

# UNITED STATES V. PATTERSON

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## INTRODUCTION

In the wake of the COVID-19 pandemic, questions about the constitutionality of testimony using two-way video platforms like Zoom have gained greater prominence and taken on greater urgency. These questions have played out in both state and federal courts.<sup>1</sup> Ordinarily, video testimony by prosecution witnesses in criminal cases is a nonstarter with any court in the United States. This reticence to adopt video technology stems from the protections of the Sixth Amendment.<sup>2</sup> The Confrontation Clause of the Sixth Amendment guarantees defendants the right to confront their accusers in court.<sup>3</sup> The Supreme Court has held that this requires face-to-

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<sup>1</sup> See, e.g., *United States v. Akhavan*, 523 F. Supp. 3d 443 (S.D.N.Y. 2021) (addressing a Sixth Amendment challenge to video testimony); *United States v. Casher*, No. CR 19-65-BLG-SPW, 2020 U.S. Dist. LEXIS 106293 (D. Mont. June 17, 2020); *State v. Tate*, 969 N.W.2d 378, 391 (Minn. Ct. App. 2022).

<sup>2</sup> *Maryland v. Craig*, 497 U.S. 836, 850 (1990) (declaring that the right to face-to-face confrontation—as opposed to video confrontation—may not be easily dispensed with).

<sup>3</sup> U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”).

face, in-person testimony from prosecution witnesses,<sup>4</sup> even if such confrontation is inconvenient or even traumatic for the parties involved.<sup>5</sup>

This general prohibition on video testimony is not simply a matter of conforming to some esoteric interpretation of what the Framers expected trials to look like.<sup>6</sup> Using video testimony can materially degrade the experiences of witnesses, the reliability of their testimony, and, most importantly, the ability of fact finders to evaluate their credibility. For instance, people are more likely to lie during virtual conversations than in-person ones.<sup>7</sup> Jurors already struggle to evaluate credibility based on the demeanor of live witnesses;<sup>8</sup> they struggle even more with virtual witnesses, whose eye contact and posture are obscured by the virtual format.<sup>9</sup> The virtual format can create emotional distortions for the jury as they struggle

<sup>4</sup> *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (“We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before trial.”).

<sup>5</sup> *Id.* at 1020 (“The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential ‘trauma’ that allegedly justified the extraordinary procedure in the present case.”).

<sup>6</sup> Although the constitutional issue alone should give proponents of video testimony pause.

<sup>7</sup> In 2004 in a seminal paper by Hancock et al, researchers examined the effects of digital communication on the likelihood that someone will lie. Jeffrey T. Hancock, Jennifer Thom-Santelli & Thompson Ritchie, *Deception and Design: The Impact of Communication Technology on Lying Behavior*, in PROCEEDINGS OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 129 (2004). They collected data on the effects of three features present in different types of digital communication: synchronicity (i.e., the degree to which messages are communicated in real-time), recordability (i.e., the degree to which the interaction is automatically documented and preserved), and distribution (i.e., whether the users are physically co-present). *Id.* at 130. They found that people were most likely to lie when they communicated in an unrecorded, synchronous, distributed environment (i.e., one in which people must communicate digitally rather than face to face, in real-time, and are not recorded). *Id.* at 133. In 2022, David Markowitz replicated and expanded the findings of the Hancock study with more modern technology. David M. Markowitz, *Revisiting the Relationship Between Deception and Design: A Replication and Extension of Hancock et al. (2004)*, 48 HUM. COMM’N RSCH. 158 (2022). Markowitz found that lying is more dependent on the personal characteristics of the speaker than on the type of media used. *Id.* at 163. However, he also found that people were slightly more likely to lie over the phone or over video chat than they were in face-to-face communications. *Id.* at 163 tbl.2 (finding 11.77% mean percentage of lies during phone interactions and 12.31% during video chat interactions, as compared to 9.55% in face-to-face settings).

<sup>8</sup> See Julia Simon-Kerr, *Unmasking Demeanor*, 88 GEO. WASH. L. REV. ARGUENDO 158, 166–67 (2020) (explaining that reliance on visual cues of demeanor results undermines juries’ abilities to distinguish truth from deception).

<sup>9</sup> See Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFF. L. REV. 1275, 1294–1300 (2020) (indicating that viewers may misconstrue the apparent lack of eye contact from witnesses produced by those witnesses looking at the screen rather than the camera and the absence of physical cues, such as posture); see also Daniel M. Bialer, Note, *Assessing Witness Demeanor in the Age of COVID-19 and Beyond*, 31 CORNELL J.L. & PUB. POL’Y 451 472–73 (2022) (describing distortions in demeanor evidence stemming from virtual testimony and recommending that its use be limited).

to connect with a witness appearing online.<sup>10</sup> Meanwhile, issues with audio quality are common, leading to jurors having difficulty processing information.<sup>11</sup> At this stage, an indiscriminate increase in the use of video testimony poses a substantial risk, not just to a constitutional principle, but to the reliability of our trials.

As a result, it is important that courts set clear parameters around the use of video testimony. Academic literature since 2020 has focused on the sufficiency of the COVID-19 pandemic as a justification for video testimony,<sup>12</sup> the scientific evidence needed to back a finding of such sufficiency,<sup>13</sup> and the relative merits of video testimony as compared to other forms of modified confrontation during a global health crisis.<sup>14</sup> Yet, even before a court reaches the question of whether video testimony should be allowed in a particular case or during a particular crisis, it must decide which standard it plans to use in answering that question. For that reason, there has been renewed interest in a longstanding circuit split over the standard that should be used by trial courts when deciding whether to permit video testimony.

In *United States v. Patterson*, the Second Circuit reaffirmed its rather idiosyncratic standard for the use of video testimony.<sup>15</sup> *Patterson* involved a

<sup>10</sup> See Bandes & Feigenson, *supra* note 9, at 1292–1300 (describing difficulties juries have in evaluating virtual testimony).

<sup>11</sup> See *id.* at 1301–02 (describing the risk of viewers attributing the negative feelings arising out of “poor audio quality” or “lack of synchronicity between video and audio” to witnesses themselves).

<sup>12</sup> See, e.g., Jessica Arden Ettinger, David Gerger & Barry J. Pollack, *Ain’t Nothing Like the Real Thing: Will Coronavirus Infect the Confrontation Clause?*, CHAMPION, May 2020, at 57–59 (arguing that the pandemic does not justify abridging defendants’ confrontation rights without more specific factual findings); Brandon Marc Draper, *Revenge of the Sixth: The Constitutional Reckoning of Pandemic Justice*, 105 MARQ. L. REV. 205, 259–63 (2021) (arguing for a constitutional amendment to permit virtual trials); Garret Stone, *Please Unmute Yourselves, Court Is Now In Session—The Future of the Confrontation Clause Post-COVID-19*, 11 WAKE FOREST J.L. & POL’Y 133, 147 (2021) (arguing that the pandemic justifies virtual testimony for auxiliary witnesses like experts, character witnesses, and witnesses brought in for authentication purposes, but not for vital eyewitnesses with first-hand knowledge of the crime).

<sup>13</sup> See Elizabeth Bays, Note, *Mr. Crawford Gets COVID: Courts’ Struggle to Preserve the Confrontation Clause During COVID and What It Teaches Us About the Underlying Rights*, 98 N.Y.U. L. REV. 239, 259–63 (2023) (arguing that undue deference was given to executive branch determinations of scientific necessity).

<sup>14</sup> See *id.* at 257–59 (noting that, depending on which aspect of the confrontation right judges found most important, different modes of modified confrontation are were practiced); Ayyan Zubair, Note, *Confrontation After COVID*, 110 CALIF. L. REV. 1689, 1708–10 (2022) (arguing that Rule 15 depositions should have been used as an alternative to video testimony); Zoë Green Appler, Note, *COVID-19 & The Sixth Amendment: Questions of Confrontation, Credibility, and Constitutionality in Cook County’s Courtrooms*, 71 CHI.-KENT L. REV. 441, 466–70 (2022) (arguing in favor of virtual testimony over socially distanced in-person testimony because of courthouse capacity issues and proposing best practices for such virtual testimony).

<sup>15</sup> *United States v. Patterson*, No. 21-1678-cr, 2022 U.S. App. LEXIS 35264, at \*12–13 (2d Cir. Dec 21, 2022) (“The district court rightly applied *Gigante* in determining whether Elliott could

set of facts common to many COVID-era video testimony decisions: The trial took place in early 2021, before vaccines were widely available and while air travel was still considered quite risky, yet medically fragile witnesses from out of town needed to be procured.<sup>16</sup> A key witness to the prosecution's case was located in California, while the trial was taking place in New York.<sup>17</sup> The witness was 57 years-old and suffered from several conditions that exacerbated his risk of serious complications should he contract COVID-19.<sup>18</sup> So, he requested permission to testify from California via two-way video, rather than traveling to New York City.<sup>19</sup> The district court permitted that accommodation.<sup>20</sup>

In affirming the district court's decision, the Second Circuit reconsidered and eventually reaffirmed its own longstanding precedent from *United States vs. Gigante* which permits video testimony upon a finding by the district court that "exceptional circumstances" exist and that permitting the video testimony would "further the interest of justice."<sup>21</sup> That standard has been widely criticized by courts in other jurisdictions as too permissive of video testimony. Indeed, all other circuits that have considered the "exceptional circumstances" standard from *Gigante* have rejected it, as have some state courts of last resort.<sup>22</sup> In *Patterson*, the defendants challenged the

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testify via two-way video.").

<sup>16</sup> *Id.*; *United States v. Akhavan*, 523 F. Supp. 3d 443, 452 (S.D.N.Y. 2021) (citing then-current CDC recommendations against travel); *see also, e.g., United States v. Davis*, No. 19-101-LPS, 2020 U.S. Dist. LEXIS 196624 at \*8–11 (D. Del. Oct. 23, 2020) ("[T]he Court is merely concluding that each of the seven witnesses identified by the government is—based principally on a combination of his or her distance from Delaware and his or her particularized risk factors—. . . 'unavailable' to testify at trial."); *State v. Milko*, 505 P.3d 1251, 1253 (Wash. Ct. App. 2022) (describing two witnesses complaints that "they were not able to fly to Washington to give their trial testimony in person because of significant health concerns related to COVID-19").

<sup>17</sup> *United States v. Akhavan*, 523 F. Supp. 3d 443, 446 (S.D.N.Y. 2021).

<sup>18</sup> *Id.* at 451.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 456.

<sup>21</sup> *United States v. Patterson*, No. 21-1678-cr, 2022 U.S. App. LEXIS 35264, at \*11 (2d Cir. Dec 21, 2022) (citing *United States v. Gigante*, 166 F.3d 75, 80–82 (2d Cir. 1999)).

<sup>22</sup> *See, e.g., United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005) (rejecting the *Gigante* standard as inconsistent with both the Eighth Circuit's and the Supreme Court's Sixth Amendment precedent); *United States v. Yates*, 438 F.3d 1307, 1312–13 (11th Cir. 2006) (rejecting the *Gigante* standard as inconsistent with the Supreme Court's Sixth Amendment precedent); *People v. Jemison*, 505 Mich. 352, 355–56 (2020) (rejecting video testimony as violative of state and federal constitutional rights to confrontation); *State v. Tate*, 985 N.W.2d 291 (Minn. 2023) (same). In the wake of the pandemic, some federal district courts have followed the Second Circuit, but these have not yet been reviewed by the relevant circuits. *See, e.g., United States v. Davis*, No. 19-101-LPS, 2020 U.S. Dist. LEXIS 196624, at \*8, \*13 (D. Del. Oct. 23, 2020) (citing to the Second Circuit's *Gigante* standard); *United States v. Cole*, No. 1:20-cr-424, 2022 U.S. Dist. LEXIS 17300 at \*8 (N.D. Ohio Jan. 31, 2022) (adopting the lower court's *Gigante* approach but claiming that the two-way closed circuit testimony at issue would be acceptable "even under the higher standard applied in other circuits").

*Gigante* standard, but the Second Circuit declined to change course.<sup>23</sup> Applying the *Gigante* standard, the Second Circuit found that, because the witness could not travel across the country without exposing himself to the risk of serious illness, exceptional circumstances warranted the use of video testimony.<sup>24</sup>

The Defendants in *Patterson*, Akhavan and Weigand, petitioned the Supreme Court for certiorari on March 2, 2023.<sup>25</sup> The petition was denied on June 20, 2023,<sup>26</sup> leaving courts across the country with a lack of clarity on the permissibility of video testimony going forward.

## I BACKGROUND

### A. *The Situation at Trial*

Defendants Akhavan and Weigand were charged with conspiracy to obtain money from a financial institution by false representation in connection with their work for a company called Eaze.<sup>27</sup> Eaze is an on-demand marijuana delivery service that partnered with local marijuana retailers to provide marijuana products to customers in states that allowed such products.<sup>28</sup> Many financial institutions, including Visa and Mastercard, have policies that prohibit credit card activity connected with “unlawful transactions.”<sup>29</sup> Because the sale and distribution of marijuana are still illegal at the federal level, the financial institutions’ policies would not permit customers to make bulk purchases through Eaze.<sup>30</sup> This was despite the fact that the transactions were perfectly legal under state law in the states where the customers were making their purchases.<sup>31</sup>

Akhavan and Weigand circumvented these restrictions by contracting to run their transactions through fake companies that did not appear to be marijuana-related.<sup>32</sup> Thus, when customers made purchases, their transactions would not trigger the credit card companies’ policies.<sup>33</sup> The

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<sup>23</sup> *Patterson*, 2022 U.S. App. LEXIS 35264, at \*11.

<sup>24</sup> *Id.* at 12–13.

<sup>25</sup> Petition for Writ of Certiorari, Akhavan v. United States, 143 S. Ct. 2639 (2023) (No. 22-844).

<sup>26</sup> *Weigand v. United States*, 143 S. Ct. 2639, 2639 (2023).

<sup>27</sup> *Patterson*, 2022 U.S. App. LEXIS 35264, at \*1–2.

<sup>28</sup> Petition for Writ of Certiorari at 4, Akhavan v. United States, 143 S. Ct. 2639 (2023) (No. 22-844).

<sup>29</sup> *United States v. Akhavan*, No. 20-cr-188, 2021 U.S. Dist. LEXIS 124370, at \*7 (S.D.N.Y. July 2, 2021).

<sup>30</sup> *Id.* at \*6–7.

<sup>31</sup> *United States v. Weigand*, 482 F. Supp. 3d 224, 232–33 (S.D.N.Y. 2020).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

government claimed that the defendants were conspiring to obtain money from the credit card companies by means of a material misrepresentation about the nature of the transactions, in violation of 18 U.S.C. § 1349 and 18 U.S.C. § 1344.<sup>34</sup>

One of the defenses the defendants raised was that the misrepresentations were non-material—i.e., that the credit card companies would have processed the marijuana transactions anyway, regardless of their official policies.<sup>35</sup> As a result, testimony from Visa and Mastercard employees about the companies' practices regarding marijuana transactions became a key piece of the trial.<sup>36</sup> In order to produce this critical testimony, both the government and the defense issued subpoenas to Visa to testify at trial.<sup>37</sup> Visa elected to have Martin Elliott, its Global Head of Franchise Risk Management during the relevant period, perform that function.<sup>38</sup>

Unfortunately, Mr. Elliott was not an ideal candidate to travel to New York City (where the trial was taking place) in the middle of a global pandemic. He lived in California and did not want to fly to New York for fear of contracting COVID-19 during the necessary air travel.<sup>39</sup> He was not yet vaccinated, nor were other members of his household.<sup>40</sup> He was 57-years-old and suffered from both hypertension and atrial fibrillation, both of which significantly raise the risks associated with COVID-19 infection.<sup>41</sup> He lived with his 55-year-old wife who also suffered from hypertension and his 83-year-old mother-in-law who faced significant COVID-related risks associated with her age.<sup>42</sup> Thus, his travel to and from New York would place himself and his co-residents in danger.

Over the defense's objections, the court permitted Elliott to testify remotely.<sup>43</sup> In order to make the testimony as fair as possible, the court required Visa to ensure a high-quality video connection between the office and the courtroom.<sup>44</sup> The court ensured that Elliott could see the defendant, defense counsel, the questioning attorney, the judge, and the jurors, and that

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<sup>34</sup> United States v. Patterson, No. 21-1678-cr, 2022 U.S. App. LEXIS 35264, at \*1 (2d Cir. Dec 21, 2022).

<sup>35</sup> *Akhavan*, 2021 U.S. Dist. LEXIS 124370, at \*4–12.

<sup>36</sup> United States v. Akhavan, No. 20-cr-188, 523 F. Supp. 3d 443, 451 (S.D.N.Y. 2021) (quoting the defense as claiming that “questions about what Visa’s policies did (or did not) require and how Visa did (or did not) enforce those policies are among the most critical questions in this case”).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 451–52.

<sup>40</sup> *Id.* at 451.

<sup>41</sup> *Id.* at 451–52.

<sup>42</sup> *Id.* at 451–52.

<sup>43</sup> *Id.* at 456.

<sup>44</sup> *Id.*

he could be seen by them in turn while testifying.<sup>45</sup> The court also permitted the defendants to send representatives to California to be present in person during the testimony if they so desired.<sup>46</sup>

Despite these procedures, however, the testimony quickly became awkward, as complicated conversations over Zoom so often do. Defense counsel later claimed that they had increased difficulty exercising witness control or pinning Elliott to yes or no answers because of video lag.<sup>47</sup> There were several points when the witness's screen froze, creating confusion and delays.<sup>48</sup> There were also multiple instances where Elliott had difficulty authenticating documents efficiently—or in one case, at all—because of the virtual format.<sup>49</sup>

### B. *The Second Circuit's Legal Framework and Its Application*

The purported permission for the modification of testimony that occurred in *Patterson* stems from the Supreme Court's decision in *Maryland v. Craig*.<sup>50</sup> There, the Court held that the right to face-to-face confrontation is not absolute.<sup>51</sup> In that case, the Court was faced with a situation in which a traumatized child victim of sexual assault had been permitted to testify in a separate room.<sup>52</sup> The attorneys for both sides had been present with the child to question her, and the jury and defendant were permitted to view the questioning via one-way, closed-circuit television.<sup>53</sup> The Court ruled that, in cases where one-way video testimony was “necessary to further an important public policy” and the reliability of the means of modified testimony was otherwise assured, such modification was permissible.<sup>54</sup>

The Second Circuit took the reasoning in *Craig* a step further in *Gigante*.<sup>55</sup> In *Gigante*, a testifying witness for the prosecution asked to testify using two-way, closed-circuit video because his doctors were afraid that travel to the courthouse from the location where he was currently in federal witness protection would put his health in serious jeopardy.<sup>56</sup> The Second

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Petition for Writ of Certiorari at 10–11, *Akhavan v. United States*, 143 S. Ct. 2639 (2023) (No. 22-844).

<sup>48</sup> *Id.* at 10.

<sup>49</sup> *Id.* at 9–10 (“Because a redacted portion of the exhibit was ultimately admitted into evidence only after Elliott testified, however, the defense was unable to ask him about it. And the court refused to allow the defense to recall Elliott in light of logistical impediments . . .”).

<sup>50</sup> *United States v. Patterson*, No. 21-1678-cr, 2022 U.S. App. LEXIS 35264, at \*11–13 (2d Cir. Dec. 21, 2022); *Maryland v. Craig*, 497 U.S. 836 (1990).

<sup>51</sup> *Craig*, 497 U.S. at 844–50.

<sup>52</sup> *Id.* at 840–43.

<sup>53</sup> *Id.* at 841.

<sup>54</sup> *Id.* at 850.

<sup>55</sup> *United States v. Gigante*, 166 F.3d 75, 80–81 (2d Cir. 1999).

<sup>56</sup> *Id.* at 79.

Circuit rebalanced the interests and reasoned that, because the mechanism for testimony was not one-way video testimony but rather two-way video testimony which allowed interaction between the participants in the courtroom and the remote participants, less justification was needed for its use.<sup>57</sup> In particular, the court noted that two-way video preserved the giving of testimony under oath, the opportunity for live cross-examination, and the ability of the jury to observe demeanor.<sup>58</sup> Thus, the court dispensed with the *Craig* necessity standard for two-way video.<sup>59</sup>

Instead, the court analogized the situation to a Rule 15 deposition.<sup>60</sup> In both cases, the modified means of testimony preserves some of the essential features of confrontation (e.g., the oath and cross examination) but misses some of the finer points. Rule 15 depositions preserve the oath, the opportunity for cross-examination, and the ability of the defendant to be copresent with the witness, but eliminates the ability for the witness to be copresent with the jury, allowing the jury to observe their demeanor.<sup>61</sup> Two-way video preserves the oath, the opportunity for cross-examination, and the ability for the jury to observe demeanor evidence, but does not require the witness to come face-to-face with the defendant. The court in *Gigante* reasoned that the two forms of modified confrontation were similarly effective and that, if anything, two-way video confrontation was more reliable than a Rule 15 deposition because it preserved demeanor evidence (a historical touchstone of confrontation).<sup>62</sup>

Rule 15 depositions may be taken and preserved “because of exceptional circumstances and in the interest of justice.”<sup>63</sup> And, when a witness subsequently becomes unavailable due to death, illness, privilege, or other qualifying condition, the transcript of the Rule 15 deposition may be used as substantive evidence at trial.<sup>64</sup> The *Gigante* court reasoned that if it

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<sup>57</sup> *Id.* at 80–81.

<sup>58</sup> *Id.* at 80.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 81 (“A more profitable comparison can be made to the Rule 15 deposition . . .”); FED. R. CRIM. P. 15(a)(1). Rule 15(a)(1) of the Federal Rules of Criminal Procedure provides that a “party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. . . . [I]t may also require the deponent to produce at the deposition any designated material that is not privileged . . . .” In general, the defendant has the right to be present or, at the very least to “meaningfully participate.” FED. R. CRIM. P. 15(c)(3)(E). The defendant always has the right to cross-examine the deposed witness in the same “scope and manner . . . as would be allowed during trial.” FED. R. CRIM. P. 15(e)(2). These depositions may then be admitted into evidence at trial subject to the Federal Rules of Evidence. FED. R. CRIM. P. 15(f).

<sup>61</sup> See *Gigante*, 166 F.3d at 81 (explaining how Rule 15 would allow the admission of a transcript of a deposition and thereby preclude the jury from visually assessing witness demeanor).

<sup>62</sup> *Id.*

<sup>63</sup> FED. R. CRIM. P. 15(a)(1).

<sup>64</sup> FED. R. EVID. 804(b)(1) (allowing former testimony by an unavailable witness as an exception to the rule against hearsay).

would have been permissible under the Confrontation Clause to have the witness take a Rule 15 deposition and to read that deposition into the record at trial, it must also be permissible to use two-way video testimony, which is relatively (in the court's eyes) more reliable.<sup>65</sup> Therefore, the court fashioned a new standard based on the standard for Rule 15 depositions. In the Second Circuit, “upon 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.”<sup>66</sup>

Unsurprisingly, with circumstances so closely mirroring those in *Gigante*, the Second Circuit in *Patterson* upheld a finding that requiring Elliott to come to the Southern District of New York courthouse in the middle of a pandemic would put him at risk of “serious illness or death.”<sup>67</sup> Thus, the court concluded that the individualized dangers he was facing constituted the type of exceptional circumstances which made the witness unavailable to testify in an ordinary manner, just as the illness in *Gigante* did.<sup>68</sup> The use of two-way video was permissible.<sup>69</sup>

## II

### A WIDENING CIRCUIT SPLIT

This permissive understanding of the Confrontation Clause has not been well-received by other jurisdictions. Therefore, while the Second Circuit abides by their Rule 15-based standard, the rest of the country has been divided over two other standards, one put forward by the Michigan Supreme Court and one used by the majority of other jurisdictions.

#### A. *The Majority View*

The majority of federal circuits and the majority of states simply continue to apply the *Craig* standard, rejecting requests to adopt the more lenient standard advocated by the Second Circuit.<sup>70</sup> While two-way video may be a closer approximation of in-court testimony than one-way video, these courts note that it is, nonetheless, still an approximation.<sup>71</sup> It loses some

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<sup>65</sup> *Gigante*, 166 F.3d at 81 (noting that two-way video testimony “may provide at least as great protection of confrontation rights as Rule 15”).

<sup>66</sup> *Id.*

<sup>67</sup> *United States v. Patterson*, No. 21-1678-cr, 2022 U.S. App. LEXIS 35264, at \*12 (2d Cir. Dec. 21, 2022) (upholding the district court's finding of exceptional circumstances).

<sup>68</sup> *Id.* at \*12–13.

<sup>69</sup> *Id.* at \*13.

<sup>70</sup> *See, e.g.*, *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005) (applying the *Craig* standard to two-way video testimony); *United States v. Carter*, 907 F.3d 1199, 1202 (9th Cir. 2018) (same); *United States v. Yates*, 438 F.3d 1307, 1313 (11th Cir. 2006) (same); *Harrell v. State*, 709 So. 2d 1364, 1368–69 (Fla. 1998) (same); *State v. Rogerson*, 855 N.W.2d 495, 504 (Iowa 2014) (same); *State v. Tate*, 985 N.W.2d 291, 294 (Minn. 2023) (same).

<sup>71</sup> *See Bordeaux*, 400 F.3d at 554 (noting that the continued application of *Craig* is justified

of the intangible formality and ordeal of appearing in the courtroom and, therefore, may do less to impress upon the witness the importance of truth-telling.<sup>72</sup> It also places a level of abstraction between the defendant and the witness, even if the witness can see the image of the defendant. Courts worry that this abstraction will get in the way of the “say it to my face” effect produced by forcing the witness to say things while copresent with the defendant.<sup>73</sup> It is, therefore, not constitutionally equivalent to in-court testimony.<sup>74</sup>

These courts then read *Craig* as not merely setting out a standard for one-way video testimony.<sup>75</sup> Rather, it sets forth a scrutiny standard that controls when the government can create exceptions to a defendant’s confrontation rights.<sup>76</sup> Because two-way video is an abridgement of the defendant’s confrontation rights, these courts reason, it must be held to the necessity standard.<sup>77</sup>

As for the argument that two-way video must be permissible because it is less disruptive to constitutional rights than Rule 15 depositions, majority courts point to the Supreme Court’s differentiation between two-way video and Rule 15 depositions. Rule 15 is an official rule of criminal procedure which has been approved by the Supreme Court.<sup>78</sup> Its allowance into the rules of procedure, majority courts suppose, is because of its “carefully-crafted provisions . . . that were designed to protect defendants’ rights to physical face-to-face confrontation” by allowing the defendant to be physically present at such a deposition.<sup>79</sup>

Two-way video, on the other hand, is not envisioned in the “carefully-crafted provisions” of the rules of criminal procedure. Rather, its use would need to be authorized by the courts’ general authority to exercise control “over the mode and order of examining witnesses and presenting evidence” under Federal Rule of Evidence 611(a).<sup>80</sup> Further, the absence of two-way video from the rules of criminal procedure is not an accident. In 2002, the advisory committee on the rules of procedure suggested an addition for video

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since two-way confrontation is a “virtual, and not real” approximation).

<sup>72</sup> See *id.* (noting that two-way video does not provide the same “truth-inducing effect” as in-court testimony).

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> See *Yates*, 438 F.3d at 1314 (rejecting the argument that *Craig* does not apply to two-way video testimony).

<sup>76</sup> See *id.*

<sup>77</sup> See *id.*

<sup>78</sup> 28 U.S.C. § 2072; FED. R. CRIM. P. 15.

<sup>79</sup> See *Yates*, 438 F.3d at 1315.

<sup>80</sup> FED. R. EVID. 611(a) (“The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence . . . .”); cf. *United States v. Yates*, 438 F.3d 1307, 1314 (11th Cir. 2006) (rejecting the government’s argument that “admission of video testimony is within the inherent powers of trial courts”).

testimony to Rule 26, and this was explicitly rejected by the Supreme Court.<sup>81</sup> Justice Scalia explained that this rejection was because the proposed change was “contrary to the rule enunciated in *Craig*.”<sup>82</sup>

This differentiation, majority courts conclude, indicates that two-way video cannot be deemed equivalent to Rule 15 depositions.<sup>83</sup> Instead, the Supreme Court’s explanation suggests that, in individual cases, the correct standard is simply the *Craig* standard.<sup>84</sup> Thus, for the majority of courts, the standard for the use of two-way video testimony is the same as the standard for one-way video testimony: The use of modified testimony must be “necessary to further an important public policy” and the reliability of the means of modified testimony must be otherwise assured.<sup>85</sup>

### B. *The Michigan View*

The Michigan view is even more protective of confrontation rights than the majority approach. It involves tracing the history of the Confrontation Clause back still further so as to reject even the *Craig* standard. When *Craig* was decided, the governing case on the meaning of the Confrontation Clause was *Ohio v. Roberts*.<sup>86</sup> *Roberts* held that a statement from an unavailable witness could be admitted without traditional confrontation if it bears “particularized guarantees of trustworthiness.”<sup>87</sup> Under the *Roberts* standard, therefore, the right to confrontation was a substantive right to the reliability of witness testimony. Where that reliability could otherwise be guaranteed, confrontation was not necessary.<sup>88</sup> The *Craig* standard was based on an analysis of the reliability of one-way video.<sup>89</sup> Because it was sufficiently reliable, the defendant’s interest in avoiding it was low and could be outweighed by public policy considerations.<sup>90</sup>

But, as the Michigan Supreme Court notes, there was another view of Confrontation already competing with the *Roberts* view at the time *Craig* was decided.<sup>91</sup> In his dissenting opinion in *Craig*, Justice Scalia argued that

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<sup>81</sup> Order of the Supreme Court, 207 F.R.D. 89, 93–96 (2002) (Scalia, J.).

<sup>82</sup> *Id.* at 93.

<sup>83</sup> *See Yates*, 438 F.3d at 1314–15.

<sup>84</sup> *See id.*

<sup>85</sup> *See supra* note 70 (collecting cases by majority courts that follow the *Craig* standard for two-way video testimony); *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

<sup>86</sup> 448 U.S. 56 (1980).

<sup>87</sup> *Id.* at 66.

<sup>88</sup> *Id.* at 73.

<sup>89</sup> *Craig*, 497 U.S. at 851–52.

<sup>90</sup> *Id.* at 851–853 (“[A] State’s interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh . . . a defendant’s right to face his or her accusers in court”).

<sup>91</sup> *See People v. Jemison*, 505 Mich. 352, 361 (2020).

the Confrontation Clause is not a substantive guarantee of reliability.<sup>92</sup> It is a guarantee of specific procedures which assure reliability.<sup>93</sup> The fact that an alternative to those procedures is also reliable does not mean that it satisfies the constitutional guarantee of the traditional procedures.<sup>94</sup>

Since *Craig*, Scalia's view has won over. In *Crawford v. Washington*, Justice Scalia wrote for the majority and put forward precisely the view described above.<sup>95</sup> The Confrontation Clause is no longer about substantive reliability.<sup>96</sup> It is about adherence to the procedures demanded by the Framers.<sup>97</sup> This, the Michigan Supreme Court argues, means that *Crawford* cuts the legs out from under *Craig*.<sup>98</sup> In overruling *Roberts*, they contend, the Court necessarily modified the proper reading of *Roberts*'s progeny.<sup>99</sup> One can no longer balance the reliability of an alternative means of testimony against public policy, because substantive reliability is not the relevant standard.<sup>100</sup>

The Michigan Supreme Court acknowledged that it would be improper to hold that *Crawford* overruled *Craig* entirely, because the Supreme Court did not specifically state that it was doing so, and the Supreme Court does not overrule itself silently.<sup>101</sup> The Michigan Supreme Court, therefore, concluded that *Craig* should be confined to the specifics of its holding: Video testimony may be used to protect child victims of sexual assault when there is an individualized finding of necessity.<sup>102</sup> Otherwise, the requirement of face-to-face, in court, testimony is sacrosanct and "may be dispensed with only when the witness is unavailable and the defendant had a prior chance to cross-examine the witness."<sup>103</sup>

### C. *The Second Circuit Responds*

In appealing the district court's decision, the defendants in *Patterson* argued that the Second Circuit should adopt the Michigan view and reject

<sup>92</sup> *Id.* at 862 (Scalia, J., dissenting).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 863.

<sup>95</sup> 541 U.S. 36 (2004).

<sup>96</sup> *Id.* at 61.

<sup>97</sup> *Id.* (noting that the Confrontation Clause "is a procedural rather than a substantive guarantee").

<sup>98</sup> See *People v. Jemison*, 505 Mich. 352, 356 (2020) ("*Crawford* did not specifically overrule *Craig*, but it took out its legs.>").

<sup>99</sup> *Id.* (noting that *Crawford* "overruled *Roberts* and shifted from a reliability focus to a bright-line rule" for in-person testimony).

<sup>100</sup> *Id.* at 361–62 ("[In *Crawford*], the Court shifted gears; balancing no longer had a role.>").

<sup>101</sup> *Id.* at 363 (citing *Rodriguez de Quijas v. Shearson*, 490 U.S. 477, 484 (1989) (noting that the Supreme Court does not silently overrule itself)).

<sup>102</sup> *Jemison*, 505 Mich. at 365.

<sup>103</sup> *Id.*

*Gigante*.<sup>104</sup> The Second Circuit declined to do so.<sup>105</sup> In addressing Michigan's approach, the Second Circuit argued that *Crawford* didn't undermine *Craig* or *Gigante*; it simply changed how they must be understood.<sup>106</sup> *Craig* and *Gigante*, the Second Circuit reasoned, stand for the proposition that the confrontation right can be partially abridged in the face of sufficient necessity.<sup>107</sup> As of the time of *Craig* and *Gigante*, this meant that the *reliability of testimony* could be slightly reduced by moving from in-person to one- or two-way video testimony, when the circumstances called for it. The Second Circuit argued that *Crawford* changed the understanding of what the right was that could be abridged, but it did not disturb the *Craig-Gigante* framework.<sup>108</sup> Now, the *procedures* demanded by the Sixth Amendment can be slightly modified or abridged by moving from in-person to one- or two-way video testimony, when the circumstances call for it. Thus, there is no need to adopt Michigan's standard.<sup>109</sup>

Once the court in *Patterson* concluded that *Gigante* had not been overruled by *Crawford*, it was bound by that controlling Second Circuit precedent.<sup>110</sup> As a result, the court has not squarely addressed the majority view.

### III

#### IMPLICATIONS OF THE SECOND CIRCUIT'S DIVERGENT STANDARD

For a long time after *Gigante* was decided, its relaxed standard was used infrequently. Most commonly, it was used for situations in which a witness was a victim of child abuse or in which the witness's physical presence could not be obtained because of extradition issues.<sup>111</sup> In fact, in most Second Circuit cases predating the pandemic, there was an argument to be made that, despite the application of the looser *Gigante* standard, the *Craig* standard was also satisfied. Even in *Gigante*, the witness who testified remotely was ill enough that the court believed he would have suffered medical harm if he was forced to travel.<sup>112</sup> While the court did not inquire into the specifics

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<sup>104</sup> *United States v. Patterson*, No. 21-1678-cr, 2022 U.S. App. LEXIS 35264, at \*10–11 (2d Cir. Dec. 21, 2022).

<sup>105</sup> *Id.* at \*11.

<sup>106</sup> *Id.* at \*11–12.

<sup>107</sup> *Id.* at \*11.

<sup>108</sup> *Id.* at \*11–12.

<sup>109</sup> *Id.* at \*11 (declining to adopt the argument that *Crawford* overruled *Gigante*).

<sup>110</sup> *Id.*

<sup>111</sup> *See, e.g.*, *Jelinek v. Costello*, 247 F. Supp. 2d 212, 277 (E.D.N.Y. 2003) (denying habeas relief for an alleged Confrontation Clause violation on the *Gigante* standard where the court permitted remote testimony from a victim of child abuse); *United States v. Mostafa*, 14 F. Supp. 3d 515, 524 (S.D.N.Y. 2014) (allowing video testimony from a witness detained in the United Kingdom who could not come to the United States without being detained in Massachusetts).

<sup>112</sup> *United States v. Gigante*, 166 F.3d 75, 79 (2d Cir. 1999).

enough to formally make such a determination, it seems likely that the harm done by requiring a severely ill witness to travel might rank alongside the trauma experienced by a child witness forced to testify against their abuser. In fact, other circuits have held just that.<sup>113</sup> Thus, the *Gigante* standard represented a formal difference between the Second Circuit and other courts, but, practically speaking, ended up admitting similar evidence.

But *Patterson* represents a group of COVID-era cases in which video testimony was used far more liberally in the Second Circuit.<sup>114</sup> The witnesses in these cases were not actually incapacitated. In some cases, they had already testified in person in recent court proceedings.<sup>115</sup> In at least one case, the court admitted that it was possible to procure the witness' in-person testimony.<sup>116</sup> It was simply risky.

In this new collection of cases, an argument that the *Craig* standard would have been satisfied, if applied, becomes much more difficult. There was no guarantee of harm in these cases or even the high probability of harm present in *Gigante*. There was simply the possibility. There was no inquiry into whether alternative steps could be taken which would not necessitate two-way video. In none of these cases did the court consider an adjournment until such a time as the risk had passed or the witness could be vaccinated.<sup>117</sup> In *Patterson*, there wasn't even an inquiry into whether Visa could provide a representative other than Elliott who could testify to the same facts. Elliott's personal knowledge wasn't case specific, so it seems highly plausible that there would have been someone else in a large corporation like Visa who could testify to the same policies and who would be able to get to a courthouse in New York.<sup>118</sup> But no such inquiry was made. *Patterson* represents the true meaning of *Gigante*: The bar for using video testimony in the Second Circuit has been lowered.

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<sup>113</sup> See, e.g., *Horn v. Quarterman*, 508 F.3d 306, 317 (5th Cir. 2007).

<sup>114</sup> *Patterson*, 2022 U.S. App. LEXIS 35264, at \*12–13; see also *United States v. Avenatti*, No. 19-CR-374, 2022 U.S. Dist. LEXIS 5395, at \*2–5 (S.D.N.Y. Jan. 11, 2022) (allowing a witness who was at “increased risk of serious illness or death if [s]he were to contract COVID-19” to testify remotely to avoid traveling during the Omicron variant surge); *United States v. Calonge*, No. 1:20-cr-523-GHW, 2021 U.S. Dist. LEXIS 142032, at \*4 (S.D.N.Y. July 29, 2021) (allowing a witness with an undisclosed medical condition to testify remotely to avoid traveling during the pandemic); *United States v. Donziger*, No. 19-CR-561, 2020 U.S. Dist. LEXIS 148029, at \*8–10 (S.D.N.Y. Aug. 17, 2020) (allowing an unvaccinated witness in his seventies to testify remotely during the height of the pandemic).

<sup>115</sup> See, e.g., *Avenatti*, 2022 U.S. Dist. LEXIS 5395, at \*4–5 (noting that the witness's in-person testimony pre-pandemic did not affect the court's analysis).

<sup>116</sup> See, e.g., *id.* at \*4 (“To be sure, the Government has not proved that it would be impossible for [the witness] to appear in New York to testify.”).

<sup>117</sup> See, e.g., *United States v. Donziger*, No. 19-CR-561, 2020 U.S. Dist. LEXIS 197631, at \*5–6 (S.D.N.Y. Oct. 23, 2020) (denying a request for an adjournment to prioritize in-person testimony).

<sup>118</sup> *United States v. Akhavan*, 523 F. Supp. 3d 443, 451 (S.D.N.Y. 2021) (noting Elliott's testimony as Visa policy-focused and not specific to the issues of the case).

## IV

## WHERE DOES THE SECOND CIRCUIT GO NOW?

All of this invites the question: How far will the Second Circuit diverge from the rest of the country? The most natural niche for video testimony to expand into is the one currently held by Rule 15 depositions. Historically, Rule 15 depositions have been the solution when a witness cannot be present in court during trial.<sup>119</sup> Most circuits hold that two-way video should not be permitted where a Rule 15 deposition could be used instead.<sup>120</sup> But that precedent relies on the *Craig* necessity standard—two-way video cannot be necessary where a Rule 15 deposition would suffice.<sup>121</sup> So, there is no reason to believe that the Second Circuit would follow those other circuits' holdings. Indeed, if the Second Circuit takes seriously the claim that two-way video should be admissible on exactly the same standard as Rule 15 depositions, there is no reason that a district court in that circuit should prioritize one over the other on confrontation grounds.

Decisions like *Patterson* pave the way for a replacement of many Rule 15 depositions with video testimony. Indeed, arguably, *Patterson* was already such a replacement. In circuits which apply the *Craig* standard, Rule 15 depositions were used to procure the testimony of witnesses who were too medically fragile to travel to trial during the pandemic.<sup>122</sup> For example, a district court in the Ninth Circuit permitted the Rule 15 deposition of a witness who could not travel to court because he was 87 years-old and in a high-risk category for COVID-19.<sup>123</sup> In theory, the Second Circuit could have demanded the same thing in *Patterson*. But they did not; they used video as an alternative.

Using video-testimony instead of Rule 15 depositions certainly seems like an attractive option from a logistical and financial perspective. Rule 15 depositions generally require getting the witness together in the same room with attorneys from both sides and with the defendant.<sup>124</sup> That can become complicated for any number of reasons. In particular, Rule 15 depositions are commonly used for obtaining the testimony of witnesses located outside the United States (and, therefore, outside the court's subpoena power) who refuse to travel to testify or who have difficulty obtaining the necessary

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<sup>119</sup> FED. R. CRIM. P. 15.

<sup>120</sup> *See, e.g.*, *United States v. Yates*, 438 F.3d 1307, 1316 (11th Cir. 2006) (noting that the availability of a Rule 15 deposition showed lack of necessity under *Craig*).

<sup>121</sup> *Id.*

<sup>122</sup> *See, e.g.*, *United States v. Jesenik*, No. 3:20-cr-228-SI, 2021 U.S. Dist. LEXIS 228993, at \*4–7 (D. Or. Nov. 30, 2021).

<sup>123</sup> *Id.*

<sup>124</sup> FED. R. CRIM. P. 15(c) (providing guidance for in-person depositions with and without the defendant's presence).

documents to do so.<sup>125</sup> In order to take Rule 15 depositions for these witnesses, both parties must travel internationally.<sup>126</sup> When the defendant is represented by court-appointed counsel or the government is the party seeking to procure the testimony, this often means that the United States government must pay for and make arrangements for the defendant and their counsel to travel internationally.<sup>127</sup> Video testimony is clearly a cheaper and easier option for the government. Because of these financial and logistical barriers, one might expect that, barring a legal impediment to such a move, video testimony would become the default in cases where a Rule 15 deposition would once have been used.

Such a move would represent a significant departure from the traditional uses of modified confrontation.<sup>128</sup> And it is not clear that it would be a change for the better. Video testimony may be cheaper and easier to set up on short notice than other accommodations, but it also poses demonstrable risks to the reliability of trial testimony, as discussed above. Jurors just can't evaluate it.<sup>129</sup> By contrast, jurors are often better at evaluating purely written testimony, like Rule 15 depositions, than they are even at evaluating standard testimony.<sup>130</sup> So, *Patterson* paves the way for a situation in which a tried and true, reliable form of modified testimony can be replaced with a form of modified testimony known to produce credibility problems. It will be up to the Second Circuit to ensure that we do not reach that point. But based on their current precedent, it is not at all clear that they will.

#### CONCLUSION

The Supreme Court admits that the standard for modified testimony has been an open question ever since they decided *Crawford* in 2006.<sup>131</sup> The

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<sup>125</sup> See, e.g., *United States v. Sidona*, 636 F.2d 792, 803–04 (2d Cir. 1980) (allowing Rule 15 depositions of witnesses who refused to travel to the United States and witnesses who were willing but had not timely procured the necessary travel documents).

<sup>126</sup> FED. R. CRIM. P. 15(c). Note an exception for the defendant's presence in international depositions if certain criteria are satisfied under FED. R. CRIM. P. 15(c)(3).

<sup>127</sup> FED. R. CRIM. P. 15(d) (noting the court may—and must, when the defendant is unable to pay—order the government to cover travel and deposition transcript expenses when the government requests the deposition).

<sup>128</sup> See *United States v. Gear*, No. 17-00742, 2019 U.S. Dist. LEXIS 4011, at \*1–2 (D. Haw. Jan. 9, 2019) (noting that video testimony is not a substitute for a Rule 15 deposition simply because a foreign witness is located abroad and refuses to travel to testify at trial under the *Craig* standard).

<sup>129</sup> See *supra* notes 6–11 and accompanying text.

<sup>130</sup> See Robert Fisher, *The Demeanor Fallacy*, 2014 N.Z. L. REV. 575, 580 (2014) (citing an American commentator summarizing experimental evidence and concluding that “subjects who receive transcript consistently perform as well as or better than subjects who receive recordings of the respondent's voice” (quoting Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1088 (1991))).

<sup>131</sup> See *Wrotten v. New York*, 560 U.S. 959, 960 (2010) (Sotomayor, J., denying certiorari) (“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.”).

pandemic and its promotion of video technology have made a resolution all the more pressing. Absent constitutional or statutory barriers, it seems likely that video testimony will seep into the court system as a means of solving logistical problems just as it has in every other aspect of our lives. The logical outcome of this seepage is that (again, absent constitutional or statutory barriers) the courts will continue to move in a more permissive direction with video testimony if left unchecked. The Second Circuit's standard lowers constitutional barriers, and gives trial courts every opportunity to be permissive, particularly now that the Supreme Court has declined to step in and force them to change course.<sup>132</sup> The Second Circuit may well become the wild west of video trials, allowing video testimony in many places where other circuits simply would not. It remains to be seen how far their increasingly lax standard will go.

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<sup>132</sup> See *Akhavan v. United States*, 143 S. Ct. 2639 (2023) (denying certiorari).