SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	*Opinion issued January 11, 2022*
	)	
Respondent,	)	
	)	
v.	)	No. SC99086
	)	
RODNEY A. SMITH,	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
The Honorable Clinton R. Wright, Judge

A jury found Rodney A. Smith guilty of two counts of statutory rape in the second degree. Smith appeals, arguing the circuit court erred in permitting witness testimony via two-way live video because it violated his right to confrontation under the United States Constitution and the Missouri Constitution. The circuit court's judgment is reversed, and the case is remanded.

Factual and Procedural History

The State charged Smith in connection with allegations of sexual assault by I.S., who was 16 years old at the time and the daughter of Smith's then girlfriend. During the course of the investigation, I.S. underwent an examination at a hospital, where an emergency-room physician took swabs from I.S.'s body for a sexual assault kit. Upon

arriving at the hospital, Detective Julie Johnson, the investigating officer, identified Smith as a suspect and put out a "wanted" for him. I.S. later recanted her allegations, so Detective Johnson cancelled the "wanted" but did not close the case due to pending lab results. When Detective Johnson received those results, she collected a buccal swab from I.S. and identified sources of DNA from an unknown male in the sexual assault kit. Erik Hall, the Biology Technical Leader for the St. Louis Metropolitan Crime Laboratory, collected a buccal swab from Smith, and completed a DNA analysis and laboratory report. Hall's work showed the unknown male DNA from I.S.'s sexual assault kit matched the DNA from Smith. Anne Kwiatkowski, the DNA Section Supervisor in the St. Louis Metropolitan Crime Laboratory, reviewed, analyzed, and approved the report. Thereafter, Detective Johnson attempted to contact Smith, but when that was unsuccessful, she sought criminal charges against him.

At trial, the State presented in-person testimony from I.S., I.S.'s mother, the emergency-room physician, Detective Johnson, and Kwiatkowski. I.S., I.S.'s mother, and Detective Johnson testified that I.S. recanted her allegations against Smith prior receiving results from the lab tests. Detective Johnson further testified law enforcement was not actively pursuing Smith until lab results showed Smith's DNA matched the DNA from I.S.'s sexual assault kit. The emergency-room physician's testimony supported elements of the charged crimes. Kwiatkowski testified about testing I.S.'s samples and the DNA on such samples matching unknown male DNA. The State introduced the DNA laboratory

report, subject to limitations,[1] prepared by Hall into evidence through Kwiatkowski. The State did not initially call Hall to testify because Hall was on paternity leave pursuant to the Family Medical Leave Act ("FMLA").[2] The State sought to present evidence of Smith's buccal swabs through Kwiatkowski, but Smith objected. As a result, the parties discussed possible remedies to allow presentation of this evidence, including bringing in a different witness, seeking a continuance, or calling Hall to testify via two-way live video feed. Ultimately, the circuit court allowed Hall's virtual testimony, over Smith's objection. Hall testified he took the buccal swabs from Smith and performed a DNA analysis, which revealed Smith's DNA matched the DNA samples taken from I.S.'s sexual assault kit.

The jury found Smith guilty of two counts of statutory rape and not guilty of one count of statutory rape and three counts of statutory sodomy. The circuit court sentenced him to two concurrent terms of seven years in prison, suspended execution of sentence, and placed Smith on probation for five years. Smith filed a motion for new trial, which was overruled. Smith appealed. The court of appeals issued an opinion but transferred the case to this Court pursuant to Rule 83.02. This Court has jurisdiction pursuant to article V, § 10 of the Missouri Constitution.

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[1] These limitations were initially discussed off the record, but the circuit court described them afterward as follows: The report "could be used by the State, but not offered for the jury to view. Portions could be used by the State. . . . Based upon [later testimony], portions of it upon request could be published to the jury, but we have not discussed the entire report. So there is [sic] still limitations on it."

[2] In discussion regarding Hall being on FMLA leave, the circuit court noted its understanding that "per [FMLA] rules, he's barred from testifying." It is unclear whether the FMLA actually prevented Hall from testifying, or if the prosecutor believed Hall was unavailable to testify in person under his employer's FMLA leave policy.

Standard of Review

Typically, this Court reviews evidentiary rulings for an abuse of discretion. *State v. March*, 216 S.W.3d 663, 664 (Mo. banc 2007). Whether a criminal defendant's rights were violated under the Confrontation Clause however, is a question of law this Court reviews *de novo*. *State v. Justus*, 205 S.W.3d 872, 878 (Mo. banc 2006).

"Properly preserved confrontation clause violations are presumed prejudicial." *Id.* at 881. Violations of the Confrontation Clause are subject to the harmless error test: "the error [must] be harmless beyond a reasonable doubt, meaning that there is no reasonable doubt that the error's admission failed to contribute to the jury's verdict." *March*, 216 S.W.3d at 667.

Analysis

Smith argues Hall's two-way live video feed testimony at trial violated his right to confrontation and due process under the United States Constitution, U.S. Const. amends. VI and XIV, and the Missouri Constitution, Mo. Const. art. I, §§ 10, 18(a). Smith properly preserved this issue for appeal by objecting to Hall's virtual testimony and including the issue in his motion for new trial.

The Sixth Amendment's Confrontation Clause states "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Article I, § 18(a) of the Missouri Constitution states "in criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face." "The confrontation rights protected by the Missouri Constitution are the same as

those protected by the Sixth Amendment of the United States Constitution." *Justus*, 205 S.W.3d at 878.

Neither the United States Supreme Court nor this Court has addressed the use of two-way live video feed in a criminal proceeding and its impact on a defendant's right to confrontation. Three United States Supreme Court cases, however, examine a defendant's right to confront adverse witnesses against him or her when that witness testimony falls short of in-person, face-to-face confrontation: *Coy v. Iowa*, 487 U.S. 1012 (1988), *Maryland v. Craig*, 497 U.S. 836 (1990), and *Crawford v. Washington*, 541 U.S. 36 (2004).

In *Coy*, the Supreme Court found a defendant's confrontation rights were violated when, pursuant to an Iowa statute, a large screen was placed between the defendant and minor witnesses testifying about alleged sexual abuse. 487 U.S. at 1014. After a discussion about the historical significance of the right to confrontation, the Supreme Court stated: "We have never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Id.* at 1016. This guarantee, the Supreme Court said, "relate[s] both to appearances and to reality," *id.* at 1017, and "[t]he perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it," *id.* at 1019. The Supreme Court noted, although "[t]he Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant," the Clause "ensure[s] the integrity of the fact-finding process" by allowing the trier of fact to observe the witness and "draw its own conclusions." *Id.* at 1019-20 (alteration omitted). Ultimately, the Supreme Court said the "rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests."

Id. at 1020. The Supreme Court found the Iowa statute authorizing the testimony behind a screen violated the defendant's confrontation rights because there were "no individualized findings that these particular witnesses needed special protection." *Id.* at 1021. The Supreme Court added "something more than the type of generalized finding underlying such a statute is needed." *Id*. The Supreme Court declined to address "whether any exceptions exist" to the right of confrontation. *Id.*

The Supreme Court revisited the issue in *Craig* and rejected a Confrontation Clause challenge to a Maryland statute allowing a child abuse victim to testify via one-way, closed-circuit television, in certain circumstances. 497 U.S. at 860. The Maryland statute "permits a judge to receive, by one-way closed circuit television, the testimony of a child witness who is alleged to be a victim of child abuse." *Id*. at 840. "To invoke the procedure, the trial judge must first 'determin[e] 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.'" *Id*. at 840-41 (alteration in original) (citing Md. Cts. & Jud. Proc. Code. Ann. § 9-102(a)(1)(ii)).

> Once the procedure is invoked, the child witness, prosecutor, and defense counsel withdraw to a separate room; the judge, jury, and defendant remain in the courtroom. The child witness is then examined and cross-examined in the separate room, while a video monitor records and displays the witness' testimony to those in the courtroom. During this time the witness cannot see the defendant. The defendant remains in electronic communication with defense counsel, and objections may be made and ruled on as if the witness were testifying in the courtroom.

Id. at 841-42. The trial court allowed the testimony, the Maryland Court of Special Appeals affirmed, and the Court of Appeals of Maryland reversed and remanded for a new trial but

rejected the Confrontation Clause violation argument. *Id*. at 843. The Supreme Court of the United States vacated and remanded. *Id.* at 860. The Supreme Court held "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 850. The Supreme Court stated "the Confrontation Clause reflects a preference for face-to-face confrontation," *id.* at 849 (emphasis omitted) (citing *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)), but criminal defendants do not have "the absolute right to a face-to-face meeting with witnesses against them at trial," *id.* at 844 (emphasis omitted). The Supreme Court acknowledged "use of the one-way closed circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause." *Id.* at 852. However, "[t]he requisite finding of necessity must of course be a case-specific one." *Id.* at 855. The Supreme Court set out three findings necessary to establish whether the case furthers an important public policy:

> The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis, i.e.,* more than "mere nervousness or excitement or some reluctance to testify[.]"

Id. at 855-56 (internal citations omitted). However, just because "the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with." *Id.* at 850.[3]

In 2004, the Supreme Court established a new framework for analyzing a defendant's rights under the Sixth Amendment. *Crawford*, 541 U.S. at 36. The Supreme Court held "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68. The Supreme Court overruled *Ohio v. Roberts* and its "indicia of reliability" test. *Id.* at 68-69. After an examination of the history of the Sixth Amendment, the Supreme Court stated "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused," *id.* at 50, and "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination," *id.* at 53-54. The Supreme Court expressed disapproval of the unpredictable and subjective nature of balancing tests. *Id.* at 63-64. The Supreme Court also stated the *Roberts* balancing test was "so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion." *Id.* at 67. "By replacing categorical

[3] The *Craig* Court recognized the one-way procedure it approved does not ordinarily satisfy confrontation requirements. *Craig*, 497 U.S. at 853 ("[A] State's interest in the physical and psychological well-being of child abuse victims" may be sufficient to "outweigh . . . a defendant's right to face his or her accusers in court" in only some cases.).

constitutional guarantees with open-ended balancing tests, we do violence to [the Framers'] design." *Id.* at 67-68.

The Supreme Court has identified two purposes of the Confrontation Clause: the truth-seeking purpose and the symbolic purpose. *Craig*, 497 U.S. at 852. The truth-seeking purpose includes notions of promoting reliability, impressing upon witnesses the seriousness of their testimony, allowing the trier of fact to observe the demeanor of witnesses, and subjecting the witnesses to cross-examination. *See Coy*, 487 U.S. at 1019 ("A witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts . . . even if [a] lie is told, it will often be told less convincingly." (internal quotation omitted)); *Craig*, 497 U.S. at 846 (The Confrontation Clause "ensur[es] that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings. . . . [F]ace-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person."); *California v. Green*, 399 U.S. 149, 158 (1970) ("Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." (internal quotation omitted)); *Lee v. Illinois*, 476 U.S. 530, 540 (1986) ("The right to

confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials.").

The symbolic purpose consists of promoting "an open and even contest in a public trial." *Lee*, 476 U.S. at 540 ("[T]he Constitution provides certain safeguards to promote to the greatest possible degree society's interest in having the accused and accuser engage in an open and even contest in a public trial."); *Coy*, 487 U.S. at 1017 ("[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as essential to a fair trial in a criminal prosecution." (internal quotation omitted)).[4]

Although this case presents an issue of first impression for this Court, other jurisdictions addressing whether witness testimony via two-way live video satisfies the Confrontation Clause generally follow one of three approaches: (1) *Craig*, (2) the Second Circuit's test in *Gigante*, or (3) *Crawford*. *See infra United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999).

[4] The only case from this Court contemplating two-way video testimony is *Kansas City v. McCoy*, 525 S.W.2d 336 (Mo. banc 1975). In *McCoy*, this Court found a defendant's confrontation rights were not violated when an expert witness testified via two-way video on a case for violation of a municipal ordinance. *Id.* at 339. This Court recognized the virtual testimony preserved the opportunity for cross-examination and observation of demeanor. *Id.* In doing so, this Court acknowledged a municipal ordinance violation is a proceeding that is civil in nature and so limited its holding: "We have the view that to require the physical presence of an expert witness against one accused of violating a municipal police regulation would be to require more than the confrontation clause rights of an accused demand in many instances of prosecutions for felonies." *Id.* *McCoy* provides no precedential value nor guidance for the present case because this is a criminal prosecution, and *McCoy* was decided prior to *Crawford*.

A.

Most federal and state courts that have addressed this issue utilize *Craig*'s test. These courts hold a defendant's rights under the Confrontation Clause are violated by the use of two-way video procedure unless such procedure is necessary to further an important public policy and the reliability of the testimony is otherwise assured. *See generally State v. Mercier*, 479 P.3d 967, 976 (Mont. 2021); *Haggard v. State*, 612 S.W.3d 318, 325-26 (Tex. Crim. App. 2020); *United States v. Carter*, 907 F.3d 1199, 1208 (9th Cir. 2018); *State v. Thomas*, 376 P.3d 184, 193-94 (N.M. 2016); *United States v. Abu Ali*, 528 F.3d 210, 240-41 (4th Cir. 2008); *Bush v. State*, 193 P.3d 203, 214-15 (Wyo. 2008); *United States v. Yates*, 438 F.3d 1307, 1314 (11th Cir. 2006); *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005).

Craig's holding has widely been interpreted to allow child sex abuse victims to testify via two-way video, as well as one-way video. *See, e.g.*, *Bordeaux*, 400 F.3d at 554. Some courts have extended *Craig* to apply to adult witnesses, as well as child witnesses, in all cases of two-way video. *See, e.g.*, *Carter*, 907 F.3d at 1206 ("We now make clear that a defendant's right to physically confront an adverse witness (whether child or adult) cannot be compromised by permitting the witness to testify by video (whether one-way or two-way) unless *Craig*'s standard is satisfied.").

The reliability portion of *Craig*'s test is met by a "combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." *Craig*, 497 U.S. at 846. Because the *Craig* Court stated the combination of oath, cross-examination, and observation of a witness's demeanor

"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," the reliability portion of *Craig*'s test is generally not discussed in detail by courts. *Id.* at 851.

Craig's test requires courts to engage in a case-specific finding to analyze the necessity prong. There is not much uniformity across jurisdictions as to what this prong requires or what satisfies it. It is widely held that convenience, efficiency, and cost are insufficient to support the necessity prong. *See generally Thomas*, 376 P.3d at 195; *State v. Rogerson*, 855 N.W.2d 495, 507 (Iowa 2014); *Commonwealth v. Atkinson*, 987 A.2d 743, 750 (Pa. Super. Ct. 2009). But that is not always the case. *See Harrell v. State*, 709 So.2d 1364, 1370 (Fla. 1998) (finding the "important state interest in resolving criminal matters in a manner which is both expeditious and just" satisfied the necessity prong of *Craig*). Conversely, permanent illness, the existence of no viable alternatives to the two-way video, and the witness being located outside the United States have been found sufficient to support the necessity prong.[5] *See generally Carter*, 907 F.3d at 1208-09;

[5] Common "viable alternatives" to two-way video include issuing a continuance and obtaining a pretrial deposition. Missouri Rule 25.14 permits a prosecuting attorney or defense attorney to file a motion to take the deposition of a witness to preserve such testimony. A defendant has a right to attend the deposition or "personally waive the right to be present and the right of confrontation in writing or in open court." Rule 25.14. The deposition may be used by either party at trial, with Rule 25.13 governing if offered by the defendant and Rule 25.16 governing if offered by the State. As relevant here, Rule 25.16 allows the state to use the deposition if the defendant

> (1) Was personally present at the deposition and had the right of confrontation and cross-examination at the deposition, or (2) Personally waived that right to be present and the right of confrontation in writing or in open court, or (3) Failed to attend the deposition after the court ordered defendant to do so.

Rule 25.16(a)(1)-(3). The State must also show the witness is unavailable because the witness

> (1) Is dead, (2) Is unable to attend or testify because of sickness or infirmity, (3) Has invoked a testimonial privilege or other refusal to testify not produced by the action

Rogerson, 855 N.W.2d at 506-07; *Atkinson*, 987 A.2d at 748; *Bush*, 193 P.3d at 215-16; *Horn v. Quarterman*, 508 F.3d 306, 319-20 (5th Cir. 2007); *Yates*, 438 F.3d at 1316. Under this prong, "important public policy" is a policy that would generally affect more than one case. *See, e.g.*, *Yates*, 438 F.3d at 1316 ("[T]he prosecutor's need for the video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the Defendants' rights to confront their accusers face-to-face.").

B.

As a departure from *Craig*, the Second Circuit established a more lenient standard. In *Gigante*, the Second Circuit allowed a witness to testify via two-way live video because of the witness's "fatal illness and participation in the Federal Witness Protection program" as well as the defendant's refusal to attend a Rule 15 deposition due to ill health. 166 F.3d at 81-82. The Second Circuit determined "it is not necessary to enforce the *Craig* standard" because the two-way video, as opposed to one-way, "preserved the face-to-face confrontation celebrated [in] *Coy*." *Id.* at 81. The Second Circuit made a "more profitable comparison" to the standard for a Rule 15 deposition and held, "[u]pon a finding of exceptional circumstances, . . . a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice." *Id.* Ultimately, the

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> of the state, or (4) Is otherwise unavailable and the state has made a good faith effort to obtain the presence of the witness at the hearing or trial, but has been unable to procure the attendance of the witness.

Rule 25.16(b)(1)-(4). A pre-trial deposition is also available under Federal Rule of Criminal Procedure 15.

Second Circuit concluded testimony via two-way live video "afforded greater protection of [the defendant]'s confrontation rights than would have been provided by a Rule 15 deposition" because the jury could judge the witness's "credibility through his demeanor and comportment." *Id.* In making this conclusion, however, the Second Circuit recognized "[t]here may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony." *Id.* *Gigante* has been adopted only in one other circuit, and it was an unpublished opinion. *See United States v. Benson*, 79 F. App'x 813, 821 (6th Cir. 2003).

C.

A third approach is to apply *Crawford* to cases involving two-way video procedures. *People v. Jemison*, 952 N.W.2d 394, 396 (Mich. 2020). [6] It is beyond debate that for two decades preceding *Crawford*, reliability was the touchstone of the Supreme Court's Confrontation Clause doctrine. In *Roberts*, the Supreme Court held the Confrontation Clause was not a barrier for admission of a hearsay declarant's statement if the testimony bore adequate "indicia of reliability." 448 U.S. at 66. *Crawford* overruled *Roberts* and transformed the Supreme Court's approach to the Confrontation Clause doctrine from a case-by-case reliability-balancing test to a categorical rule: "Where testimonial statements

[6] A few courts have suggested *Crawford* and *Craig* co-exist. *See, e.g.*, *Bordeaux*, 400 F.3d at 554-57 (applying *Craig* to a child's live testimony via two-way video at trial, and applying *Crawford* to a child's out-of-court statements to a forensic interviewer); *Yates*, 438 F.3d at 1314 n.4 ("*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.").

are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford*, 541 U.S. at 68-69.

Craig, decided before *Crawford*, operated under the *Roberts* "indicia of reliability" framework. In *Craig*, the Supreme Court identified four considerations courts should weigh to determine reliability—physical presence, whether the testimony was taken under oath, whether the accused had an opportunity to cross-examine, and whether the jury could observe the witness's demeanor. 497 U.S. at 845-46. After weighing the four factors, the Supreme Court determined the one-way video testimony was reliable and held admitting it was justified "where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate." *Id.* at 857.

Justice Scalia dissented in *Craig*. He rejected the majority's reliability balancing test, arguing it eliminated the right to confrontation because "the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was 'face-to-face' confrontation." *Id.* at 862 (Scalia, J., dissenting). "Whatever else [the Confrontation Clause] may mean in addition, the defendant's constitutional right 'to be confronted with the witnesses against him' means, always and everywhere, at least what it explicitly says: the 'right to meet face to face all those who appear and give evidence at trial.'" *Id.* (quoting *Coy*, 487 U.S. at 1016). Justice Scalia criticized the balancing test articulated by the *Craig* majority, stating it runs afoul to the text of the Constitution. *Id.* at 870. "We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their

meaning to comport with our findings." *Id.* "For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it." *Id.*

Fourteen years later, Justice Scalia wrote for the majority in *Crawford*, and his dissent from *Craig* became the Supreme Court's view of the Confrontation Clause doctrine. The Supreme Court overruled *Roberts* because it is improper to "replac[e] categorical constitutional guarantees with open-ending balancing tests." 541 U.S. at 67-68. The Supreme Court held a defendant's confrontation right is absolute for testimonial evidence unless the witness is unavailable and the defendant had "a prior opportunity for cross-examination." *Id.* at 68. The Supreme Court discussed historical examples to illustrate why face-to-face testimony is critical. *Id.* at 43-50; *see also Jemison*, 952 N.W.2d at 399. For example, in Sir Walter Raleigh's 1603 trial for treason, Raleigh argued his accuser lied in order to save himself and demanded the accuser testify: "Call my accuser before my face." 541 U.S. at 44. The trial court refused Raleigh's request, the jury found him guilty, and he was sentenced to death. *Id.* As a result, "English law developed a right of confrontation that limited these abuses" against criminal defendants. *Id.* The Supreme Court doubted that a reliability balancing test would have "provid[ed] any meaningful protection" in these cases. *Id.* at 68. Therefore, the Supreme Court restored face-to-face testimony as a fundamental element of a defendant's confrontation right. *Id.* at 57 (quoting *Mattox v. United States*, 156 U.S. 237 (1895)); *see also* Mo. Const. art. I, § 18(a) ("[I]n criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face.").

The *Roberts*' reliability balancing test was the basis for *Craig*'s rule to allow important public policy considerations to override face-to-face confrontation only when it is necessary and the testimony is reliable enough. 497 U.S. at 850. When *Crawford* overruled *Roberts*, it put *Craig*'s reliability focused rule into serious doubt.[7] Whether *Craig* continues to have any precedential value was well articulated by Judge Sutton in his concurring opinion in *United States v. Cox*:

> Consider how they treated another decision of the Court: *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). *Craig* relied heavily, indeed almost entirely, on *Roberts* to justify its decision. 497 U.S. at 846-50, 110 S.Ct. 3157. But *Crawford* overruled *Roberts* with respect to testimonial statements. 541 U.S. at 60-69, 124 S.Ct. 1354.
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> Or consider how the two opinions characterized the Confrontation Clause guarantee. *Craig* treated the Clause as a safeguard for evidentiary reliability as measured by the judge in that case and today's rules of evidence. *See* 497 U.S. at 849, 110 S.Ct. 3157. But *Crawford* held that it was a procedural guarantee that "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination" in front of the accused. 541 U.S. at 61, 124 S.Ct. 1354.
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> Or consider how the opinions treated a defendant's right to face-to-face confrontation with the witnesses against him. *Craig* said that the "face-to-face confrontation requirement is not absolute." 497 U.S. at 850, 110 S.Ct. 3157. But *Crawford* said that a face-to-face meeting between an accuser and the accused was an essential part of the confrontation right. 541 U.S. at 43–45, 124 S.Ct. 1354. "Dispensing with confrontation because testimony is obviously reliable," *Crawford* observed, "is akin to dispensing with jury trial because a defendant is obviously guilty." *Id.* at 62, 124 S.Ct. 1354.
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> Or consider the methodology of each opinion. *Craig* looked to the "growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court" to identify new

[7] Many courts have noted *Crawford*'s potential effect on *Craig*'s holding. *See Jemison*, 952 N.W.2d at 396. ("*Crawford* did not specifically overrule *Craig*, but it took out its legs."); *Carter*, 907 F.3d at 1206 n.3 ("The vitality of *Craig* itself is questionable in light of the Supreme Court's later decision in *Crawford*."); *Thomas*, 376 P.3d at 193 ("*Crawford* may call into question the prior holding in *Craig* to the extent that *Craig* relied on the reliability of the video testimony.").

> exceptions to the right to face-to-face confrontation. 497 U.S. at 855, 110 S.Ct. 3157. But *Crawford* looked to the original publicly understood meaning of confrontation to determine when the exception-free words of the guarantee ("[i]n all criminal prosecutions") should have exceptions. 541 U.S. at 42–50, 124 S.Ct. 1354.
>
> Or consider how each opinion describes the relationship of the Clause to the rules of evidence. *Craig* worried that adherence to the words of the guarantee was "too extreme" and would "abrogate virtually every hearsay exception" developed by the rules of evidence up to that point. 497 U.S. at 848, 110 S.Ct. 3157 (quoting *Roberts*, 448 U.S. at 63, 100 S.Ct. 2531). But *Crawford* refused to rely on "the law of evidence" at the time of the trial because it "would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." 541 U.S. at 51, 124 S.Ct. 1354.
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> Or consider each opinion's view of exceptions to the guarantee. *Craig* offered no hint that there was any limit to the kinds of exceptions that the *Roberts* balancing test would allow then or in the future. But *Crawford* carefully identified the kinds of exceptions that might be allowed under its approach and conspicuously never mentions *Craig* as one of them. *See id.* at 53-55, 124 S.Ct. 1354.

871 F.3d 479, 492-93 (6th Cir. 2017) (Sutton, J., concurring).

Nevertheless, *Crawford* did not overrule *Craig*, and it is the Supreme Court's "prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Therefore, Missouri courts should certainly continue to apply *Craig* to the facts it decided: a child victim may testify against the accused by means of video (or similar *Craig* process) when the circuit court determines, consistent with statutory authorization and through case-specific showing of necessity, that a child victim needs special protection.

Whether the combination of oath, cross-examination, and observation of demeanor, when utilized in a two-way video setting in which the witness is in a remote location with minimal or no safeguards, is ever enough to ensure the reliability of any witness does not have to be decided today because the circuit court made no express finding that Hall was

unavailable. More importantly, this Court is not confident the issue would be decided the same way today. In denying certiorari in 2010, Justice Sotomayor stated:

> This case presents the question whether petitioner's rights under the Confrontation Clause of the Sixth Amendment, as applied to the States through the Fourteenth Amendment, were violated when the State introduced testimony at his trial via a two-way video that enabled the testifying witness to see and respond to those in the courtroom, and vice versa. The question is an important one, and it is not obviously answered by *Maryland v. Craig*. We recognized in that case that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial, but only where denial of such confrontation is necessary to further an important public policy. In so holding, we emphasized that the requisite finding of necessity must of course be a case-specific one. Because the use of video testimony in this case arose in a strikingly different context than in *Craig*, it is not clear that the latter is controlling.

Wrotten v. New York, 130 S. Ct. 2520, 2520 (2010) (Sotomayor, J., denying certiorari) (internal quotations, citations, and alterations omitted). To decide two-way video procedures categorically satisfy the safeguards of the Confrontation Clause would be to easily dispense with the "face-to-face confrontation requirement," something the Supreme Court required in *Crawford*, 541 U.S. at 68, and even expressly cautioned against in *Craig*, 497 U.S. at 850.

Conclusion

Hall, the witness in the case at bar, was neither a victim nor a child. The circuit court made no finding that Hall was unavailable. The circuit court's error of admitting Hall's two-way live video testimony was not harmless beyond a reasonable doubt. The testimony from multiple witnesses established I.S. recanted her allegations. Absent Hall's testimony, the circuit court ruled the State could not lay a proper foundation to admit the evidence that Smith's DNA matched the DNA from I.S.'s sexual assault kit. This evidence

was the only physical evidence proving sexual contact between Smith and I.S. Therefore, the error of admitting Hall's two-way live video testimony was not harmless beyond a reasonable doubt. The circuit court's judgment is reversed, and the case is remanded.[8]

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Zel M. Fischer, Judge

All concur.

[8] Because this Court remands, it is not necessary to address Smith's remaining claims requesting plain error review.