

¹¹⁷ *Id.* at 928.

¹¹⁸ Turner, *supra* note 2, at 251.

¹¹⁹ *Id.* at 218.

Given the negative effects of these setting-based factors and technological factors, it is clear that VCPs are inferior to in-person courtroom proceedings when it comes to assessing witness credibility. However, in light of *Craig*, which states that “in certain narrow circumstances, ‘competing interests, if closely examined’ may warrant dispensing with confrontation at trial,”¹²⁰ and the Supreme Court not providing “definitive guidance regarding the use of video testimony,” courts have diverged on the circumstances under which VCP use is unconstitutional.¹²¹

In *United States v. Gigante*, the Second Circuit became the first circuit to hold videoteleconference testimony constitutional because the two-way closed-circuit television used in the case “preserved all of these characteristics of in-court testimony: [the witness] was sworn . . . subject to full-cross examination . . . testified in full view of the jury, court, and defense counsel . . . and gave this testimony under the eye of the [defendant] himself.”¹²² However, the Second Circuit found it unnecessary to apply *Craig* in *Gigante* because *Craig* dealt with one-way closed-circuit television while *Gigante* dealt with two-way closed-circuit television.¹²³

In light of the rise of videoconference technology, some courts take into account audio and video quality in determining whether to uphold the use of VCPs. For example, in *Spinks v. State*, a Maryland court of special appeals took into account whether Skype or Webex provided “sufficient transmission quality” to establish the “traditional indicia of reliability under the Confrontation Clause.”¹²⁴ The court in *Spinks* mentioned the requirements of a Maryland law that set the minimum standards for video testimony:

[A]ll participants shall be able to observe all physical evidence and exhibits presented during the proceeding, and the [VCP] shall permit participants to transmit documents as necessary. Video quality shall be adequate to allow participants and the fact-finder to observe the demeanor and non-verbal communications of other participants. Sound quality shall be adequate to allow participants to hear clearly what is occurring where each of the participants is located.¹²⁵

The court in *Spinks* ultimately followed precedent from another Maryland court of special appeals case, *White v. State*.¹²⁶ In *White*, the court held that “under the principles espoused in *Craig*, the Skype and WebEx two-way video conferences reliably preserved all elements of confrontation aside from physical, in-court testimony.”¹²⁷

In courts that have applied *Craig* to determine the constitutionality of VCP testimony, there is disagreement among the circumstances needed to make VCP testimony constitutional. Some courts allow videoteleconference testimony to be constitutional for the sake of necessity when having testimony in-person would be very difficult or impossible. For example, in *Horn v. Quarterman*, the Fifth Circuit concluded that videoteleconference

¹²⁰ *Maryland v. Craig*, 497 U.S. 836, 848 (1990).

¹²¹ Abu, *supra* note 4, at 319.

¹²² *United States v. Gigante*, 166 F.3d 75, 80 (2d Cir. 1999).

¹²³ *Id.* at 81.

¹²⁴ *Spinks v. State*, 2021 Md. App. LEXIS 710, at *21 (2021).

¹²⁵ *Id.* at *23 nn.2–3.

¹²⁶ *Id.* at *27.

¹²⁷ *White v. State*, 116 A.3d 520 (Md. App. 2015).

testimony could be constitutional in cases in which a witness is terminally ill.¹²⁸ The Sixth Circuit also made a similar conclusion in *United States v. Benson* where it held that videoteleconference testimony could be constitutional when a witness is “too ill to travel.”¹²⁹ In *Lipsitz v. State*, the Nevada Supreme Court went further and upheld a trial court’s decision to allow a sexual assault victim residing in a drug treatment facility to testify via two-way video testimony.¹³⁰ The Nevada Supreme Court upheld the decision because it found that the use of the two-way video testimony “furthered the important public policy of protecting the victim’s well-being while also protecting the defendant’s invoked right to a speedy trial while ensuring that criminal cases are resolved promptly.”¹³¹

Other states also have decisions in line with the Second Circuit, Fifth Circuit, and Nevada Supreme Court when applying *Craig*. In *Harrell v. State*, the Florida Supreme Court upheld the use of videoteleconference testimony for two witnesses who resided in Argentina.¹³² The Florida Supreme Court upheld the use of videoteleconference testimony on grounds that in-person testimony would be very difficult and mentioned three points: the witnesses “lived beyond the subpoena power of the court,” one of the witnesses could not travel to the United States due to poor health, and both witnesses were essential to the case.¹³³ Notably, the Florida Supreme Court did not find the “split-second delay between what was said and what was seen” on camera or the fact that a witness “repeatedly looked at an individual off the screen” to be constitutional violations.¹³⁴ In *City of Missoula v. Duane*, the Montana Supreme Court reached a conclusion based on expense, finding that there was a compelling need to use videoteleconference testimony given that a witness would incur significant expenses in order to travel between California and Montana to testify in three separate trials.¹³⁵

The Colorado, Montana, and Nebraska Supreme Courts went further in 2021, holding that a general public health crisis like the COVID-19 pandemic was enough to justify the use of VCPs.¹³⁶ Each of the aforementioned three state supreme courts noted different approaches when it came to authorizing VCP use during the pandemic. The Colorado Supreme Court required that judges continue court proceedings through VCPs “whenever possible.”¹³⁷ The Massachusetts Supreme Court noted that some trial courts deemed certain proceedings to be presumptively virtual and other proceedings to be possibly in-person.¹³⁸ Lastly, the Nebraska Supreme Court said that not allowing a witness who tested positive for the coronavirus to

¹²⁸ *Horn v. Quarterman*, 508 F.3d 306, 310, 318 (5th Cir. 2007).

¹²⁹ *United States v. Benson*, 79 F. App’x. 813, 820, 821 (6th Cir. 2003).

¹³⁰ *Lipsitz v. State*, 444 P.3d 138, 144 (Nev. 2019).

¹³¹ *Id.*

¹³² *Harrell v. State*, 709 So. 2d 1364, 1366–67, 1370 (Fla. 1998).

¹³³ *Id.* at 1369–70.

¹³⁴ *Id.* at 1367.

¹³⁵ *City of Missoula v. Duane*, 355 P.3d 729, 734 (Mont. 2015).

¹³⁶ *People v. Hernandez*, 488 P.3d 1055, 1063 (Colo. 2021); *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 832 (Mass. 2021); *State v. Comacho*, 960 N.W.2d 739, 755–56 (Neb. 2021).

¹³⁷ *Hernandez*, 488 P.3d at 1059.

¹³⁸ *Vazquez Diaz*, 167 N.E.3d at 829.

testify was necessary to “advance the important public policy of protecting the public health.”¹³⁹

On the other hand, some courts have held that “public policy goals of convenience and efficiency do not outweigh a defendant’s confrontation rights.”¹⁴⁰ For example, in *United States v. Yates*, in which witnesses who were living in Australia were allowed to testify through VCPs, the Eleventh Circuit held that “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 Defendant’s rights to confront their accusers face-to-face.”¹⁴¹ The Eleventh Circuit emphasized that “there simply is no necessity [for videoteleconference testimony] of the type *Craig* contemplates” and held that the VCP use violated the defendant’s confrontation rights.¹⁴²

Given the disagreement on the circumstances that make VCP use unconstitutional, the potential negative effects of VCPs on witness credibility, and the traditional preference for physical confrontation, it is likely that VCP use is unconstitutional for adult witnesses under *Craig* without necessity established by compelling interests such as protecting public health or protecting a witness’s health. For example, in *State v. Thomas*, the New Mexico Supreme Court found no evidence that the Skype testimony “was necessary to further an important public policy as required by *Craig*” and was therefore unconstitutional.¹⁴³ Without a “compelling interest,” such as a terminally ill witness’s inability to travel in *Horn*¹⁴⁴ or the significant expenses and travel required to testify three times for the witness in *Duane*,¹⁴⁵ VCP use should be expected to be held unconstitutional for adult witnesses in many courts.

V. CHILD WITNESSES

A. HOW DO WE ASSESS THE CREDIBILITY OF CHILD WITNESSES?

Testifying in court can be challenging for children.¹⁴⁶ For a child testifying in the presence of the child’s alleged abuser, testifying can be “an extremely stressful, frightening, and formidable event,” and the experience can “trigger extreme levels of anxiety and psychological strain, often referred to as ‘secondary traumatization.’”¹⁴⁷ Thus, when it comes to evaluating witness credibility for children, a focus on certain factors is required to accurately assess their credibility.

While the credibility of adult witnesses can be assessed through “experience, knowledge, training, and sense of honesty,”¹⁴⁸ assessing the credibility of children requires a focus on consistency, honesty, and

¹³⁹ *Comacho*, 960 N.W.2d at 755.

¹⁴⁰ Abu, *supra* note 4, at 322.

¹⁴¹ *United States v. Yates*, 438 F.3d 1307, 1310, 1316 (11th Cir. 2006).

¹⁴² *Id.* at 1317, 1319.

¹⁴³ *State v. Thomas*, 376 P.3d 184, 195 (N.M. 2016).

¹⁴⁴ *Horn v. Quarterman*, 508 F.3d 306, 310, 318 (5th Cir. 2007).

¹⁴⁵ *City of Missoula v. Duane*, 355 P.3d 729, 734 (Mont. 2015).

¹⁴⁶ Michal Gilad, *Falling Between the Cracks: Understanding Why States Fail in Protecting Our Children from Crime*, 3 UNIV. ILL. L. REV. 907, 928 (2019).

¹⁴⁷ *Id.*

¹⁴⁸ WEX LEGAL DICTIONARY, *supra* note 104.

suggestibility for three reasons. First, children are more likely to be suggestible than adults.¹⁴⁹ Second, children are “subject to coaching from influential adults, and their [testimony] can be drastically influenced by suggestive and leading questioning techniques.”¹⁵⁰ Third, children who are victims of abuse often have long delays between the abuse and their disclosure.¹⁵¹

In addition to consistency, honesty, and suggestibility, assessing the credibility of children also requires a focus on the manner in which children communicate,¹⁵² the questions asked of children,¹⁵³ and the location where children testify for three reasons.¹⁵⁴

First, a child’s credibility can be affected depending on how emotional the child is while testifying.¹⁵⁵ For example, children can be “perceived as more credible and truthful when communicating” in an emotional as opposed to a neutral manner.¹⁵⁶ However, too much emotion may hurt a child’s credibility—in a study where participants analyzed the credibility of children in a mock police interview, the participants were “strongly influenced by the emotions displayed; in particular, the display of strong negative emotions . . . or positive emotions during disclosure significantly reduced judged credibility.”¹⁵⁷

Second, the testimony of children is affected by the questions asked of them.¹⁵⁸ For example, research shows that closed-ended questions (“yes” or “no” questions) result in “fewer details, but also result in more errors and inconsistent statements” than any other type of questions asked.¹⁵⁹ On the other hand, open-ended questions (“tell me everything you remember about what happened”) “encourage children to elaborate on previously reported information” and result in “greater accuracy, more forensically important information, and fewer inconsistencies than closed-ended questions.”¹⁶⁰

Third, the testimony of children is affected by the location in which children give testimony.¹⁶¹ In a study using descriptions of children who claimed to have been abused and analyzing what prospective jurors expected of such children’s testimony in a sexual-abuse case, the answers of the jurors depended on the location where the child would testify.¹⁶² For example, if the child was described to be testifying in-person in a courtroom, prospective

¹⁴⁹ Emily Denne, Colleen Sullivan, Kyle Ernest & Stacia N. Stolzenberg, *Assessing Children’s Credibility in Courtroom Investigations of Alleged Child Sexual Abuse: Suggestibility, Plausibility, and Consistency*, 25 CHILD MALTREATMENT 224, 225 (2020).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Sara Landström, Karl Ask, Charlotte Sommar & Rebecca Willén, *Children’s Testimony and the Emotional Victim Effect*, 20 LEGAL & CRIMINOLOGICAL PSYCH. 365 (2013).

¹⁵³ Deirdre A. Brown & Michael E. Lamb, *Can Children Be Useful Witnesses? It Depends How They Are Questioned*, 9 CHILD DEV. PERSPS. 250 (2015).

¹⁵⁴ Bradley D. McAuliff & Margaret Bull Kovera, *Do Jurors Get What They Expect? Traditional Versus Alternative Forms of Children’s Testimony*, 18 PSYCH. CRIME & L. 27 (2012).

¹⁵⁵ Landström et al., *supra* note 152, at 365.

¹⁵⁶ *Id.*

¹⁵⁷ Ellen M. Wessel, *Disclosure of Child Sexual Abuse: Expressed Emotions and Credibility Judgments of a Child Mock Victim*, 22 PSYCH. CRIME & L. 331 (2016).

¹⁵⁸ Brown & Lamb, *supra* note 153, at 250.

¹⁵⁹ *Id.* at 251.

¹⁶⁰ *Id.*

¹⁶¹ McAuliff & Kovera, *supra* note 154, at 27.

¹⁶² *Id.*

jurors expected the child to be “more nervous, tearful, fidgety, and less confident, cooperative, and fluent, and to maintain less eye contact and provide shorter responses than when the child provided alternative forms of testimony” such as through closed-circuit television or videotape.¹⁶³ Prospective jurors also “believed it was easiest to determine the child’s truthfulness . . . when a child testified live in court.”¹⁶⁴

B. HOW DO VCPs AFFECT THE CREDIBILITY OF CHILD WITNESSES?

In a study comparing the effectiveness of video interviewing versus face-to-face interviewing, Hamilton, Whiting, Brubacher, and Powell found that video interviewing was “just as effective as face-to-face interviewing” in terms of the accuracy and informativeness of children’s accounts.¹⁶⁵ The same study also noted previous research that showed “children provide more accurate reports and are more resistant to misleading information when questioned via live video-feed as opposed to when they are in a courtroom.”¹⁶⁶ However, jurors may not view child witnesses as highly as the aforementioned research because, in general, VCPs negatively affect the witness credibility of children. Multiple studies comparing children testifying live in a courtroom with children testifying through closed-circuit television yielded negative results. For example, in a mock trial involving alleged child sexual-abuse victims, Goodman, Tobey, Batterman-Faunce, Orcutt, Thomas, Shapiro, and Sachsenmaier found that younger children who testified through closed-circuit television were viewed as less credible despite a higher rate of accuracy than those children who testified live in court.¹⁶⁷

Two other studies also have similar results. For example, in one study Sara Landström and Pars Granhag found that live observers of children perceived children more positively than observers who saw children through closed-circuit television or video.¹⁶⁸ In another study, Landström, Granhag, and Hartwig found that live observers of children “rated their statements as more convincing” than video observers of children.¹⁶⁹ The same study also found that live observers of children had “better subjective, as well as objective, memory of the children’s statements” than video observers of children.¹⁷⁰

In a study by Emma Antrobus, Blake M. McKimmie, and Peter Newcombe, the effects of different VCPs on children were analyzed in a

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Gemma Hamilton, Elizabeth A. Whiting, Sonja P. Brubacher & Martine B. Powell, *The Effects of Face-to-Face Versus Live Video-Feed Interviewing on Children’s Event Reports*, 22 *LEGAL & CRIMINOLOGICAL PSYCH.* 260 (2017).

¹⁶⁶ *Id.* at 261.

¹⁶⁷ Gail S. Goodman, Ann E. Tobey, Jennifer M. Batterman-Faunce, Holly Orcutt, Sherry Thomas, Cheryl Shapiro & Toby Sachsenmaier, *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children’s Eyewitness Testimony and Jurors’ Decisions*, 22 *L. & HUM. BEHAV.* 165, 183–86, 195 (1998).

¹⁶⁸ Sara Landström & Pars A. Granhag, *In-Court Versus Out-Of-Court Testimonies: Children’s Experiences and Adults’ Assessments*, 24 *APPLIED COGNITIVE PSYCH.* 941 (2010).

¹⁶⁹ Sara Landström, Pär Anders Granhag & Maria Hartwig, *Children’s Live and Videotaped Testimonies: How Presentation Mode Affects Observers’ Perception, Assessment and Memory*, 12 *LEGAL & CRIMINOLOGICAL PSYCH.* 333 (2007).

¹⁷⁰ *Id.*

mock trial.¹⁷¹ The study noted differences in mock jurors' views of children as they testified through closed-circuit television testimony, pre-recorded testimony, and a combination of both in a criminal case.¹⁷² The study found that the mock jurors were more pro-prosecution when closed-circuit television was used than when pre-recorded testimony was used. Although the study did not involve in-person testimony, the results suggested that "jurors make assumptions about why the child is not appearing in court."¹⁷³ Antrobus and co-authors also believed that the differences between in-person testimony and alternative forms of testimony were "driven by juror's assumptions that the child is too unreliable to come to court . . . and [is] therefore less honest."¹⁷⁴

VI. THE CONSTITUTIONALITY OF VIRTUAL COURTROOM PROCEDURES FOR CHILDREN

In general, VCPs negatively affect the credibility of child witnesses. Like adults, children are subject to the same setting-based and technological factors associated with VCP use that impair witness credibility for adults. Children are also subject to negative assumptions about why they are not testifying in the courtroom, including that they are "too unreliable to come to court" and thus less honest.¹⁷⁵ Given the negative effects of the setting-based and technological factors of VCPs as well as the assumptions children face while testifying through VCPs, it is clear that VCPs are inferior to in-person courtroom proceedings when it comes to assessing child-witness credibility. However, in light of *Craig*, which identified "a State's interest in the physical and psychological well-being" of child abuse victims as an interest that could eliminate the need for confrontation at trial,¹⁷⁶ courts have generally allowed the use of VCPs for child witnesses in cases of sexual abuse where the child has a fear of the defendant with some limits. These courts authorize the use of VCPs either through *Craig*, state statutes, or 18 U.S.C. § 3509(b).¹⁷⁷ 18 U.S.C. § 3509(b)(1)(B) states the following:

(B) The court may order that the testimony of the child be taken by closed-circuit television . . . if the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons:

- (i) The child is unable to testify because of fear.
- (ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.
- (iii) The child suffers a mental or other infirmity.

¹⁷¹ Emma Antrobus, Blake M. McKimmie & Peter Newcombe, *Mode of Children's Testimony and the Effect of Assumptions About Credibility*, 23 PSYCHIATRY, PSYCH., & L. 922 (2016).

¹⁷² *Id.* at 936.

¹⁷³ *Id.* at 937.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Maryland v. Craig*, 497 U.S. 836, 853 (1990).

¹⁷⁷ 18 U.S.C. § 3509(b).

(iv) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.¹⁷⁸

Forty-eight states currently have statutes similar to 18 U.S.C. § 3509(b) allowing children to testify via closed-circuit television in certain circumstances.¹⁷⁹ Many of these statutes allow for children to testify in cases of sexual offenses if it is determined that testifying in front of the defendant would cause the child emotional distress. For example, Hawaii requires proof that testifying in the presence of the defendant would “likely result in serious emotional distress to the child and substantial impairment of the child’s ability to communicate.”¹⁸⁰

Other state statutes are broader. Some statutes do not limit the use of closed-circuit television to child sexual-abuse cases.¹⁸¹ For example, Alaska’s statute applies to any criminal proceeding and allows trial courts to consider the following factors when deciding whether to allow closed-circuit television testimony: “(1) the child’s chronological age; (2) the child’s level of development; (3) the child’s general physical health; (4) any physical, emotional, or psychological injury experienced by the child; and (5) the mental or emotional strain that will be caused by requiring the child to testify under normal courtroom procedures.”¹⁸²

Some state statutes do not limit the use of VCPs by children to just closed-circuit television.¹⁸³ For example, a Rhode Island statute allows children to testify “behind a screen or mirror” that allows the defendant to “see and hear the child during his or her testimony, but does not permit the child to see or hear [the defendant].”¹⁸⁴ An Arizona statute goes further and allows for testimony of the child witness to be recorded outside the courtroom without the defendant present and shown during trial. North Carolina’s statute is also flexible and defines “remote testimony” as a “method by which a child witness testifies in a criminal proceeding outside the physical presence of the defendant.”¹⁸⁵

A. FEDERAL CIRCUITS

Multiple federal circuits after *Craig* have upheld the use of VCPs for child witnesses in sexual-abuse cases. For example, in *United States v. Farley*, the Tenth Circuit upheld a trial court’s decision to allow a child to testify through two-way closed-circuit television under 18 U.S.C. § 3509(b) and *Craig*.¹⁸⁶ The trial court’s decision was made in light of evidence from a child psychologist who met with the child witness and found that the child witness would be unable to testify because of fear and because she would suffer trauma if she testified.¹⁸⁷ In *United States v. Garcia*, the Ninth Circuit

¹⁷⁸ § 3509(b)(1)(B).

¹⁷⁹ See *supra* note 78.

¹⁸⁰ HAW. REV. STAT. ANN. § 626-1 (LexisNexis 2021); HAW. R. EVID. 616.

¹⁸¹ ALASKA STAT. ANN. § 12.45.046 (West 2021); 42 PA. STAT. AND CONS. STAT. § 5985 (West 2021).

¹⁸² ALASKA STAT. ANN. § 12.45.046 (West 2021).

¹⁸³ *Id.*; 11 R.I. GEN. LAWS § 37.13.2 (2021).

¹⁸⁴ 11 R.I. GEN. LAWS § 37.13.2 (2021).

¹⁸⁵ N.C. GEN. STAT. ANN. § 15A-1225.1 (West 2021).

¹⁸⁶ *United States v. Farley*, 992 F.2d 1122, 1125 (10th Cir. 1993).

¹⁸⁷ *Id.* at 1124.

reached a similar conclusion in upholding a trial court's decision to allow a child to testify via closed-circuit television under § 18 U.S.C. § 3509(b).¹⁸⁸ The trial court's decision was made in light of two pieces of evidence: (1) testimony from a psychiatrist who did not meet with the child witness but still said that a child may experience trauma while testifying in court in the defendant's presence and (2) testimony from a mental health specialist who met with the child, said that the child would be emotionally traumatized if she testified in the defendant's presence, and said that closed-circuit television testimony would reduce the trauma.¹⁸⁹

In *United States v. Rouse*, the Eighth Circuit did not need any expert testimony to uphold a trial court's decision to allow three children to testify through closed-circuit television under 18 U.S.C. § 3509(b).¹⁹⁰ Instead, the Eighth Circuit found that the trial court's reliance on observations of the three child witnesses as they were called to testify was sufficient.¹⁹¹ The first child witness was "unable to speak" when called and said in the judge's chambers that she was "afraid to speak" in front of the defendants.¹⁹² The second child witness was observed crying outside the courtroom and said in the judge's chambers that she was crying because she was afraid of the defendants.¹⁹³ The third child witness said that in order for her to go in the courtroom, her guardian ad litem "would have had to physically pull her."¹⁹⁴

In other cases, federal circuits have limited the use of VCPs for child witnesses. For example, in *United States v. Bordeaux*, the Eighth Circuit held that a child's fear of the defendant who was her alleged sexual abuser that rendered her unable to testify in open court was not enough to justify the use of two-way closed-circuit television.¹⁹⁵ The Eighth Circuit found that *Craig* required "the trauma caused by the presence of the defendant [to be] the dominant element preventing the child witness from testifying in open court" and accordingly found that the defendant's confrontation right was violated since the child's fear of him was not the dominant reason why she was unable to testify in open court.¹⁹⁶

In *United States v. Etimani*, the Ninth Circuit outlined an equipment requirement for two-way closed-circuit television in testimony.¹⁹⁷ In *Etimani*, the trial court had the closed-circuit television monitor placed "behind and to the left of the child, rather than in her field of vision while testifying."¹⁹⁸ The defendant argued that the monitor placement violated 18 U.S.C. § 3509(b)(1)(D), which requires that the "closed circuit television transmission shall relay into the room in which the child is testifying the defendant's image, and the voice of the judge."¹⁹⁹ The Ninth Circuit disagreed and cited legislative history behind 18 U.S.C. § 3509 that showed

¹⁸⁸ *United States v. Garcia*, 7 F.3d 885 (9th Cir. 1993).

¹⁸⁹ *Id.* at 890.

¹⁹⁰ *United States v. Rouse*, 111 F.3d 561, 568–69 (8th Cir. 1997).

¹⁹¹ *Id.* at 569.

¹⁹² *Id.* at 568.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *United States v. Bordeaux*, 400 F.3d 548, 555 (8th Cir. 2005).

¹⁹⁶ *Id.* at 552–53.

¹⁹⁷ *United States v. Etimani*, 328 F.3d 493, 495 (9th Cir. 2003).

¹⁹⁸ *Id.* at 497.

¹⁹⁹ *Id.* at 499 (quoting 18 U.S.C. § 3509(b)(1)(D)).

Congress' intent to "not require the placement of the monitor in the child's field of vision."²⁰⁰ Ultimately, the court interpreted 18 U.S.C. 3509(b) to require that if the television monitor is not in the field of vision of a child witness, (1) the presence of the monitor be called to the child's attention, (2) the child can see the monitor with little effort while testifying, and (3) the jury can observe whether or not the child looks at the monitor while testifying.²⁰¹

B. STATE SUPREME COURTS

Multiple state supreme courts after *Craig* have upheld the use of VCPs for child witnesses in sexual-abuse cases. For example, in *Commonwealth v. Williams*, the Pennsylvania Supreme Court upheld a trial court's decision to allow a child witness to testify through closed-circuit television under *Craig* and a state statute.²⁰² The trial court allowed the use of VCPs based on the child witness's indication that she "would be too afraid of [the defendant] to talk . . . if he were present in the courtroom" and a licensed psychologist's expert testimony that the child witness would not be able to testify in the presence of the defendant.²⁰³ In *Rollins v. State*, the Mississippi Supreme Court also upheld a trial court's decision to allow child witnesses to testify via closed-circuit television under a state statute on the grounds that the child witnesses would suffer "traumatic emotional distress."²⁰⁴

In other cases, state supreme courts have established limits on VCP use for child witnesses. For example, in *State v. Bergquist*, the Vermont Supreme Court struck down a state statute allowing for closed-circuit television testimony.²⁰⁵ The Vermont statute in *Bergquist* allowed a child witness in a sexual-assault case to testify via closed-circuit television if "hearing or seeing the defendant would pose 'a substantial risk of trauma to the child . . . which would substantially impair the ability of the child to . . . testify.'"²⁰⁶ However, the Vermont Supreme Court found the statute unconstitutional because it did not meet a standard outlined in *Craig*.²⁰⁷ While *Craig* said that a state law requiring "that the child witness will suffer 'serious emotional distress such that the child cannot reasonably communicate'" would be constitutional, the Vermont statute only required a "substantial risk of trauma to the child."²⁰⁸

Further, in *State v. Boyd*, the Kansas Supreme Court agreed that a trial court erred when it allowed child witnesses to testify via closed-circuit television without direct evidence that the child witnesses would be traumatized by testifying in the presence of the defendant.²⁰⁹ In *Boyd*, the Kansas Supreme Court noted that a psychologist's opinion that the child witnesses would be traumatized by testifying in the presence of their ex-adoptive parents was not sufficient to conclude that the child witnesses

²⁰⁰ *Id.* at 500.

²⁰¹ *Id.* at 501.

²⁰² *Commonwealth v. Williams*, 84 A.3d 680, 686–87 (Pa. 2013).

²⁰³ *Id.* at 683.

²⁰⁴ *Rollins v. State*, 970 So. 2d 716, 717, 722 (Miss. 2007).

²⁰⁵ *State v. Bergquist*, 211 A.3d 946, 964 (Vt. 2019).

²⁰⁶ *Id.* (quoting VT. R. EVID. 807(f)).

²⁰⁷ *Id.* at 968.

²⁰⁸ *Id.*

²⁰⁹ *State v. Boyd*, 127 P.3d 998, 1006, 1011 (Kan. 2006).

would be traumatized by testifying in the presence of the defendant, who was the child witnesses' former babysitter.²¹⁰

VII. MODERN VCP SCENARIOS INVOLVING ADULT AND CHILD WITNESSES

The constitutionality of using modern VCP platforms like Microsoft Teams, Webex, and Zoom, for witness testimony is up for debate. There are multiple scenarios in which witness testimony on such platforms can be unconstitutional under *Craig*. For example, on a platform like Zoom where the video of a single main speaker can occupy most of a computer screen, there are four scenarios where VCP use may be constitutional or unconstitutional.

The first scenario occurs when the witness has their camera on while testifying but the video is either lagging or frozen. When the witness's video lags or freezes, the defendant will be unable to observe the witness's demeanor. Thus, Zoom use is likely to be unconstitutional if the video lags or freezes for a significant amount of the testimony.

The second scenario occurs when the witness is testifying with their camera on but the audio is lagging or cutting out. When the witness's audio lags or cuts out, the defendant will be unable to listen to all of the witness's testimony at normal speed. Thus, Zoom use is likely to be unconstitutional if audio disruptions occur for a significant amount of the testimony.

The third scenario occurs when the witness has their camera on while testifying but is not always the main speaker that occupies most of the computer screen during testimony. Here, the witness may become a secondary speaker because their appearance on Zoom is downgraded to a smaller video panel or disappears from the speakers visible on a computer screen altogether. In this case, the Zoom use is likely unconstitutional because the defendant may not be able to see the witness's demeanor well while someone else is talking. For example, if the defense attorney asks a question or interrupts while the witness is testifying and the defense attorney becomes the main speaker on the computer screen, the defendant's attention would naturally shift to the defense attorney and the defendant would not be able to see the witness's demeanor well.

The fourth scenario involves a child witness testifying in a Zoom breakout room with judges, attorneys, and no defendants. Here, the purpose of having the child witness testify in a Zoom breakout room would be to avoid having the child see the defendant's video panel or the defendant's name on a screen. In this case, if the jurors can also see the testimony, the Zoom use is very likely to be constitutional because the Zoom use is analogous to having the child witness testify in the judge's chambers or another room in the courthouse via closed-circuit television.

Taken together, these different scenarios of Zoom use illustrate how the constitutionality of VCPs can hinge on how VCPs are used. With the press of a button, such as turning one's camera on or off or designating someone as a main speaker, the defendant can experience anything from no

²¹⁰ *Id.* at 1010–11.

confrontation, partial virtual confrontation, or full virtual confrontation. Thus, when having a witness testify on a VCP, courts should make sure the VCP settings are set to ensure the defendant's confrontation rights are satisfied and inform the witness of how best to present themselves orally and visually.

VIII. CONCLUSION

After *Crawford*, there was some uncertainty as to whether *Craig* was still good law. Without *Craig*, the use of VCPs could be in jeopardy. But because *Crawford* did not explicitly overrule or address the same issues as *Craig*, *Craig* is still the standard by which VCPs are evaluated. A majority of federal circuits²¹¹ and twenty-four state supreme courts²¹² have applied *Craig* post-*Crawford*. Further, forty-eight states²¹³ and the federal government²¹⁴ currently have statutes allowing closed-circuit television testimony by children in certain circumstances. The standard outlined in *Craig*—that “in certain narrow circumstances, competing interests, if closely examined, may warrant dispensing with confrontation at trial”—has different implications for adult witnesses and child witnesses.²¹⁵

For adult witnesses, *Craig* means that VCPs are likely to be unconstitutional absent compelling interests because VCPs impair witness credibility for adults. Based on cases from different federal circuits and state supreme courts, protecting the health of the public or the health of the witness are likely to be compelling interests²¹⁶ while efficiency and convenience are not.²¹⁷

For child witnesses, *Craig* means that VCPs are very likely to be constitutional in cases where protecting the health of the public or child is a compelling interest and in cases where the child is likely to experience emotional distress from testifying in the presence of the defendant. A significant number of federal circuit cases,²¹⁸ state supreme court cases,²¹⁹ and statutes all authorize VCP testimony for children under a variety of circumstances.²²⁰

Given the rise of VCP use during the COVID-19 pandemic, it remains to be seen whether courts will go back to conducting proceedings the way they did pre-pandemic or retain significant use of VCPs. VCPs have a significant number of advantages and disadvantages, and the constitutionality of their use has to be determined on a case-by-case basis.

²¹¹ See *supra* notes 72–77.

²¹² See *supra* notes 79–102.

²¹³ See *supra* note 78.

²¹⁴ See *supra* note 177.

²¹⁵ *Maryland v. Craig*, 497 U.S. 836, 848 (1990).

²¹⁶ *Horn v. Quarterman*, 508 F.3d 306, 310, 318 (5th Cir. 2007); *United States v. Benson*, 79 F. App'x. 813, 820, 821 (6th Cir. 2003); *People v. Hernandez*, 488 P.3d 1055, 1063 (Colo. 2021); *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 832 (Mass. 2021); *State v. Comacho*, 960 N.W.2d 739, 755–56 (Neb. 2021).

²¹⁷ *United States v. Yates*, 438 F.3d 1307, 1316 (11th Cir. 2006).

²¹⁸ *United States v. Farley*, 992 F.2d 1122, 1125 (10th Cir. 1993); *United States v. Garcia*, 7 F.3d 885 (9th Cir. 1993); *United States v. Rouse*, 111 F.3d 561, 568–69 (8th Cir. 1997).

²¹⁹ *Commonwealth v. Williams*, 84 A.3d 680, 686–87 (Pa. 2013); *Rollins v. State*, 970 So. 2d 716, 717, 722 (Miss. 2007).

²²⁰ See *supra* note 78.

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But given that *Craig* is still good law, VCPs will always have a place in any courtroom under certain circumstances for both adults and children.